IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

eSPEED, INC.; CANTOR FITZGERALD, L.P.; CFPH, L.L.C., and eSPEED GOVERNMENT SECURITIES, INC.,	)	
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.	)	

OPINION

Jack B. Blumenfeld, Esquire and Julia Heaney, Esquire, Morris, Nichols, Arsht & Tunnell, P.O. Box 1347, 1201 North Market Street, Wilmington, Delaware 19899, counsel for plaintiffs.

Of counsel: Gary A. Rosen, Esquire, Law Offices of Gary A. Rosen, P.C., 1831 Chestnut Street, Suite 802, Philadelphia, Pennsylvania 19103; David J. Wolfsohn, Esquire, Alan C. Promer, Esquire, and Michele D. Hangley, Esquire, Hangley Aronchick Segal & Pudlin, One Logan Square, 27th Floor, Philadelphia, Pennsylvania 19103.

Richard L. Horwitz, Esquire and David E. Moore, Esquire, Potter Anderson & Corroon LLP, Hercules Plaza, 6th Floor, 1313 N. Market Street, Wilmington, Delaware 19899, counsel for defendants.

Of counsel: James W. Dabney, Esquire, Peter L. Simmons, Esquire, and Henry C. Lebowitz, Esquire, Fried, Frank, Harris, Shriver & Jacobson LLP, One New York Plaza, New York, New York 10004.

Wilmington, Delaware
September 9 , 2004

JORDAN, District Judge

I. INTRODUCTION

This is a patent infringement case. Presently before me are the parties' requests for construction of the disputed claim language of U.S. Patent No. 6,560,580 B1 (issued May 6, 2003) ("the '580 patent") pursuant to *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996).[1] The plaintiffs are eSpeed, Inc., Cantor Fitzgerald, L.P., CFPH, L.L.C., and eSpeed Government Securities, Inc. (collectively, "eSpeed" or "plaintiffs").[2] The defendants are Brokertec USA, L.L.C., Garban, L.L.C., ICAP Plc, OM Technology AB, and OM Technology (US), Inc. (collectively, "BrokerTec" or "defendants").[3] The parties have fully briefed their positions and appeared before me for oral argument on August 27, 2004. (*See* Docket Item ["D.I."] 514.) Jurisdiction is proper under 28 U.S.C. § 1338.

---

[1]The named inventors of the '580 patent, entitled "Automated auction protocol processor", are Stuart A. Fraser, Howard Lutnick, and Bijoy Paul, with plaintiffs Cantor Fitzgerald, L.P. and CFPH L.L.C. as assignees. (*See* '580 patent (attached to Docket Item ["D.I."] 463 (Joint Claim Construction Chart) as Ex. A).) Plaintiff eSpeed, Inc. is the exclusive licensee of the '580 patent. (D.I. 1, ¶ 11.)

[2]The plaintiffs' motion to amend their complaint to add eSpeed Government Securities, Inc. as a plaintiff was granted on August 30, 2004 (D.I. 511) and the plaintiffs filed their First Amended Complaint on August 31, 2004 (D.I. 512).

[3]Defendant ICAP Plc has challenged the exercise of personal jurisdiction over it in this court. (D.I. 161.) That motion is under advisement.

II. BACKGROUND

A. Procedural Background

eSpeed filed a complaint for patent infringement against BrokerTec on June 30, 2003, alleging that BrokerTec is willfully and intentionally infringing the '580 patent. (D.I. 1, ¶ 12.) On the same day, eSpeed also filed a motion for a preliminary injunction to enjoin 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]." (D.I. 3.) eSpeed's motion for a preliminary injunction was denied on January 14, 2004. (D.I. 200 (reported at *eSpeed, Inc. v. BrokerTec USA, L.L.C.*, 2004 U.S. Dist. LEXIS 385, 69 U.S.P.Q.2d 1466 (D. Del. Jan. 14, 2004) ("*eSpeed I*").) On February 24, 2004, BrokerTec filed a motion to sever the plaintiffs' claim against defendant Garban, L.L.C. (D.I. 248, 249), which was denied on June 15, 2004 (D.I. 424 (reported at *eSpeed, Inc. v. BrokerTec USA, L.L.C.*, 2004 U.S. Dist. LEXIS 13486 (D. Del. June 15, 2004) ("*eSpeed II*")). The parties are scheduled to try this case to a jury beginning on February 7, 2005.

B. The Disclosed Technology

The '580 patent discloses "[a] data processing system for implementing transaction management of auction-based trading for specialized items such as fixed income instruments" which provides "a highly structured trading protocol" ('580 patent, Abstract (attached to D.I. 463 as Ex. A)) that the parties commonly refer to as an electronic trading platform, *see eSpeed I*, 2004 U.S. Dist. LEXIS 385 at *3. The plaintiffs argue that the defendants operate two electronic trading platforms that infringe

the '580 patent, namely, the BrokerTec ETN and the Garban ETC/GTN.[4] (D.I. 464 at 2.) Specifically, the plaintiffs say that the defendants' electronic trading platforms infringe the "workup protocol" claimed by each of the independent asserted claims of the '580 patent, that is, claims 20, 22, 24, and 29.[5] (*Id.* at 3-5.) Claim 20, which is set forth below with the disputed claim terms in italics, exemplifies this claimed workup protocol:

> A method implemented on a distributed workstation computer system for trading an item between passive participants and an aggressor participant, the method comprising:
>
> providing a *bid/offer system state* wherein the passive participants participate by entering bids or offers at select prices and volumes for the item;
>
> distributing the bids or offers to the workstations;
>
> receiving a hit or lift from the aggressor participant in response to one or more of the bids or offers to trade a desired volume of the item at a desired price; and
>
> transitioning to a trading *system state* wherein:
>
> > (a) a trade transaction is executed, at a defined price set by the hit or lift, between the aggressor participant and each passive participant whose bid or offer had been hit or lifted by the aggressor participant;

---

[4]For a more thorough description of the technology disclosed by the '580 patent and additional background information pertaining to this case, *see eSpeed I,* 2004 U.S. Dist. LEXIS 385 at *3-*5; *see also eSpeed II*, 2004 U.S. Dist. LEXIS 13486 at *2-*7.

[5]Though claims 20, 22, and 24 are method claims, and claim 29 is an apparatus claim, the plaintiffs say, and the defendants do not dispute, that the claim construction issues are substantively the same for each claim. (D.I. 464 at 2.) eSpeed is asserting claims 20-25 and 29-30 against BrokerTec. In those asserted claims, claim 21 depends from claim 20; claim 23 depends from claim 22; claim 25 depends from claim 24; and claim 30 depends from claim 29. All of the disputed claim terms construed herein appear only in the asserted independent claims. It follows that each asserted dependent claim contains the same limitation as the independent claim from which it depends.

> (b) a period of exclusivity is provided during which the aggressor participant and a designated passive participant may *control trading* by transacting additional volume of the item with each other at the defined price to the exclusion of other participants desiring to participate in trading; and
>
> (c) upon termination of the period of exclusivity, new trade transactions involving the other participants are tested for and executed at the defined price without providing the other participants a period of exclusivity to *control trading*.

('580 patent, col. 20, ll. 4-29.)

According to the plaintiffs, the "automated workup protocol" disclosed by the '580 patent is inventive because it departs from "the traditional sequential workup practice" used in voice broking, or open outcry, environments. (D.I. 464 at 6-7.) This departure from the earlier workup practice is inventive, the plaintiffs say, because "only the initial aggressor and the earliest passive participant enjoy a workup rather than all 'Workup State' participants," (*id.* at 6) which "increases the speed and volume of trading by requiring participants other than the initial pair to commit to their full intended size" (*id.* at 6-7). The defendants, of course, dispute this position, and say that the workup protocol of the '580 patent "is nothing more than an automation of pre-existing trading protocols and rules...." (D.I. 41, ¶ 6.)

III. STANDARD OF REVIEW

A determination of patent infringement involves two steps. First, the patent claims are construed, and, second, the claims are compared to the allegedly infringing device. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1455 (Fed. Cir. 1998) (en banc). Claim construction is a matter of law for the court. *Markman*, 52 F.3d at 979. "To properly construe the claims, a court must examine the claims, the rest of the

specification, and, if in evidence, the prosecution history." *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1324 (Fed. Cir. 2003). The process begins, however, with the language used in each claim itself. *See, e.g., Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996). It is that language that defines and measures the scope of a patented invention. *See, e.g., SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1121 (Fed. Cir. 1985) (en banc).

If possible, claim language is given the ordinary and accustomed meaning understood by practitioners in the art. *Hockerson-Halberstadt, Inc. v. Avia Group Int'l, Inc.*, 222 F.3d 951, 955 (Fed. Cir. 2000). There is a "heavy presumption" that, if such a meaning exists, it is the meaning intended. *Bell Atlantic Network Services, Inc. v. Covad Communications Group, Inc.*, 262 F.3d 1258, 1268 (Fed. Cir. 2001). That presumption does not control, however, when the inventor deviates from the ordinary and accustomed meaning by acting as a lexicographer or when the ordinary and accustomed meaning would deprive the claim, as a whole, of an ascertainable meaning. *Id.* The intrinsic record before the court, therefore, "must be examined in every case to determine whether the presumption of ordinary and customary meaning is rebutted." *Texas Digital Systems, Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1204 (Fed. Cir. 2002). If there is no clear, ordinary and customary meaning in the claim language, then consideration of the rest of the intrinsic evidence is directed to resolving, if possible, the lack of clarity. *Interactive Gift Express, Inc. v. Compuserve Inc.* , 256 F.3d 1323, 1331 (Fed. Cir. 2001).

If the meaning of a claim term remains unclear after considering the intrinsic evidence, a court may enlist the aid of extrinsic evidence "to help resolve the lack of

clarity." *Id.* at 1332; *see also Mannington Mills, Inc. v. Armstrong World Indus., Inc.,* 218 F. Supp. 2d 594, 598 (D. Del. 2002) ("When the extrinsic record can provide a meaning eluding the court's grasp, a court should adopt such a construction if that construction is cognizant with the overall intrinsic record before it.") (citing *Vitronics*, 90 F.3d at 1583). Use of extrinsic evidence, however, is restricted. "Relying on extrinsic evidence to construe a claim is 'proper only when the claim language remains genuinely ambiguous after consideration of the intrinsic evidence.'" *Interactive Gift*, 256 F.3d at 1332. Extrinsic evidence may not "contradict the import of other parts of the specification [or intrinsic record]. Indeed, where the patent documents are unambiguous, expert testimony regarding the meaning of a claim is entitled to no weight." *Id.* Neither are inventors entitled to an after-the-fact claim construction inapposite to the"clear import of the patent disclosure itself." *North Am. Vaccine, Inc. v. Am. Cyanamid Co.*, 7 F.3d 1571, 1577 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1069 (1994).

IV. DISCUSSION

The plaintiffs allege that the defendants' accused trading platforms infringe claims 20-25 and 29-30 of the '580 patent. (D.I. 464 at 2.) In those claims, the parties dispute the meaning of the following claim terms: (1) "state" or "system state"; (2) "bid/offer system state" or "system bid/offer state"; and (3) "control trading" or "control subsequent trading".[6] (D.I. 463.)

[6]At the time the parties filed their Joint Claim Construction Chart and the accompanying briefing, the claim term "trading system state" or "system trading state" was also in dispute. (*See* D.I. 463, D.I. 464 at 25, D.I. 482 at 12.) The defendants argue that "state" and "trading system state" have essentially the same meaning, as those terms are used in the '580 patent. (D.I. 482 at 12-13.) When asked about the defendants' position during the hearing on claim construction, counsel for the plaintiffs

There are two issues to be addressed before turning to a discussion of the disputed claim terms themselves. First, each of the defendants' proposed claim constructions end with the phrase "...substantially as described in the '580 patent", (*see* D.I. 463 at 3-6), which the plaintiffs have dubbed an "omnibus clause" (D.I. 503 at 1). The plaintiffs argue that including this clause in the construction of the disputed claim terms would render them "so open-ended as to virtually invite the jury to import further limitations into the claims, and thereby nullify the Court's construction." (D.I. 464 at 14.) The defendants have not cited, nor am I aware of, any pertinent legal authority that supports including such a clause in the construction of the disputed claim terms (*see* D.I. 514 at 27:10-28:10), and I decline to adopt that proposed language in this case.

Second, despite taking the position at the inception of this case that "[t]he subject matter [of the '580 patent] has to do with the rules of trading government bonds..." (D.I. 464 at 15), the defendants now assert, for the first time, approximately a year after the case was filed, that the '580 patent claims a "finite state machine", which, apparently, is something known in the field of computer data processing (D.I. 482 at 6-7). This change in position is surprising, given that the parties were proceeding up until this point with the understanding, I thought, that the '580 patent was a business method patent. When asked at the claim construction hearing what, exactly, the '580 patent was if it was not a business method patent, counsel for the defendants stated that "it is a patent on a computer system that embodies logic for processing bid/offer, hit, lift and other

---

stated that "at this point, I don't think trading state, separate from state, bid/offer state, and control trading has any impact on any of the issues in the case." (D.I. 514 at 30:10-14.) Based on this representation, it appears that the claim term "trading system state" or "system trading state" is no longer in dispute, and I will not construe it herein.

trading commands in a specified way as claimed in the patent." (D.I. 514 at 56:10-14.) However, the defendants' counsel stopped short of saying that the '580 patent was a patent on software or hardware.[7] (*Id.* at 54:22-55:18.) I am unpersuaded by the defendants' sudden shift in defining the field of the invention of the '580 patent, and thus, the scope of the pertinent art. The parties have treated the '580 patent as a business method patent since the inception of this case. No persuasive reason was advanced for treating it otherwise now.

A. "state" or "system state"

1. The Parties' Proposed Constructions

The plaintiffs say that "state" or "system state" should be construed as "an automated trading procedure that defines the options available to participants and the rules of trading." (D.I. 463 at 3; D.I. 464 at 10.) The defendants' proposed construction is "a condition of a finite state machine embodied in a computer system and used to control an aspect of the system's operation, substantially as described in the '580 patent." (D.I. 463 at 3; D.I. 482 at 6.)

2. The Court's Construction

As discussed, the '580 patent is a business method patent, and not, as the defendants would have it, "a patent on an automated auction protocol processor that implements what could be characterized as a business method." (D.I. 514 at 54:18-21) or "a patent on a computer system that embodies logic..." (*id.* at 10-12). The

[7]The plaintiffs do not deny that the '580 patent claims "an automated system implemented on a computer" (D.I. 514 at 58:8-10; 82:5-7) and "a list of instructions to carry out a process" (*id.* at 61:13-14).

defendants' proposed claim construction for "state" or "system state" therefore fails, because it is predicated upon the erroneous conclusion that the invention claimed in the '580 patent is a finite state machine.[8]

The plaintiffs' proposed claim construction of "state" or "system state" is supported by the intrinsic evidence, specifically, the language of unasserted claim 26, which recites "a plurality of states which define the ability of participants to participate in trading...." ('580 patent, col. 21, ll. 24-26.) There is also language in the specification which says that "[t]he workstation "state" determines the options available to [a] trader," (*id.*, col. 5, ll. 15-32) and that "[a]s each state is entered, the protocols are shifted and new rules to trading apply" (*id.*, col. 8, ll. 55-61). Thus, because the intrinsic evidence clearly supports the plaintiffs' proposed construction of the claim term "state" or "system state", I will construe "state" or "system state" to mean "an automated trading procedure that defines the options available to participants and the rules of trading".

B. "bid/offer system state" or "system bid/offer state"

1, The Parties' Proposed Constructions

The plaintiffs' proposed construction of the term "bid/offer system state" or "system bid/offer state" is "a state during which participants may enter into the system bids and offers for an item at select prices and volumes." (D.I. 463 at 4; D.I. 464 at 17.)

[8]Furthermore, during prosecution of the '580 patent, the plaintiffs emphasized to the Examiner that a state change referred to changing protocols of trading, and not to the operation of a computer or a computer program. Rather, they said that "[c]hange of state refers to the different protocols governing trading securities during different conditions...." (D.I. 463, Ex. E at FN1866-67.)

The defendants' proposed construction is "a 'state' (as defined above) in which a computer system allows entry of bid, offer, hit, or lift commands and allows select actions by participants with active offerings that other participants are denied, substantially as described in the '580 patent." (D.I. 463 at 4; D.I. 482 at 9.)

The plaintiffs say that "bid/offer system state" or "system bid/offer state" is clearly and broadly defined in the claims themselves, and, therefore, that definition should control. (D.I. 464 at 18 and n.9 (citing, *inter alia, Prima Tek II, L.L.C. v. Polypap, S.A.R.L.*, 318 F.3d 1143, 1150-51 (Fed. Cir. 2003).) In support of that argument, they point to claim 20, which recites "providing a bid/offer system state wherein the passive participants participate by entering bids or offers at select prices and volumes for the item...." ('580 patent, col. 20, ll. 8-10.) They also point to claims 22 and 24, which both recite "providing a bid/offer system state wherein a first participant enters a bid or offer for the item at a select price and volume...." (*Id.*, col. 20, ll. 37-39, 61-63.) Similarly, claim 29 (the apparatus claim) recites a trading system that "provides a system bid/offer state enabling the passive participants to participate by entering bids or offers with respect to the item...." (*Id.,* col 22, ll. 16-18.)

In response, the defendants argue that the "wherein" clauses relied upon by the plaintiffs do not provide a complete definition for "bid/offer system state" or "system bid offer state" because they differ from claim to claim. (D.I. 492 at 12.) The defendants cite unasserted claim 14 in support of this argument, which reads "providing a bid/offer system state wherein passive participants enter[] bids or offers for the item at associated select prices and volumes...." ('580 patent, col. 19, ll. 41-43.)

2. The Court's Construction

I agree with the plaintiffs' position that "bid/offer system state" or "system bid/offer state" is clearly and broadly defined in the claims of the '580 patent, and that that definition controls. *See Prima Tek II*, 318 F.3d at 1150-52 (noting that "the scope of the asserted claims may be ascertained from the plain language of the claims" and that "broad claims supported by the written description should not be limited in their interpretation to a preferred embodiment"). The defendants' argument that "wherein" clauses cited by the plaintiffs differ from claim to claim is a futile one, as the wherein clause of claim 14 is nearly identical to the wherein clauses of claims 20, 22, 24, and 29. Nor have the defendants directed my attention to anything in the patent or the intrinsic record that contradicts the definition of "bid/offer system state" or "system bid/offer state" set forth in the claims.[9] Accordingly, I will construe "bid/offer system state" and "system bid/offer state" as "a state during which participants may enter into the system bids and offers for an item at select prices and volumes."

C. "control trading" or "control subsequent trading"

1. The Parties' Proposed Constructions

[9]The defendants' proposed claim language would limit "bid/offer system state" or "system bid/offer state" to a state that "allows select actions to participants with active offerings that other participants are denied". (D.I. 463 at 4.) In support of this limitation, the defendants rely almost entirely on a description of the preferred embodiment of the invention (*see id.* (citing '580 patent, col. 8, l. 66 to col. 11, l. 50)) that is set forth in the specification of the '580 patent, in conjunction with a discussion of "clearing time" and the "when state" (*see* '580 patent, col. 9, l. 66 to col. 12, l. 38). Where, as here, the disputed claim terms are clearly defined in the language of the claims themselves, the defendants cannot overcome the presumption that those definitions apply "simply by pointing to the preferred embodiment or other structures or steps disclosed in the specification or prosecution history." *Teleflex*, *Inc. v. Ficosa North Am. Corp.*, 299 F.3d 1313, 1327 (Fed. Cir. 2002) (citation omitted). I therefore decline to read the defendants' proposed limitation into the claim language.

The plaintiffs say that "control trading" or "control subsequent trading" means "to have the option to trade additional volume of an item to the exclusion of other participants desiring to participate in the trade." (D.I. 463 at 6; D.I. 464 at 26.) The defendants' proposed construction is that to "control trading" means "to exercise authority to hold up a trade for as long as a participant continues to respond to its contra-party's size offerings, substantially as described in the '580 patent." (D.I. 463 at 6; D.I. 482 at 14.)

Claim 20 provides an example of the use of the term "control trading" in the patent, as it recites that "[a] period of exclusivity is provided during which the aggressor participant and a designated passive participant may *control trading* by transacting additional volume of the item with each other at the defined price to the exclusion of other participants desiring to participate in trading." ('580 patent, col. 20, ll. 19-24 (emphasis added).) Further, both the plaintiffs and the defendants cite the following language from the specification in support of their respective claim constructions (*see* D.I. 463 at 6; D.I. 464 at 27-28; D.I. 482 at 14-15):

> The initial participants in the Workup State (i.e., the Aggressor[10] and the first customer on the passive side) are known as "current workers" and are vested with the authority under system control to hold up a trade for a predetermined duration of time.

('580 patent, col. 8, ll. 46-51.)

[10]An Aggressor is defined in the '580 patent as "a customer who initializes a trade". A "trade" is defined as "a string of transactions at one price initiated by a hit or lift and continuing until timed out or done". A "hit" is "accepting a pending bid (the dollar amount offered to buy a security - issue)" and a "lift" is "accepting a pending offer (the dollar amount offered to sell a security - issue)". (*See* '580 patent, col. 6, ll. 30-45.)

> Current workers control the trade and can submit additional transaction volume to their contra-traders; this to the exclusion of outside customers.

(*Id.*, col. 12, ll. 48-50.)

The defendants argue that the claim language of claim 20 supports their proposed construction of "control trading" because it "expressly notes that traders 'control' trading 'by transacting additional volume'" and that "[t]he adverb 'by' indicates that the mechanism by which traders exercise control is by continuing to trade." (D.I. 482 at 15 (emphasis in original).) In response, the plaintiffs say that "even if 'transacting additional volume' is the 'mechanism' by which participants control trading" it does mean that a participant may control trading indefinitely by continuing to transact additional volume. (D.I. 490 at 10.) The plaintiffs also say that claim 20 clearly states that the ability to control trading only exists for a period that is "'provided' whether or not the participants exercise the option to transact additional volume." (*Id.*) Finally, the plaintiffs say that there is "no suggestion" in the language of claim 20 "that transacting additional volume could mean that the 'period' never ends." (*Id.* at 11.)

The defendants also say that the plaintiffs' proposed claim construction is too broad, as it "conflates 'control' with any period of exclusivity," and is inconsistent with the intrinsic record of the '580 patent. (D.I. 492 at 24.) They rely on the following language from claim 29, reciting

> ...a system trading state which (a) executes a trade transaction in accordance with the hit or lift at a defined price set by the hit or lift, (b) provides a period of exclusivity enabling the aggressor participant and a designated passive participant to control subsequent trading by executing transactions between the aggressor and designated passive participant of additional volume of the item at the defined price to the exclusion of other participants desiring to participate in the trading...

('580 patent, col. 22, ll. 21-28.) The defendants also cite this language from the specification in support of their proposed claim construction:

> The status of current worker dissipates upon entry of "done", or the lapsing of the trading inactivity interval. Again, this interval is a pre-set system parameter triggered via system logic. Absent such termination, current workers can trade almost indefinitely, as long as they continue to respond to their contra-party's size offerings.

(*Id.*, col. 12, ll. 58-62.) Finally, the defendants cite the prosecution history of the '580 patent, namely, declarations submitted by two of the inventors (Mr. Paul and Mr. Fraser) during prosecution wherein the defendants claim they used "the term 'control' as a synonym for the right to continue trading until 'done'...." (D.I. 482 at 15.) This, say the defendants, "demonstrates that the concept of 'controlling' trading encompasses more than a limited option to trade additional volume (such as for a pre-set time interval), as plaintiffs' definition implies." (*Id.* at 15-16.) The plaintiffs say that the defendants have "distorted the content of these declarations" and that Mr. Paul's declaration emphasizes that control over a trade is temporally limited to a certain period.[11] (*Id.* (citing D.I. 459 at Tab 50, ¶ 11).)

2. The Court's Construction

[11]The plaintiffs also say that the defendants' construction of "control trading" contradicts the use of the term "control" in the defendants' "own internal development documents and sales literature." (D.I. 464 at 30.) However, extrinsic evidence is relevant only when the intrinsic record leaves some ambiguity as to a term's scope. *Vitronics,* 90 F.3d at 1584. The intrinsic record here does not leave any ambiguity as to the scope of the term "control trading", and therefore I need not consider this extrinsic evidence. *See id.; see also Interactive Gift*, 256 F.3d at 1332.

Simply stated, the parties' dispute over the construction of "control trading" hinges on whether the term is construed as a period in which participants trade to the exclusion of others for as long as they continue to respond to each other's offers and counteroffers, or if it is construed as trading to the exclusion of others for a predetermined period of time. At the claim construction hearing, counsel for the defendants said that "[t]he ['580] patent doesn't say that the rule is you only get three seconds, and then whether you've done your full volume or not, or whether you're finished or not, you're out. That was an idea that BrokerTec came up with, not these plaintiffs." (D.I. 514 at 92:12-17.) When I restated the defendants' position that the plaintiffs' "invention is limited to a system that allows the first seller and first buyer to keep trading without a time limitation, except some non-trading intervention time that might kick in. But as long as one person - that one person is selling one share, they could theoretically keep going for as long as they want," (*id.* at 94:11-19), plaintiffs' counsel said only that "[i]t must be preferred embodiment" (*id.* at 95:3-4). In support of that assertion, the plaintiffs directed my attention to language from the specification stating that "current workers...are vested with the authority under system control to hold up a trade for a predetermined duration of time." (*Id.* at 95:20-96:10.)

However, that portion of the specification, together with the other intrinsic evidence cited by the plaintiffs, is not enough to overcome the plain language of the claims themselves. I agree with the defendants' argument that the claim term "control trading", as it is used in the claims, indicates that the manner in which the aggressor and the passive participant trade to the exclusion of other participants, is "by transacting additional volume of the item with each other". (*See* '580 patent, col. 20, ll. 19-24, 46-

49; col. 22, ll. 19-27.) The plaintiffs say that the defendants' proposed claim construction means that the period of exclusivity never ends. (D.I. 490 at 11.) This, I think, overstates the defendants' position. The defendants do not dispute that the period of exclusivity (as in, an interval of time) eventually ends. Their position is that the period of exclusivity ends when a participant no longer responds to its contra-party's size offerings (D.I. 482 at 14-16) and not, as the plaintiffs would have it, that the period of exclusivity times out regardless of the trading activity of the participants.

The plaintiffs have not pointed out any intrinsic evidence that contradicts the defendants' proposed construction of "control trading". For that reason, and because the defendants' proposed construction is supported by the claim language and the specification of the '580 patent, I will construe "control trading" or "control subsequent trading" to mean "to exercise authority to hold up a trade for as long as a participant continues to respond to its contra-party's size offerings."

V. CONCLUSION

For these reasons, the disputed claim terms will be construed as follows:

Claim Term	**The Court's Construction**
"state" or "system state"	The court construes "state" or "system state" to mean "an automated trading procedure that defines the options available to participants and the rules of trading."

“bid/offer system state” or “system bid/offer state”	The court construes “bid/offer system state” or “system bid/offer state” to mean “a state during which participants may enter into the system bids and offers for an item at select prices and volumes.”
“control trading” or “control subsequent trading”	The court construes “control trading” or “control subsequent trading” to mean “to exercise authority to hold up a trade for as long as a participant continues to respond to its contra-party’s size offerings.”

An appropriate order will issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

eSPEED, INC.; CANTOR FITZGERALD, L.P.; CFPH, L.L.C., and eSPEED GOVERNMENT SECURITIES, INC.,	)	
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.	)	

ORDER

For the reasons set forth in the Memorandum Opinion issued today, it is hereby ORDERED that the following disputed claim terms of U.S. Patent No. 6,560,580 B1 (issued May 6, 2003) are construed as follows:

Claim Term	The Court's Construction
"state" or "system state"	The court construes "state" or "system state" to mean "an automated trading procedure that defines the options available to participants and the rules of trading."
"bid/offer system state" or "system bid/offer state"	The court construes "bid/offer system state" or "system bid/offer state" to mean "a state during which participants may enter into the system bids and offers for an item at select prices and volumes."
"control trading" or "control subsequent trading"	The court construes "control trading" or "control subsequent trading" to mean "to exercise authority to hold up a trade for as long as a participant continues to respond to its contra-party's size offerings."

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

September 9, 2004
Wilmington, Delaware