

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

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MICHAEL W. DOBBINS  
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TRADING TECHNOLOGIES	:	
INTERNATIONAL, INC.,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 04-CV-5312
	:	
v.	:	Judge James B. Moran
	:	
eSPEED, INC.,	:	
	:	
Defendant.	:	

**INTERVENORS' MEMORANDUM IN  
SUPPORT OF THEIR MOTION TO INTERVENE AND TO  
UNSEAL COURT FILES AND PROCEEDINGS**

The Futures Industry Association ("FIA") and Managed Funds Association ("MFA") file this Memorandum in Support of their Motion to Intervene and to Unseal Court Files and Proceedings.

**I. INTRODUCTION**

Trading Technologies International, Inc. ("TT") has initiated patent litigation that has far-reaching ramifications for the futures industry. Indeed, TT posted an open letter to the futures industry on its website in which TT proposes to tax every future transaction at 2.5 cents per side, permanently.<sup>1</sup> TT also published a full-page copy of the open letter in the January 7, 2005 edition of the Wall Street Journal. TT's Open Letter to the Futures Industry, Wall Street Journal, January 7, 2005, at A12. Further, TT claims to have written, posted and published the letter in order "to make our thoughts as clear and open as possible." Despite the litigation's importance to the industry and TT's purported desire to be "clear and open," TT has filed all of its

<sup>1</sup> A copy of TT's December 14, 2004 open letter is attached hereto as Exhibit "A".

substantive briefs under seal denying both the industry and the public access to its positions and assertions. Having elected to take its dispute public by filing an action, TT cannot now shield its filings from public review without demonstrating good cause. Here, TT has not even attempted to meet its burden and this Court should allow public access to the parties' filings.<sup>2</sup>

## **II. PROCEDURAL BACKGROUND**

### **A. TT's Business and Litigation**

TT is an independent software vendor providing solutions to the futures industry. On August 24, 2004, TT sued its rival eSpeed, Inc. ("eSpeed") in this Court alleging infringement of at least two U.S. patents (the "Litigation"). The patents in suit relate to TT's X\_Trader software and MD Trader trading tool. Essentially, TT claims that eSpeed infringed its patents by marketing a version of TT's software under eSpeed's own brand.

On September 29, 2004, a stipulated Protective Order was entered by this Court governing the Litigation. The Protective Order limits third-party access to information designated "confidential" or "highly confidential" by TT or eSpeed. Since the entry of the Protective Order, TT and eSpeed have filed virtually all of their substantive briefs under seal or otherwise subject to restrictions from public access.<sup>3</sup> The record, however, does not reflect any showing of good cause that would justify such restrictions. In short, TT is attempting to utilize the Federal courts to conduct an essentially private resolution.

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<sup>2</sup> The Board of Trade of the City of Chicago, Inc., ("CBOT") and the Chicago Mercantile Exchange ("CME") filed a similar Motion on December 22, 2004. FIA and MFA join in CBOT and CME's Motion filing separately to emphasize the unique interests of their members.

<sup>3</sup> A copy of the Docket is attached hereto as Exhibit "B".

**B. FIA and MFA**

The FIA is a non-profit U.S. based trade association founded in 1955. The FIA is the umbrella organization for the futures industry, representing all sectors of the industry. Over the years, FIA has consistently worked to improve regulations, encourage competition, establish best practices, and promote the financial integrity of the markets. FIA represents its members' views before legislators, regulators, and other policymakers to influence the development of industry rules and practices. These activities include the filing of amicus briefs on issues of significant interest to the industry.

The 39 regular members of the FIA are U.S. registered futures commission merchants ("futures brokers"). These futures brokers provide trading and clearing support for institutional and public customers on the major international futures exchanges. These firms are responsible for more than 95% of the total amount of funds held on behalf of customers trading on U.S. futures exchanges--an amount in excess of \$77 billion. FIA's members include the top 20 firms in terms of customer funds held. They are the major clearing members of the U.S. futures exchanges. Regular members elect the FIA board and set policy for the organization.

FIA's 165 associate members include U.S. and international derivative exchanges and clearinghouses, banks and corporate users, independent software vendors and other service providers, legal and accounting firms, introducing brokers, commodity trading advisors, commodity pool operators and hedge funds. Associate members participate in the committees and divisions of the association and may be elected to the board. Associate members do not vote for the election of FIA board members or have other voting rights.

MFA, founded in 1991 and based in Washington, D.C., is a U.S.-based non-profit membership organization dedicated to serving the needs of professionals worldwide that specialize in the alternative investment industry -- privately and publicly managed futures funds,

hedge funds, and funds of funds. MFA has over 850 members who manage a significant portion of the over \$1 trillion in assets invested in these types of investment vehicles around the world. These members are, collectively, extremely active participants in the U.S. futures markets. Further, MFA members utilize, directly or indirectly, the competing futures trading software products at issue in the Litigation.

A crucial part of FIA and MFA's mission is to monitor events that could have an impact on their members' business. Both associations believe that their members are better served by having access to such information so that they can make informed decisions. In that regard, promoting open access to filings in the Litigation is within the core mission of FIA and MFA.

The Litigation has far-reaching ramifications for FIA and MFA members. In fact, TT has published an open letter to the futures industry proposing to tax every futures and futures option transaction at 2.5 cents per side, in perpetuity. *See* Exhibit A at p. 1. Such a tax would quickly exceed the hundreds of millions of dollars annually and TT threatens to sue FIA members if they do not comply. *Id.* at p. 5. Further, MFA's members are major end-users of U.S. futures exchanges. Consequently, this case may ultimately increase the costs of futures trading for MFA members. Importantly, the foundation of TT's threats are the patents in suit in the Litigation. Obviously, FIA's and MFA's members have a vested interest in monitoring the proceedings to understand and gauge the strengths and weaknesses of TT's alleged patent claims.<sup>4</sup>

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<sup>4</sup> It is clear that the FIA and MFA have standing to intervene under the circumstances. It is well-recognized that an association has standing to assert the interests of its members where (1) its members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the organizations purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333, 343 (1977). Here, all three elements are indisputably present. As to the FIA, while TT and eSpeed are associate members of FIA, it is the regular members who set policy for and govern the organization. Further, FIA is merely seeking open access to publicly-filed documents in furtherance of its general mission to advance the interests of the entire industry and is not actively taking a position adverse to a member's substantive position in the Litigation. *Cf. Retired Chicago Policy Ass'n. v. City of Chicago*, 7 F.3d 584, 606-09, (7th Cir. 1993) (where association directly sues its own members, associational standing may be inappropriate).

### III. ARGUMENT

#### A. The Standard

“There is a strong presumption toward public disclosure of court files and documents[.]” *In re Bank One Sec. Litig.*, 222 F.R.D. 582, 585 (N.D. Ill. 2004) (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982)). This presumption is premised on the principle that “the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding.” *Id.* at 585-86. (quoting *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994)). Further, public disclosure is justified by the First Amendment. *See Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000) (recognizing that “the First Amendment provides a presumption that there is a right of access to proceedings and documents which have historically been open to the public and where the disclosure of which would serve a significant role in the functioning of the process in question”).

The party seeking confidential treatment has the burden of showing good cause. Fed. R. Civ. P. 26(c);<sup>5</sup> *In re Matter of Cont'l. Ill. Secs. Litig.*, 732 F.2d 1302, 1310 (7th Cir. 1984). In describing that burden and in recognition that any concealment from the public is disfavored, the Seventh Circuit has stated that any “step that withdraws an element of judicial process [from public review] . . . requires rigorous justification.” *In re Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992). More specifically, “[e]stablishing good cause requires a party to present ‘a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.’” *Bank One*, 222 F.R.D. at 586 (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 (1981)).

Even if a party can demonstrate good cause, the Court must still balance the public’s interest in access against the litigant’s interest in concealment. *In re Matter of Cont'l Ill. Secs.*

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<sup>5</sup> Local Rule 26.2(b) of the Northern District of Illinois specifically requires good cause before removing filings from the public domain.

*Litig.*, 732 F.2d at 1313; *Bank One*, 222 F.R.D. at 586. In balancing these interests, “[i]f there is any doubt as to whether the material should be sealed, it is resolved in favor of disclosure.” *Id.*

Once a protective order is entered, if someone challenges confidential treatment, the party seeking to preserve confidentiality must continue to show good cause.<sup>6</sup> *Union Oil Co. of Cal. V. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000); *Bank One*, 222 F.R.D. at 586. If a party cannot show good cause justifying the ongoing concealment of certain information, the protective order must be dissolved or modified to permit the disclosure of that information. *Id.* Further, if a party does identify specific information warranting ongoing concealment, a Court should place the documents in the public record following redaction. *Bank One*, 222 F.R.D. at 586 (citing *Methodist Hosps., Inc. v. Sullivan*, 91 F.3d 1026, 1032 (7th Cir. 1996)).<sup>7</sup>

**B. The Parties Cannot Possibly Meet The Required Standard And The Information Should Be Made Public**

Here, neither TT nor eSpeed have made the requisite showing. In fact, the record reveals that both parties have routinely filed entire briefs under seal and, therefore, beyond the reach of the public. Such filings are particularly suspect.

The documents under seal in this matter include pleadings, briefs, memoranda and motions. The Seventh Circuit routinely discourages restriction of access to entire pleadings and briefs. *See e.g., Pepsico, Inc. v. Redmond*, 46 F.3d 29, 30 (7th Cir. 1995); *In re Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992); *Bank One*, 222 F.R.D. at 587. The Seventh Circuit has explained that “such an extraordinary request requires an extraordinary justification” and that “holding trade secrets in confidence is one thing, holding entire judicial proceedings in confidence quite

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<sup>6</sup> As CBOT and CME point out in their Memorandum, intervention is the appropriate procedure under the circumstances. *See* CBOT and CME Memorandum of Law at pp. 5-6; *Jessup*, 227 F.3d at 997.

<sup>7</sup> The fact that the Litigation involves claims of patent infringement does not alter the analysis. *See Pratt & Whitney Canada, Inc. v. U.S.*, 14 Cl. Ct. 268, 274 (1988) (applying general standard in favor of public access to judicial records in patent litigation).

another.” *Pepsico, Inc.*, 46 F.3d at 31. Further, to the extent the pleadings or memoranda contain confidential information, the proper procedure is to redact the relevant portion, not restrict access to the entire document.<sup>8</sup> *Bank One*, 222 F.R.D. at 587 (citing *Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999)).

The record does not indicate that either party has complied with its burden of demonstrating good cause. Rather, it appears as if both parties simply designated whole documents as restricted under the stipulated Protective Order. Simply relying on the technical provisions of a protective order, however, does not absolve eTrade or TT of its burden. *See Bank One*, 222 F.R.D. at 587 (technical provisions of protective order are immaterial to whether information belongs in the public domain); *Solaia Tech LLC v. Arvinmeritor, Inc.*, 2004 WL 549449 at \* 3 (N.D. Ill. Jan. 28, 2004)<sup>9</sup> (same). Because neither eTrade nor TT have met their burden, the documents filed under seal or as restricted should be released for public access.

Even if eTrade or TT could demonstrate good cause, the material is still not automatically entitled to protection. Rather, this Court must balance the public’s interest in access against the litigant’s interest in preserving confidentiality. *Bank One*, 222 F.R.D. at 586. Any doubt must be resolved in favor of disclosure. *Id.*

Here, the public’s interest to access is overwhelming, especially in regard to TT. Through its initiation of patent litigation, TT seeks to extort a license fee for each and every transaction executed by the futures industry based on the allegation that there is widespread infringements of its patents. In fact, TT has gone public with its campaign posting an open letter on the internet threatening to sue anyone who does not comply with its demand. *See Exhibit A.*

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<sup>8</sup> If a party, however, fails to make the requisite showing that any part of the pleading or memorandum is confidential, then the entire document should be disclosed.

<sup>9</sup> A copy is attached hereto as Exhibit “C” for the Court’s convenience.


Independent of TT's procedural and legal obligations, TT can hardly complain when it is required to reveal the basis for the claims when it has initiated public litigation. Indeed, the very premise for granting patent rights in the first place is specifically to promote complete disclosure. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-151 (1989) ("The federal patent system thus embodies a carefully crafted bargain for encouraging the creation and disclosure of new, useful and non-obvious advances in technology and design in return for the exclusive right to practice the invention for a period of years . . .").

#### IV. CONCLUSION

For all the foregoing reasons, intervenors, Futures Industry Association and Managed Funds Association, respectfully request that this Court allow public access to all hearings and the transcripts of all hearings and all pleadings and other documents filed by eSpeed and TT, except to the extent a showing is made that good cause exists for protecting specific information identified by the parties and the Court concludes that the need to preserve confidentiality outweighs the public's strong interest in disclosure.

Respectfully submitted,

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# EXHIBIT “A”



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## FOR IMMEDIATE RELEASE

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## News Release

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## TT's Open Letter to the Futures Industry

CHICAGO, Tuesday, December 14, 2004

Lately, there has been discussion and speculation about TT throughout the *futures industry* (customers, traders, FCMs, exchanges, ISVs, etc.). We wrote this letter to make our thoughts as clear and open as possible.

We believe that we are an important part of the *futures industry* we serve, that our position in this industry is unique, and that our value is growing. We are aiming to unlock that value and accelerate our positive contribution.

The solution that TT has offered to each of the 'big four' exchanges is as follows:

- TT and the participating exchange (PE) would guarantee each other level access, permanently.
- Inside the world of PE futures and future options (this includes traders, customers, FCMs, ISVs, exchanges, etc.), TT would forfeit the right to be the aggressor in any patent infringement lawsuit, permanently; in that way allowing absolutely anyone to use TT's current and future patent protected concepts any way they desire.
- TT would receive from PE 2.5 cents per side for every PE future and future option transaction, permanently.

We believe this 2.5 cent solution is in the best interest of the *futures industry*. The remainder of this document will explain our reasoning.

### **1) TT Has Built Itself into an Integral Piece of the Futures Industry**

Over the past several years, the *futures industry* has had no better friend than TT. By making a premier order-entry system commercially available, TT has truly leveled the playing field among market participants through our *innovative* technologies. The confidence derived from access to such a level playing field increases direct access, participation, and liquidity. Over 50% of the 'big four' futures exchanges' electronic volume now flows through X\_TRADER® precisely because it provides commercial, desktop access to the same playing field long enjoyed only by the world's largest traders and banks.

Fast, reliable, functionality-rich, multi-exchange order-entry software is complicated and time consuming to engineer and support. TT's desktop software allows for multi-exchange, multi-product interrelation on a single screen, setting off a domino effect toward tighter, more liquid markets. This interrelation is at least as important as any other function in the *futures industry*.

TT's *innovations* (MD Trader™, Autospreader™, Autotrader™, Navigator™, FIX Gateway, etc.) have allowed for much more volume to be processed by the *futures industry*. These *innovations* have also helped the industry in launching new products. Simply put, the 'big four' are now based mostly on a direct-access, end-to-end solution (from the end-user's order entry system to the exchange matching engine), and TT manages over 50% of one end of 'big four' electronic volume. In fact, the trading volume that goes through X\_TRADER dwarfs the volume of even the largest exchange.

TT's recently engineered and released FIX Gateway allows exchanges, banks, etc. to interface their existing trading infrastructures with the X\_TRADER screen. As a result, many exchanges beyond the 'big four' are now in the process of interfacing to TT. In time, cash foreign exchange, cash bonds, more futures exchanges, etc. will be pulled onto the X\_TRADER platform. For exchanges without a TT connection, this is a wise move, considering the customer liquidity on the other side of X\_TRADER. This paradigm shift is further proof of TT's place in the *futures industry*.

TT has captured more than a 50% volume share while competing against all other ISVs, SunGard, Bloomberg, Reuters, CQG, Interactive Brokers, Tradestation, Schwab, E-Trade, eSpeed, internal bank systems, internal FCM systems, internal prop shop systems, exchange native screens, and more. We believe that most of this success is a direct result of TT's *innovative* technologies.

Protecting the results of TT's consistent *innovation* is a priority. Beyond the MD Trader patents that were recently received, another eighty patent applications have been filed, and TT continues to file more. While some of these pending patents concern products mentioned earlier, others pertain to the interaction of the matching engine and front end. TT's intellectual property will be used aggressively to protect the integral piece of the modern-day electronic *futures industry* that we built.

Over the past six years, TT was steered into its current position in a deliberate manner. \$40 million was invested over four years (1999-2002). Currently, \$8 million is in TT's bank account. While our company has a \$32 million cumulative net income loss over the past six years, TT is the only futures-focused ISV that is profitable, and has been so for two years. In just those two years, TT has grown from 110 to 280 employees. TT is on pace to have \$50 million in revenue and \$6 million in profit for 2004. While the past six years have required much discipline, sacrifice, and patience, it has all been worthwhile, as TT has built a very valuable asset.

## **2) Your Opportunity is Only as Good as Your Industry is Healthy**

Approximately five years ago, before Harris Brumfield (TT's CEO, who at the time was a full-time trader and TT investor) signed the MD Trader concept over to TT, he was faced

with a tough decision. Either he could hoard the MD Trader concept for his trading (as virtually all traders do with anything that gives them an edge), or he could transfer ownership to TT and make it commercially available. The train of thought that gave him peace with his decision was a theoretical one. In order to feel good about signing over the MD Trader concept and all future technological *innovations*, he convinced himself that his opportunity as a trader was only as good as his industry was healthy. In the MD Trader concept, he believed he owned a key to a premier commercial order-entry system and, therefore, a key to a level playing field and his industry's health.

A premier commercial order-entry system is a great asset for the *futures industry*. There's a big difference between one or a few groups controlling the industry with premier order-entry and the whole world having access to premier order-entry, as they do now. In the former case, order-entry slippage leads to payment for order flow, block trading, and internalization. This liquidity fragmentation limits the growth of the market. In the latter and current case, growth is unimpeded. After all, any industry is only as good as the product it offers the world.

### **2a) Competition, Competition, Competition**

We believe in competition within every sector of the *futures industry*: ISVs, traders, FCMs, and exchanges.

The futures-focused ISV space in its current form is built on quicksand. These ISVs are either unprofitable or, in TT's case, barely profitable. With the advent of eSpeed entering the multi-exchange order-entry space with its differentiating cash market and subsidized order-entry systems (in addition to eSpeed's home grown software, it has recently acquired an ISV, Ecco), the futures-focused ISV space as known is doomed. Unless a company has strong intellectual property, it will be unable to compete.

The 2.5 cent solution would create a new era of competition for order-entry by extending TT's intellectual property to the world, forever. Many old-model ISVs would find a place for their services amid larger, broader companies. This combination of events would lead to an industry-wide slashing of order-entry system prices. This would lay the foundation for an unprecedented distribution flood, which would lead to still higher volumes for participating exchanges. This process would further accelerate the day TT's retail version of MD Trader (in development) entered the marketplace to compete with MD Trader concept imitators already in the retail space.

Among traders, TT has improved competition by spreading access to a premier order-entry system all over the world. This has been a key to a level playing field, enabling the brightest minds and hardest workers to enter the market freely and competitively. The end results are tighter and more liquid markets. This is essential for the *futures industry* to thrive.

Among FCMs, TT has improved competition by allowing market participants to switch FCMs without switching their order-entry system. This has created a more competitive market for FCM services which has lowered costs and improved services. At the same time, TT's *innovations* have helped the FCM business to expand exponentially. The net effect of these forces has been a win for the *futures industry*.

Among exchanges, TT has improved competition by giving market participants freedom of choice between comparable products on different exchanges. When TT made the controversial decision to offer connectivity to Eurex US products, CBOT immediately chose (in a close vote, eight to seven) to cut transaction prices. Conversely, when BrokerTec Futures chose not to do business with TT, CBOT products dropped not one penny in price. Also, the CME and LIFFE exchanges are currently doing battle over the Eurodollar contract, causing prices in both exchanges to drop.

TT furthered exchange-comparable product competition with Navigator. Also, TT is helping to aggressively spread a common protocol, FIX, throughout the *futures industry* with our FIX Gateway and FIX Adaptor. This allows for more open access, lower connectivity costs, and even more competition. Over time, the competition resulting from TT's *innovations* puts pressure on exchanges to differentiate and create new products. Further, we hope that competition encourages the exchanges to do away with memberships, allowing for one common transaction rate and an even more level playing field for traders and hedgers.

In this ultra-competitive environment, the *futures industry* is enjoying the benefits of record volume and thriving more than ever. If you are concerned with competition in your sector, you should take comfort in the fact that there is competition throughout the industry, making for a greater whole. With a greater whole, many, many people across all sectors of the industry find ways to succeed.

### **2b) Volume-Catalyst: Totally Aligned with an Industry's Health**

Theoretically, had each of the 'big four' futures exchanges been participating in the 2.5 cent solution, TT would have received \$130 million (5.2 billion sides x 2.5 cents) over the past twelve months. Revenue in this form would give us an opportunity to be a *volume-catalyst* for the *futures industry*. We would be incentivized to seize this opportunity, since our profits would be driven by volume.

An entity in the center of a financial ecosystem that is motivated by a low, fixed, volume-based rate is unheard-of. Such an entity would be strictly aligned with an industry's health, and the benefits for the industry would be great. Similarly, all that TT has contributed to the *futures industry* to this point would pale in comparison to what TT would contribute as a *volume-catalyst*. The value of the TT *volume-catalyst* effect would dwarf a 2.5 cent inclusion.

### **3. TT - Patient, Patient, Patient**

We believe in capitalism and what it does for the world. Over the past several years, TT's *innovations* have been a driving force in helping create tremendous profitability for the *futures industry*. Yet, some in the industry still connect TT's value to our \$50 million revenue and \$6 million profit, ignoring the fact that TT's business plan to this point has not included maximizing profit. This is letting the trees get in the way of the forest. First, we hope the *futures industry* embraces the 2.5 cent solution. Failing that, it seems inevitable that, once thoroughly educated about TT's value, at least one well-capitalized entity in all of financial services, etc., will offer an acceptable price for TT. Failing both of those opportunities, we control our own destiny. Whenever we desire, TT, as a stand

alone company, could raise the price of the patent-protected portion of our software and immediately have enormous cash-flow. This would be a last resort, but we would go this route if forced to.

Three independent organizations (the US, UK, and EU patent offices) have validated TT's first intellectual property, MD Trader. Further, thirty-two of the who's who in trading (from around the world and across all asset classes) have independently verified the original and revolutionary nature of the invention with signed declarations, under penalty of perjury. What's more, global companies have stamped TT's patents with Consent Judgments. Every day, exposure and damages have been accumulating. Ultimately, TT will be in a position to collect triple damages for willful infringement. Let's say, in a conservative hypothetical, that the fair value of the patents is determined to be 20 to 30 cents per side; this would mean 60 to 90 cents per side in possible damages for anybody (traders, FCMs, ISVs, etc.) deemed to be willfully infringing. This doesn't even take into account the potential of obtaining a royalty based on a trader's profits for using an infringing system, which, at least for some, could turn out to have a fair value far greater than 20 to 30 cents per side. TT believes there is a lot of exposure floating around out there. While we are tied up during the eSpeed litigation, we may not be able to pursue other infringers. However, regardless of when we are freed up, we will enforce our rights, including the right to recover back damages.

We believe the invention of the MD Trader concept represents an end to a process, meaning that there is no way to equal or better the function that it performs. We are confident that the court system will protect our patented *innovation*. On top of that, we believe that a vast majority of our eighty pending patents will be issued over time. We also believe that the paradigm shift represented by our FIX Gateway will lead to a wide expansion of our exchange access. Moreover, we will continue to relentlessly push *innovation*. As days pass, weeks pass, and months pass, TT's position will only become stronger and stronger. Proof of this is the fact that TT has been experiencing record-shattering sales in the past three months, and the pipeline indicates continuing exponential growth.

We know how valuable our place in the *futures industry* is. Yet, we have no specific timetable to pull any particular trigger to realize our true value. From a business perspective, we consider all of our possible paths equally attractive. In other words, speaking strictly as a business, we are indifferent as to whether the industry accepts the 2.5 cent solution or not. However, all things considered, TT's preference is the 2.5 cent solution. The *volume-catalyst* effect of the 2.5 cent solution would ensure a healthy industry. A healthy *futures industry* contributes to world productivity, which is a passion worth pursuing.

#### **4. We Believe that TT's Status is an Urgent Matter for the Futures Industry, but Obviously, Your Opinion is what Counts**

We don't understand why the *futures industry* would risk diminishing its value by allowing any player in financial services, etc., who might not be aligned with the overall industry's health, to own and control an integral piece of the industry. Already, some global firms are interested in buying TT, and if the right offer surfaced, TT would be sold without notice. Also, there are joint-venture offers for TT to be a part of launching a super-exchange. As mentioned before, a last resort would entail TT raising the price of the patent-protected portion of our product.

With a guarantee of level access to TT, with ten cents per side currently the going rate for licensing the MD Trader patents (already a significant discount), with 70% of volume using the MD Trader concept, and with eighty quality TT patents still pending, the 2.5 cent solution is attractive. In fact, given the alternatives available to TT, it is the lowest priced solution that we can consider. If we were to accept anything less, we would be breaking our fiduciary duty to our shareholders and employees. TT is able to rationalize dropping as low as the 2.5 cents solution for the following reasons: this would apply to 100% of volume instead of 70%, the 2.5 cents would be permanent instead of ten cents for sixteen years, TT would not have to chase infringers, and, most of all, the TT *volume-catalyst* effect would drive volumes to still unrealized heights, ushering in the most prosperous era this industry has ever seen.

Still, it takes two to tango—TT cannot force the *futures industry* to accept a solution that we predict would be good for the industry. While we are confident in our prediction, obviously, our prediction is not a given. If you, the *futures industry*, choose to end our current relationship, TT respects that decision. After all, sometimes, different strokes, different folks.

On the other hand, various traders, FCMs, etc. have told us that they agree that TT's status is an urgent matter and that the 2.5 cent solution would be in the industry's best interest, yet they can't publicly support the solution. It would seem to us that they would be kicking, screaming, and speaking out as loud as possible. Every voice matters—assume that yours will be the one that tips the scales.

###

# EXHIBIT “B”

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Docket Sheet for 1:04-CV-5312 U.S. District Court for the Northern District of Illinois

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A0279

U.S. District Court  
Northern District of Illinois (Chicago)

CIVIL DOCKET FOR CASE #: 04-CV-5312

Trading Tech Intl v. eSpeed Inc  
Assigned to: Hon. James B. Moran  
Demand: \$0,000  
Lead Docket: None  
Dkt# in other court: None

Filed: 08/12/04  
Jury demand: Both  
Nature of Suit: 830  
Jurisdiction: Federal Question

Cause: 35:145 Patent Infringement

TRADING TECHNOLOGIES  
INTERNATIONAL, INC.  
plaintiff

Paul H. Berghoff  
[COR LD NTC A]  
Leif R. Sigmond, Jr.  
[COR]  
Matthew J. Sampson  
[COR]  
George I. Lee  
[COR]  
Stephen Richard Carden  
(312) 935-2365  
[COR]  
Brian Richard Harris  
[COR]  
Jennifer M Swartz  
[COR]  
McDonnell, Boehnen, Hulbert &  
Berghoff, Ltd.  
300 South Wacker Drive  
32nd Floor  
Chicago, IL 60606  
(312) 913-0001

Steven F. Borsand  
[COR NTC]  
Trading Technologies  
International, Inc.  
222 South Riverside Drive  
#1100  
Chicago, IL 60606  
(312)476-1000

v.

ESPEED, INC.  
defendant

George Carter Lombardi  
[COR]  
Raymond C. Perkins

[COR LD NTC A]  
Andrew M. Johnstone  
[COR]  
Winston & Strawn LLP  
35 West Wacker Drive  
41st Floor  
Chicago, IL 60601  
(312) 558-5600

TRADING TECHNOLOGIES INTERNATIONAL, INC.

plaintiff

v.

ESPEED, INC.

defendant

**Proceedings include all events**

Date Filed	Doc. No.	Image	Description
08/12/2004	1	<u>Yes: 42 Page(s); 1523 KB; PDF</u>	COMPLAINT (Attachments); jury demand - Civil cover sheet - Appearance(s) of Matthew J. Sampson, Brian Richard Harris, George I. Lee, Leif R. Sigmond Jr., Paul H. Berghoff as attorney(s) for plaintiff (original and one copysummons(es) issued.) (Documents: (1-1 through 1-3)) [Date Entered: 08/13/04, By: gma]
08/12/2004	--	No	RECEIPT regarding payment of filing fee paid; on 8/12/04 in the amount of \$150.00, receipt #1078972. [Date Entered: 08/13/04, By: gma]
08/12/2004	2	<u>Yes: 1 Page(s); 20 KB; PDF</u>	NOTIFICATION by plaintiff of affiliate under Local Rule 3.2. [Date Entered: 08/13/04, By: gma]
08/12/2004	3	<u>Yes: 1 Page(s); 27 KB; PDF</u>	NOTICE by plaintiff of claim involving patent under Local Rule 3.4. [Date Entered: 08/13/04, By: gma]
08/13/2004	--	No	MAILED patent report to Washington, D.C. [Date Entered: 08/13/04, By: gma]
08/24/2004	6	<u>Yes: 11 Page(s); 279 KB; PDF</u>	MOTION by plaintiff Trading Technologies International, Inc. to file under seal exhibit 4 of its memorandum in support of its motion for a preliminary injunction (Attachment); Notice. [Date Entered: 08/30/04, By: gma]
08/24/2004	7	No	MOTION by plaintiff Trading Technologies International, Inc. for leave to file additional attorney appearance; Notice. [Date Entered: 08/30/04, By: gma]
08/24/2004	8	<u>Yes: 3 Page(s); 46 KB; PDF</u>	MOTION by plaintiff Trading Technologies International to extend the page limit under L.R. 7.1 for its memorandum in support of its motion for a preliminary injunction. [Date Entered: 08/30/04, By: gma]
08/24/2004	10	<u>Yes: 1 Page(s); 28 KB; PDF</u>	ATTORNEY APPEARANCE for plaintiff by Jennifer M Swartz. [Date Entered: 08/30/04, By: gma]
08/24/2004	11	<u>Yes: 1 Page(s); 27 KB; PDF</u>	ATTORNEY APPEARANCE for plaintiff by Steven F. Borsand. [Date Entered: 08/30/04, By: gma]
08/24/2004	12	<u>Yes: 30 Page(s); 1111 KB; PDF</u>	MEMORANDUM by plaintiff Trading Technologies in support of its motion for a preliminary injunction (Attachments). [Date Entered: 08/30/04, By: gma]
08/26/2004	4	<u>Yes: 1 Page(s); 27 KB; PDF</u>	ATTORNEY APPEARANCE for defendant by Raymond C. Perkins, George Carter Lombardi, Andrew M. Johnstone. [Date Entered: 08/27/04, By: gma]

08/26/2004	5	<u>Yes: 1 Page(s); 46 KB; PDF</u>	RETURN OF SERVICE executed as to defendant eSpeed Inc on 8/24/04. [Date Entered: 08/27/04, By: gma]
08/26/2004	9	<u>Yes: 1 Page(s); 32 KB; PDF</u>	MINUTE ORDER of 8/26/04 by Hon. James B. Moran: Plaintiff's motion to file under seal exhibit 4 of its memorandum in support of its motion for a preliminary injunction is granted [6-1]. Plaintiff's motion to extend the page limit under L.R. 7.1 for its memorandum in support of its motion for a preliminary injunction is granted [8-1]. Plaintiff's motion for leave to file additional attorney appearance of Steven F. Borsand is granted [7-1]. Mailed notice [Date Entered: 08/30/04, By: gma]
08/26/2004	14	<u>Yes: 1 Page(s); 30 KB; PDF</u>	MINUTE ORDER of 8/26/04 by Hon. James B. Moran: Plaintiff's motion for a preliminary injunction is entered and continued to 8/31/04 at 9:00 a.m. Mailed notice [Date Entered: 08/31/04, By: gma]
08/30/2004	--	No	SCHEDULE set on 8/30/04 by Hon. James B. Moran : Status hearing set to 9:15 9/1/04 by agreement of the parties . Mailed notice [Date Entered: 08/30/04, By: lg]
08/30/2004	13	No	EXHIBIT 4 by plaintiff Trading Technologies International to its memorandum in support of its motion for a preliminary injunction. (RESTRICTED) [Date Entered: 08/31/04, By: gma]
09/01/2004	15	<u>Yes: 1 Page(s); 32 KB; PDF</u>	MINUTE ORDER of 9/1/04 by Hon. James B. Moran: Status hearing held and continued to 9/7/04 at 9:15 a.m. Plaintiff's oral motion to serve subpoena on Mr. Brucato is granted. Plaintiff's brief to be filed on or before 9/15/04. Defendant's response to be filed on or before 9/29/04. Plaintiff's reply to be filed on or before 10/4/04. Mailed notice [Date Entered: 09/02/04, By: gma]
09/07/2004	--	No	SCHEDULE set on 9/7/04 by Hon. James B. Moran : Status hearing held and continued to 9:15 11/2/04 . Preliminary injunction hearing set for 10:00 12/2/04 . Mailed notice [Date Entered: 09/07/04, By: lg]
09/13/2004	--	No	SCHEDULE set on 9/13/04 by Hon. James B. Moran : Status hearing set to 9:15 9/15/04 by agreement of the parties . Mailed notice [Date Entered: 09/13/04, By: lg]
09/13/2004	16	<u>Yes: 10 Page(s); 186 KB; PDF</u>	ANSWER by defendant eSpeed Inc and affirmative defenses to plaintiff's complaint for patent infringement[1-1]; jury demand. [Date Entered: 09/14/04, By: gma]
09/13/2004	17	<u>Yes: 3 Page(s); 29 KB; PDF</u>	CORPORATE DISCLOSURE STATEMENT by defendant eSpeed, Inc. [Date Entered: 09/14/04, By: gma]
09/15/2004	--	No	SCHEDULE set on 9/15/04 by Hon. James B. Moran : Status hearing held and continued to 9:15 9/16/04 . Mailed notice [Date Entered: 09/15/04, By: lg]
09/15/2004	18	<u>Yes: 12 Page(s); 251 KB; PDF</u>	MOTION by plaintiff Trading Technologies International to file under seal exhibit 4 of its memorandum in support of its motion for a preliminary injunction; Memorandum in support. [Date Entered: 09/16/04, By: gma]
			SCHEDULE set on 9/16/04 by Hon. James B. Moran : Status hearing

09/16/2004	--	No	held and continued to 9:15 9/23/04 . Mailed notice [Date Entered: 09/16/04, By: lg]
09/17/2004	19	<u>Yes: 4 Page(s); 82 KB; PDF</u>	MINUTE ORDER of 9/17/04 by Hon. James B. Moran: (Entered Preliminary Injunction Discovery Order.) Mailed notice [Date Entered: 09/20/04, By: gma]
09/23/2004	--	No	SCHEDULE set on 9/23/04 by Hon. James B. Moran : Status hearing held. No notice [Date Entered: 09/23/04, By: lg]
09/23/2004	20	<u>Yes: 3 Page(s); 65 KB; PDF</u>	MINUTE ORDER of 9/23/04 by Hon. James B. Moran: Entered Memorandum Opinion and Order. Mailed notice [Date Entered: 09/24/04, By: gma]
09/23/2004	21	<u>Yes: 2 Page(s); 35 KB; PDF</u>	ATTORNEY APPEARANCE for plaintiff by Stephen Richard Carden. [Date Entered: 09/24/04, By: gma]
09/29/2004	22	No	OPPOSITION by defendant eSpeed Inc to Trading Technologies International's motion to file customer declarations under seal [18-1]. (RESTRICTED) [Date Entered: 09/30/04, By: gma]
09/29/2004	23	<u>Yes: 16 Page(s); 418 KB; PDF</u>	MINUTE ORDER of 9/29/04 by Hon. James B. Moran: (Entered Protective Order.) Mailed notice [Date Entered: 09/30/04, By: gma]
10/04/2004	24	No	RESTRICTED DOCUMENT by plaintiff pursuant to LR 26.2. (RESTRICTED) [Date Entered: 10/06/04, By: gma]
10/13/2004	--	No	SCHEDULE set on 10/13/04 by Hon. James B. Moran : Status hearing set to 9:15 11/2/04 . Mailed notice [Date Entered: 10/13/04, By: lg]
10/18/2004	25	<u>Yes: 6 Page(s); 72 KB; PDF</u>	MOTION by defendant eSpeed Inc for leave to file an oversize brief instanter; Notice. [Date Entered: 10/25/04, By: gma]
10/18/2004	26	No	OPPOSITION by defendant eSpeed Inc to Trading Technologies International's motion for preliminary injunction. (RESTRICTED) [Date Entered: 10/25/04, By: gma]
10/18/2004	27	No	APPENDIX filed by defendant eSpeed Inc to eSpeed's opposition to Trading Technologies International's motion for preliminary injunction [26-1]. (RESTRICTED) [Date Entered: 10/25/04, By: gma]
10/21/2004	28	<u>Yes: 1 Page(s); 28 KB; PDF</u>	MINUTE ORDER of 10/21/04 by Hon. James B. Moran: eSpeed's motion for leave to file an oversize brief instanter is granted [25-1]. Status hearing is set for 10/28/04 at 9:15 a.m. Mailed notice [Date Entered: 10/25/04, By: gma]
10/26/2004	29	No	MOTION by defendant to compel. (RESTRICTED) [Date Entered: 10/29/04, By: gma]
10/26/2004	30	No	MOTION by defendant eSpeed Inc to compel and memorandum in support. (RESTRICTED) [Date Entered: 10/29/04, By: gma]
10/27/2004	31	No	MOTION by defendant to compel production of Harris Brumfield's trading records; Notice. (RESTRICTED) [Date Entered: 10/29/04, By: gma]
			MOTION by plaintiff Trading Technologies International to compel a

10/28/2004	32	No	response to subpoenas to Steve Brucato and Catus Technologies and to compel working samples of the accused products and information on Espeed's currently non-accused products. (RESTRICTED) [Date Entered: 10/29/04, By: gma]
10/28/2004	33	<u>Yes: 1 Page(s); 36 KB; PDF</u>	MINUTE ORDER of 10/28/04 by Hon. James B. Moran: Plaintiff is to construe the claims by 11/11/04. Plaintiff is to respond to agreement or difference in construction by 11/18/04. Defendant is to advise plaintiff of the prior art in which they will rely by 11/18/04. Responses to discovery disputes to be filed on or before 11/4/04. Replies to be filed by 11/8/04. Status hearing set for 11/2/04 is stricken and reset to 11/10/04 at 1:30 p.m. Parties granted leave to file oversized briefs. Mailed notice [Date Entered: 10/29/04, By: gma]
10/29/2004	36	<u>Yes: 3 Page(s); 47 KB; PDF</u>	PRELIMINARY INJUNCTION HEARING WITNESS LIST by plaintiff Trading Technologies International. [Date Entered: 11/02/04, By: gma]
11/01/2004	34	No	REPLY by plaintiff Trading Technologies International, Inc. in support of its memorandum in support of its motion for a preliminary injunction. (RESTRICTED) [Date Entered: 11/02/04, By: gma]
11/01/2004	35	No	APPENDIX filed by plaintiff Trading Technologies International to its reply in support of its memorandum in support of its motion for a preliminary injunction. (RESTRICTED) [Date Entered: 11/02/04, By: gma]
11/04/2004	37	No	OPPOSITION by defendant eSpeed Inc to Trading Technologies' motion to compel [32-1],[32-2]. (RESTRICTED) [Date Entered: 11/05/04, By: gma]
11/04/2004	38	No	RESPONSE by plaintiff Trading Technologies International to defendant eSpeed's motions to compel [31-1],[30-1],[29-1]. (RESTRICTED) [Date Entered: 11/08/04, By: gma]
11/08/2004	39	No	REPLY by defendant eSpeed Inc in support of its motion to compel [31-1],[30-1],[29-1]. (RESTRICTED) [Date Entered: 11/09/04, By: gma]
11/08/2004	40	No	REPLY by plaintiff Trading Technologies International in support of its motion to compel [32-1], [32-2]. (RESTRICTED) [Date Entered: 11/09/04, By: gma]
11/10/2004	--	No	SCHEDULE set on 11/10/04 by Hon. James B. Moran : Status hearing held and continued to 9:30 11/23/04 . Mailed notice [Date Entered: 11/10/04, By: lg]
11/18/2004	41	No	SUPPLEMENTAL brief by defendant on the invalidity of the '132 and '304 patents (RESTRICTED) [Date Entered: 11/23/04, By: ls]
11/23/2004	--	No	SCHEDULE set on 11/23/04 by Hon. James B. Moran : Status hearing held. No notice [Date Entered: 11/24/04, By: lg]
12/01/2004	42	No	RESPONSE by plaintiff Trading Technologies to eSpeed's supplemental brief on invalidity [41-1]. (RESTRICTED) [Date Entered: 12/02/04, By: gma]

12/06/2004	43	No	RESTRICTED DOCUMENT by defendant pursuant to Local Rule 26.2; Notice. (RESTRICTED) [Date Entered: 12/07/04, By: gma]
12/06/2004	44	No	APPENDIX filed by defendant to eSpeed's presentation at the hearing on Trading Technologies' motion for preliminary injunction. (RESTRICTED) [Date Entered: 12/07/04, By: gma]
12/07/2004	45	<u>Yes: 3 Page(s); 34 KB; PDF</u>	AGREED UPON SCHEDULE by plaintiff for post-hearing briefing. [Date Entered: 12/08/04, By: gma]
12/07/2004	46	No	COPY by plaintiff of claim charts; Notice. (RESTRICTED) [Date Entered: 12/09/04, By: gma]
12/07/2004	47	No	COPY by plaintiff of slides used during Trading Technologies' presentation at the hearing on motion for preliminary injunction; Notice. (RESTRICTED) [Date Entered: 12/09/04, By: gma]
12/15/2004	48	<u>Yes: 3 Page(s); 33 KB; PDF</u>	MOTION by plaintiff for leave to file a brief in excess of the page limit. [Date Entered: 12/16/04, By: gma]
12/15/2004	49	No	POST-PRELIMINARY INJUNCTION HEARING OPENING BRIEF by plaintiff Trading Technologies International, Inc. (RESTRICTED) [Date Entered: 12/16/04, By: gma]
12/15/2004	50	No	APPENDIX filed by plaintiff Trading Technologies International, Inc. to post-preliminary injunction hearing opening brief [49-1]. (RESTRICTED) [Date Entered: 12/16/04, By: gma]
12/15/2004	51	No	SUPPLEMENTAL BRIEF by defendant eSpeed Inc on non-infringement. (RESTRICTED) [Date Entered: 12/16/04, By: gma]
12/20/2004	52	No	AMENDED SUPPLEMENTAL BRIEF by defendant eSpeed Inc on non-infringement. (RESTRICTED) [Date Entered: 12/21/04, By: gma]
12/21/2004	53	<u>Yes: 1 Page(s); 29 KB; PDF</u>	MINUTE ORDER of 12/21/04 by Hon. James B. Moran: Plaintiff's motion for leave to file a brief in excess of the page limit is granted [48-1]. Mailed notice [Date Entered: 12/22/04, By: gma]
12/22/2004	54	No	RESPONSE by plaintiff Trading Technologies International to eSpeed's amended supplemental brief on non-infringement [52-1]. (RESTRICTED) [Date Entered: 12/23/04, By: gma]
12/22/2004	55	No	ATTORNEY APPEARANCE for Chicago Mercantile Exchange by Jerrold E. Salzman, Kevin M. Jones; Notice. [Date Entered: 12/23/04, By: gma]
12/22/2004	56	No	LOCAL RULE 3.2 DISCLOSURE STATEMENT by Chicago Mercantile Exchange, Inc. [Date Entered: 12/23/04, By: gma]

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# EXHIBIT “C”

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Citation: 2004 us dist lexis 1019

2004 U.S. Dist. LEXIS 1019, \*

SOLAIA TECHNOLOGY LLC, Plaintiff, vs. ARVINMERITOR, INC., et al., Defendants.

No. 02 C 4704

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN  
DIVISION

2004 U.S. Dist. LEXIS 1019

January 27, 2004, Decided  
January 28, 2004, Docketed

**SUBSEQUENT HISTORY:** Summary judgment denied by Solaia Tech. LLC v. Judge Mark R. Filip Arvinmeritor, Inc., 2004 U.S. Dist. LEXIS 19734 (N.D. Ill., Sept. 29, 2004)

**PRIOR HISTORY:** Solaia Tech. LLC v. Arvinmeritor, Inc., 2003 U.S. Dist. LEXIS 17413 (N.D. Ill., Sept. 29, 2003)

**DISPOSITION:** [\*1] Defendant Enbridge's Motion to Unseal and Declassify Confidential Information granted.

#### CASE SUMMARY


**PROCEDURAL POSTURE:** Defendant companies filed a motion to unseal and de-classify public, non-trade secret information in connection with a patent infringement action by plaintiff assignee.

**OVERVIEW:** The companies moved to unseal and open to the public all portions of the court record containing references to the existence or terms of an agreement between an attorney and the assignee. The attorney was the original patentee's in-house counsel, who prosecuted the patent at issue for the patentee. The agreement provided that the assignee would pay the attorney two percent of the gross recoveries received from the licensing or enforcement of the patent in exchange for the attorney's services as a consultant. The trial court initially placed the information under seal as a precautionary measure pending further consideration. The court found that good cause had not been demonstrated for keeping the existence and the contents of the agreement from the public under Fed. R. Civ. P. 26(c). The existence of the agreement and its contents were not a trade secret, and neither the assignee nor the attorney derived economic value from the secrecy of the information. As the patent attorney that prosecuted the patent in suit, the attorney was a fact witness, and his financial interest in the outcome of the litigation was clearly relevant to his potential bias.


**OUTCOME:** The court granted the motion to unseal the information.

**CORE TERMS:** confidential, unseal, patent, good cause, seal, protective order, trade secret, designation, secrecy, court record, sealed, independent determination, confidential information, failed to provide, public record, public domain, presumptively, legitimately, competitive, competitor, designated, privacy, salary, impugn, secret, prosecuted, timing


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**HN1** ↓ The Seventh Circuit has made clear that judicial proceedings are presumptively in the public domain. [More Like This Headnote](#)

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**HN2** ↓ What happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after public arguments based on public records. [More Like This Headnote](#)


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**HN3** ↓ Although pretrial discovery is usually conducted in private, the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding. [More Like This Headnote](#)


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**HN4** ↓ Secrecy is fine at the discovery stage, before the material enters the judicial record. [More Like This Headnote](#)


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**HN5** ↓ In order to protect the legitimate privacy interests of litigants, Fed. R. Civ. P. 26(c) allows a court to enter a protective order sealing a portion or the whole record for good cause shown. [More Like This Headnote](#)

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**HN6** ↓ The Seventh Circuit has stressed that a trial judge must make an independent determination of good cause, even if the parties submit an agreed protective order. [More Like This Headnote](#)


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**HN7** ↓ A judge may not rubber stamp a stipulation to seal the record. [More Like This Headnote](#)

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**HN8** ↓ The judge is the primary representative of the public interest in the judicial process and has an independent duty to balance the public's interest against the property and privacy interests of the litigants. [More Like This Headnote](#)

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**HN9** ↓ Only genuine trade secrets or some other properly demarcated category of legitimately confidential information, such as information covered by a recognized privilege, matters occurring before the grand jury, or information required by statute to be maintained in confidence (i.e. the name of a minor victim of a sexual assault) are entitled to be kept secret and out of the public record. [More Like This Headnote](#)

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**HN10** ↓ Many litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in the litigation they must be

revealed. [More Like This Headnote](#)

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**HN11** Bald assertions that disclosure could harm a party's competitive position are insufficient justification for secrecy. [More Like This Headnote](#)

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**HN12** Agreeing to keep information confidential does not establish that it may legitimately be kept from public view once the material enters the court record. [More Like This Headnote](#)

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**HN13** Calling a settlement agreement confidential does not make it a trade secret, any more than calling an executive's salary confidential would require a judge to close proceedings if a dispute erupted about payment (or termination.) [More Like This Headnote](#)

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**HN14** Both litigants and judges may protect properly confidential matters by using sealed appendices to briefs and opinions. [More Like This Headnote](#)

**COUNSEL:** For Solaia Technology LLC, PLAINTIFF: Raymond P Niro, Niro, Scavone, Haller & Niro, Ltd, Chicago, IL USA. Patrick Francis Solon, Niro, Scavone, Haller & Niro, Ltd, Chicago, IL USA. Christopher J Lee, Niro, Scavone, Haller & Niro, Ltd, Chicago, IL USA. Richard Burns Megley, Jr, Niro, Scavone, Haller & Niro, Ltd, Chicago, IL USA. Thomas L Stoll, Fish & Neave, Washington, DC USA.

For Arvinmeritor, Inc, DEFENDANT: Todd Lawrence McLawhorn, Howrey Simon Arnold & White, LLP, Chicago, IL USA. Joseph P Lavelle, Howrey, Simon, Arnold & White, LLP, Washington, DC USA. Jennifer Lee Dzwonczyk, Howrey, Simon, Arnold & White, LLP, Washington, DC USA. Danielle R Oddo, Howrey, Simon, Arnold & White, LLP, Washington, DC USA. Vivian Kuo, Howrey, Simon, Arnold & White, LLP, Washington, DC USA. Richard Allen Schnurr, Howrey, Simon, Arnold & White, Chicago, IL USA. Anthony Nimmo, Howrey, Simon, Arnold & White, Chicago, IL USA. Michael K Lindsey, Howrey, Simon, Arnold & White, Chicago, IL USA.

For Borg Warner Corp, DEFENDANT: Michael Francis Harte, Latham & Watkins LLP, Chicago, IL USA. Hugh Allen Abrams, Sidley Austin [\*2] Brown & Wood LLP, Chicago, IL USA. Constantine L Trela, Sidley Austin Brown & Wood LLP, Chicago, IL USA.

For Callaway Golf Co, DEFENDANT: Russell M Pelton, Jr, Michael A Chabraja LYNN Marie Geerdes McGuirewoods LLP, Chicago, IL USA.

For Enbridge Inc, Enbridge Energy Co, Inc, Enbridge Energy Partners, LP, DEFENDANTS: Darren Steven Cahr, Gardner Carton & Douglas LLP, Chicago, IL USA. Patrick Joseph Kelleher, Gardner Carton & Douglas LLP, Chicago, IL USA. Jared D Solovay, Gardner Carton & Douglas LLP, Chicago, IL USA. Vernon William Francissen, Gardner Carton & Douglas LLP, Chicago, IL USA.

For Gillette Company, The, DEFENDANT: Edward J Defranco, Scott Howard Kaliko Fish &

Neave, New York, NY USA. Christopher M Kanis, Thomas, Mamer & Haughey, Champaign, IL USA. Keith E Allen, Quarles & Brady LLP, Chicago, IL USA. Steven P Mandell, Mandell, Menkes & Surdyk, LLC, Chicago, IL USA. Steven Pepe, Fish & Neave, New York, NY USA. Catherine Ann Van Horn, Catherine A Van Horn Attorney at Law, Michigan City, IN USA.

For Tyco International (Us) Inc, DEFENDANT: Jesse J Jenner, Bryan J Vogel [PHV] Fish & Neave, New York, NY USA. Christopher M Kanis, Thomas, Mamer & Haughey, Champaign, [\*3] IL USA. Keith E Allen, Quarles & Brady LLP, Chicago, IL USA. Steven P Mandell, Mandell, Menkes & Surdyk, LLC, Chicago, IL USA. Richard L Rainey, Fish & Neave, Washington, DC USA. Roberick R McKelvie, Fish & Neave, Washington, DC USA. Catherine Ann Van Horn, Catherine A Van Horn Attorney at Law, Michigan City, IN USA.

For Rockwell Automation, Inc, THIRD-PARTY DEFENDANT: Todd Lawrence McLawhorn, Howrey Simon Arnold & White, LLP, Chicago, IL USA. Joseph P Lavelle, Howrey, Simon, Arnold & White, LLP, Washington, DC USA. Jennifer Lee Dzwonczyk, Laura C Munyon, Howrey, Simon, Arnold & White, LLP, Washington, DC USA. Danielle R Oddo, Howrey, Simon, Arnold & White, LLP, Washington, DC USA. Richard Allen Schnurr, Howrey, Simon, Arnold & White, Chicago, IL USA. Anthony Nimmo, Howrey, Simon, Arnold & White, Chicago, IL USA. Michael K Lindsey, Howrey, Simon, Arnold & White, Chicago, IL USA.

**JUDGES:** Nan R. Nolan, United States Magistrate Judge.

**OPINIONBY:** Nan R. Nolan

**OPINION: MEMORANDUM OPINION AND ORDER**

Enbridge Energy Company, Inc., Enbridge Pipelines (Lakehead) L.L.C., and Enbridge Energy Limited Partnership ("Enbridge") have filed a "Motion to Unseal and De-Classify Public, Non-Trade-Secret [\*4] Information." The motion is granted.

**BACKGROUND**

Enbridge moves to unseal and open to the public all portions of the court record containing references to the existence or terms of the June 4, 2001 agreement between Michael Femal ("Femal") and Plaintiff Solaia Technology LLC ("Solaia"). Schneider Automation ("Schneider") was the original owner of the '318 patent at issue in this case. Solaia has obtained from Schneider the rights to enforce the '318 patent. Femal is Schneider's in-house counsel who prosecuted the '318 patent for Schneider. At a September 11, 2003 hearing before Judge Guzman regarding Femal's motion for an order sealing all parts of the court record disclosing the existence and details of his agreement with Solaia, Judge Guzman indicated that the information in question was not confidential but as a "precautionary measure" sealed these materials until this Court could decide the issue. The issue is fully briefed and now ripe for decision.

**DISCUSSION**

<sup>HN1</sup> The Seventh Circuit has made clear that judicial proceedings are presumptively in the public domain. <sup>HN2</sup> "What happens in the halls of government is presumptively public business. Judges deliberate in [\*5] private but issue public decisions after public arguments based on public records." *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000). <sup>HN3</sup> Although pretrial discovery is usually conducted in private, "the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding." *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944-45 (7th Cir. 1999); see also *Baxter Int'l, Inc. v. Abbott Laboratories*, 297 F.3d 544, 545 (7th Cir. 2002) (stating <sup>HN4</sup> "secrecy is fine at the discovery stage, before the material enters the judicial

record.").

<sup>HN5</sup> In order to protect the legitimate privacy interests of litigants, Federal Rule of Civil Procedure 26(c) allows a court to enter a protective order sealing a portion or the whole record for good cause shown. <sup>HN6</sup> The Seventh Circuit has stressed that a trial judge must make an independent determination of good cause, even if the parties submit an agreed protective order. Citizens, 178 F.3d at 945 (stating <sup>HN7</sup> a judge "may not rubber stamp a stipulation to seal the record."). [\*6] <sup>HN8</sup> "The judge is the primary representative of the public interest in the judicial process" and has an independent duty to balance the public's interest against the "property and privacy interests of the litigants." *Id.* An independent determination of good cause prevents the parties from having "carte blanche to decide what portions of the record shall be kept secret." *Id.* <sup>HN9</sup> Only genuine trade secrets or "some other properly demarcated category of legitimately confidential information," such as information covered by a recognized privilege, "matters occurring before the grand jury," or information required by statute to be maintained in confidence (i.e. the name of a minor victim of a sexual assault) are entitled to be kept secret and out of the public record. Baxter, 297 F.3d at 546; Citizens, 178 F.3d at 946.

This Court has no trouble finding that good cause has not been demonstrated for keeping the existence and the contents of the Femal agreement from the public. The Femal agreement provides that Solaia will pay Femal two percent of the gross recoveries received from the licensing or enforcement of the '318 patent in exchange for Femal's services [\*7] as a consultant. The existence of the Femal agreement and its contents are not a trade secret, and neither Solaia nor Femal derive economic value from the secrecy of this information. As the Seventh Circuit has remarked, <sup>HN10</sup> "many litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in the litigation they must be revealed." Baxter, 297 F.3d at 546. As the patent attorney that prosecuted the patent in suit in this case, Femal is a fact witness or potential witness in this matter. Femal's financial interest in the outcome of the litigation is clearly relevant to his potential bias. n1

----- Footnotes -----

n1 Solaia states that Femal's compensation agreement with Solaia was modified on September 23, 2000, and he is no longer paid on the basis of any contingency. As Enbridge correctly points out, Femal has already testified at a time when he believed that he was going to collect two percent of all the money recovered from the accused infringers. Thus, the existence and terms of the agreement remain relevant.

----- End Footnotes----- [\*8]

Solaia and non-party Schneider oppose Enbridge's motion to unseal the record. Solaia's and Schneider's arguments are so irrelevant to the good cause determination that the Court spends little time disposing of them. Solaia and Schneider complain that Enbridge improperly delayed in bringing the motion to unseal. Judge Guzman did not put any time limit on such a motion. Neither Solaia nor Schneider cite any authority regarding the proper timing of a motion to unseal. The timing of Enbridge's motion is immaterial to a determination of whether the information belongs in the public domain.

Schneider also argues that Enbridge's motion should be denied because it failed to provide notice of its challenge in accordance with paragraph 10 of the Amended Protective order. Paragraph 10 provides that a party may make a good faith challenge to a confidential designation by providing the designating party with oral or written notice of the specific

reasons why the objector believes the information should not be designated confidential. The Court finds that at the September 11, 2003 hearing before Judge Guzman, Enbridge gave prior oral notice to Femal that it did not consider the material protectable [\*9] as a trade secret under Rule 26(c). See 9/11/03 transcript, p. 19. Even if Enbridge failed to provide proper notice, this is not a valid basis for finding that the materials should be barred from public disclosure. Schneider's additional assertion that Enbridge's challenge is not made in good faith is without merit.

Schneider's alleges that its competitors, including Rockwell, will use the existence and terms of the Femal agreement against Schneider in the marketplace "to harass and/or harm Schneider's competitive position" and "to impugn the character or conduct of Schneider and its distributor Square D . . . ." Schneider has not explained how the existence and details of Femal's agreement with Solaia could be used harm Schneider competitively. Schneider has also not explained why this sort of harm would be a sufficient reason to conceal the Femal information. See Baxter, 297 F.3d at 547 (holding <sup>HN11</sup> bald assertions that disclosure could harm a party's competitive position insufficient justification for secrecy). If a competitor falsely impugns Schneider's character, Schneider may have a claim against it for any ensuing damages, but this does not justify placing [\*10] the existence and the terms of the Femal agreement under seal.

Schneider makes much of the fact that the existence and terms of the Femal agreement were designated as confidential by Femal over a year and a half ago in the now settled Solaia Technology, LLC v. Jefferson-Smurfit et al. litigation. Schneider points out that neither Rockwell nor any other defendant in the Jefferson-Smurfit litigation objected to this confidential designation, and Rockwell expressly agreed to never challenge this confidential designation. <sup>HN12</sup> Agreeing to keep information confidential does not establish that it may legitimately be kept from public view once the material enters the court record. Union Oil, 220 F.3d at 567 (stating <sup>HN13</sup> "calling a settlement agreement confidential does not make it a trade secret, any more than calling an executive's salary confidential would require a judge to close proceedings if a dispute erupted about payment (or termination.)").

Finally, the Court notes that litigants in this case have been improperly filing entire pleadings and briefs which allegedly contain confidential information under seal. The Court directs the parties to Pepsico, Inc. v. Redmond, 46 F.3d 29 (7th Cir. 1995) [\*11] and In re Krynicki, 983 F.2d 74 (7th Cir. 1992), which discuss the impropriety of filing entire pleadings or briefs under seal. The Amended Protective Order shall be revised to indicate that the parties must file public pleadings and briefs but may file sealed supplements if necessary to discuss in detail materials subject to the protective order. Union Oil, 220 F.3d at 568 (stating <sup>HN14</sup> "both litigants and judges may protect properly confidential matters by using sealed appendices to briefs and opinions.").

## CONCLUSION

Enbridge's Motion to Unseal and Declassify Confidential Information is granted. The Clerk is directed to unseal docket entries 389, 391, 392, 400, 405, 421, and 424 and place them in the public record.

**Nan R. Nolan**

**United States Magistrate Judge**

**Dated:** 1/27/04

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**CERTIFICATE OF SERVICE**

The undersigned counsel for Futures Industry Association and Managed Funds Association hereby certifies that on January 13, 2005, a copy of the foregoing INTERVENORS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO INTERVENE AND TO UNSEAL COURT FILES AND PROCEEDINGS, was served by email and hand delivery to the following counsel of record:

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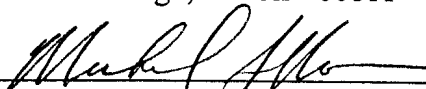
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