2021-1649

United States Court of Appeals for the Federal Circuit

LARRY G. JUNKER,

Plaintiff – Appellee,

v.

MEDICAL COMPONENTS, INC., MARTECH MEDICAL PRODUCTS, INC.,

Defendants – Appellants.

On Appeal from the United States District Court for the Eastern District of Pennsylvania, No. 2:13-cv-04606-MSG

APPELLEE LARRY G. JUNKER'S COMBINED PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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March 11, 2022

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 21-1649

Short Case Caption Junker v. Medical Components, Inc.

Filing Party/Entity Larry G. Junker

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 03/11/2022

Signature: /s/ James D. Petruzzi

Name: James D. Petruzzi

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Larry G. Junker		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

Alan S. Gold		
Alexander R. Ferrante		
Robert M. Mason		

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☑ None/Not Applicable ☐ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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STATEMENT OF COUNSEL

Based on my professional judgment, I believe the Panel decision is contrary to the following precedent of this Court: *Grp. One, Ltd. V. Hallmark Cards, Inc.*, 254 F.3d 1041 (Fed. Cir. 2001); *McKay v. United States*, 199 F.3d 1376, 1380 (Fed. Cir. 1999), *Elekta Instrument S.A. v. O.U.R. Scientific Int'l, Inc.*, 214 F.3d 1302 (Fed. Cir. 2000), *Junker v Eddings*, 396 F.3d 1359 (Fed. Cir. 2005); *Cargill, Inc. v. Canbra Foods, Ltd.,* 476 F.3d 1359 (Fed. Cir. 2007) and *Merck & Cie v. Watson Lab'ys, Inc.*, 822 F.3d 1347 (Fed. Cir. 2016).

Further, based on my professional judgment, I believe this appeal requires an answer to the following precedent setting questions of exceptional importance:

1. May a Panel decision disregard Federal Circuit law applicable to summary judgment standards of review, and also rely on post-critical date evidence to assess whether a pre-critical date letter constitutes an offer for sale and disregard industry practice in applying contract law as generally understood under Federal Circuit law?
2. May a quotation letter create an on-sale bar if it is not capable of forming a binding contract by simple acceptance that does not meet the terms of a specific and defined offer?

3. May a quotation constitute an offer "for sale" by a company/individual who violated a non-disclosure agreement and infringed the patent having no right to sell and with no involvement by the patentee in the alleged sale activity?

Dated: March 11, 2022

Respectfully submitted,

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INTRODUCTION AND STATEMENT OF ISSUES

Summary of argument

I. The Panel failed to make reasonable inferences in favor of Mr. Junker and applied the wrong legal standards.

In reversing denial of summary judgment in Appellant's favor, the Court should have made all reasonable factual inferences in favor of Appellee. But in finding the 1/8/99 letter to be an offer for sale, the Panel read into the letter inferences favoring Medcomp, added facts from outside the letter, and failed to defer to the District Court's findings and inferences. The Court also failed to find Medcomp proved the on-sale bar by clear and convincing evidence, as required for application of the on-sale bar.

II. Contract law requires an offer to be susceptible to forming a firm contract, and should not apply to quotations; anything else will create commercial chaos.

The Panel disregarded this Court's well-established law of contracts that quotations are not offers for sale. Yet in what it deemed a close case, found the quotation was indeed a firm offer, despite its very terms indicating it was precatory and not capable of forming a contract. Indeed, the letter characterized itself as a quote three times, and the recipient responded by requesting yet another quote.

The Panel introduced tremendous uncertainty into the business community, leaving it with little idea what must be done to test market interest with a quotation to potential customers without starting the one-year patent filing clock. This ruling upends commonly understood business norms.

III. The on-sale bar is not applicable to quotations by one who violated an NDA and infringed the patent with no right to form a binding contract for sale of the infringing product.

To form a binding contract, an offer has to be capable of forming a contract. The quotation at issue was proffered by an entity incapable of forming a contract with any quotation or offer. Mr. Eddings/Xentek violated a non-disclosure agreement with Mr. Junker and then infringed the patent when they began actually selling product a year after the so-called offer. The on-sale bar should not invalidate a patent on the actions of an entity having no right to sell and in violation of a non-disclosure agreement. Under this ruling, someone with no business and no product could make an "offer" unknown to the patentee, invalidating his patent.

ARGUMENT

I. The Panel decision disregarded applicable standards of review, failing to give proper deference to the summary judgment denial and improperly inserting factual findings contradicting the evidentiary record.

"When both parties move for summary judgment, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration." *McKay v. United States*, 199 F.3d 1376, 1380 (Fed. Cir. 1999). "In reviewing a denial of a motion for summary judgment, 'we give considerable deference to the trial court, and will not disturb the trial court's denial of summary judgment unless we find that the court has indeed abused its discretion.'" *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000) (quoting *Elekta Instrument S.A. v. O.U.R. Scientific Int'l, Inc.*, 214 F.3d 1302, 1306 (Fed. Cir. 2000). The District Court's Order granted Mr. Junker's and denied Medcomp's cross motions for summary judgment regarding on-sale bar. On Medcomp's appeal of both the grant and denial, this Court effectively reversed those decisions; the only basis for a reversal resulting in patent invalidity is the grant of Medcomp's summary judgment motion. This Court's decision makes clear it has given no deference to the District Court and yet made no finding the District Court abused its discretion in denying Medcomp's motion. The Court also made no finding the on-sale bar was proven by clear and convincing evidence, as required for every invalidity defense. 35 U.S.C. § 282; *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91 (2011). That standard is no less applicable to the party asserting such defense on summary judgment review. *See Invitrogen Corp. v. Clontech Labs., Inc.*, 429 F.3d 1052, 1063 (Fed. Cir. 2005).

In reversing, this Court failed to resolve reasonable inferences in favor of Mr. Junker, as Federal Circuit, and indeed Supreme Court precedent requires. As both parties and this Court's opinion have pointed out, whether an offer occurred is a question of law based on underlying factual findings. But the factual findings the

Panel made clearly conflict with those made by the District Court, and conflict with the evidence, and in particular the very terms of the letter in question. The Court states the 1/8/99 letter speaks for itself, but then disregards what the letter actually says:

1. Xentek is providing a quotation;
2. The product quoted is one Boston Scientific (“BS”) has not yet seen;[1]
3. This product is still in development;
4. This product is not presently available on the market;
5. This product could be tailored to BS’s specifications;
6. Again, Xentek is providing a quotation; and
7. Xentek will further discuss BS’s requirements in person.

In other words, when this letter speaks, it clearly states it is a “quote” and a preliminary negotiation.

And what commercial terms does the letter actually contain? The letter only contains piece part prices. It “offers” no other commercial terms. The listing of various sizes and quantities are not offers to sell those sizes and quantities. The letter merely shows how those factors modify the piece part price. The letter does not “offer” to sell “bulk, non-sterile, FOB Athens, Texas on a net 30-day basis” but states these are the conditions of the quoted prices. The obvious implication is

[1] The letter thanks BS for the opportunity to quote the “Medi-Tech Peelable Sheath,” which is not the infringing product. Medi-Tech is a company unrelated to Galt. *See* https://medi-techintl.com/. In the letter Eddings introduces to BS for the first time “a product of our own design” (the Xentek product) which BS has not yet seen. The Panel clearly misapprehended this distinction as indicated by its analysis of what is offered in its hypothetical acceptance scenarios. *See* Fed. Cir. Op. p.11, 13.

modification of these terms will modify the prices accordingly.[2] The letter provides not the complete commercial terms asserted by the Panel, but, rather, basic pricing information provided to a potential buyer, the very essence of a price quotation. Any less detail would render it useless to a potential buyer's purchasing decisions.

And while the Court inferred Xentek's intent to be bound by the quotation, Mr. Eddings testified otherwise:

> Q. If they had said to you then, I want to buy it today, what would you have said? You didn't have a product?
>
> A. I'll get back to you.
>
> Q. Because it's not finished, right?
>
> A. Right.

Appx00395. Indeed, seven months later, Xentek was still creating "subassembly drawings" for machines yet finalized to actually make the product. Appx00013. It is unreasonable to infer Eddings expected BS to accept an offer for a product they had not yet even seen as of the 1/8/99 quotation. Mr. Eddings was not offering, but exploring whether a market even existed for the yet-to-be made product.

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[2] And even the Court's interpretation of "Net 30" is only one of several that could be agreed upon, requiring further negotiation. *See, e.g.* https://thelawdictionary.org/net-1030/.

The Panel relied on several facts outside the 1/8/99 letter, including additional pre- and post-critical date quotations. Appx01577-01578. In analyzing these outside facts, the Court should have made inferences in favor of Mr. Junker. The subsequent communications, all called price "quotes" by both parties, clearly demonstrate ongoing negotiations. However, the Panel inferred the failure of some of terms to change between these communications indicated "the terms were definite, not in flux." This despite other terms having changed, and Xentek stating they will continue to learn BS's needs. The subsequent letters make clear that *after* the initial 1/8/99 quote, Xentek met with BS, showed BS the product, learned more about what BS might ultimately desire, then issued a second quote with additional sizes and prices. These additional sizes were ultimately included in the post-critical date quote the Court cites in footnote 2. The clear inference from the facts outside the 1/8/99 letter is that Xentek was "quoting" BS to measure interest and elicit negotiation, not making a series of discrete offers for sale.

To the extent the Panel found it necessary to examine evidence outside the face of the 1/8/99 letter, it was not able to rule as a matter of law, and the granting of summary judgment in favor of Appellant based on the letter was improper. At the hearing, the Panel requested additional outside-the-letter information, asking counsel for Appellant whether the letter had ultimately resulted in a sale. Counsel for Appellant replied that he believed it had, and then later expanded, stating, "…I do not know if it [the post-critical date quotation] was ever accepted. I believe it was because Galt was a primary producer of the sheath products that sold at…um, uh, to Boston Scientific and many other companies." Oral arg. audio at 2:31-3:30. The factual record indicates BS was never a customer of Galt (Xentek's parent). Notably, resulting from Mr. Junker's suit, Galt was ordered to generate a list of customers to whom Xentek sold infringing product. BS was not among them. *See* Appx00017-00018, Appx04604-04652, Appx03825. To the extent the Panel's decision relied on counsel's misleading statements, it must be reconsidered.

Because the Panel did not rule on the 1/8/99 letter as a matter of law adhering to the clear and convincing evidentiary standard, rather than reversing both of the District Court's summary judgment decisions, this Court should have affirmed or remanded.

II. The Panel's decision conflicts with the Court's precedents holding quotations are not offers for sale, and must be sufficient to form a binding contract by simple acceptance.

A. The Federal Circuit applies contract law as generally understood to create stability and consistency in its application of the on-sale doctrine.

In determining the 1/8/99 letter to BS constituted an offer, the Panel disregarded relevant industry practices, and contradicted Federal Circuit precedent and the Restatement. "We also have held that, to be true to *Pfaff* when assessing prong one of § 102(b), we must focus on those activities that would be understood to be commercial sales and offers for sale '**in the commercial community**.'" *Meds. Co. v. Hospira, Inc.*, 827 F.3d 1363, 1373 (Fed. Cir. 2016) (quoting *Grp. One, Ltd. v. Hallmark Cards, Inc.*, 254 F.3d 1041, 1047 (Fed. Cir. 2001) (emphasis added)). However, the Court did not assess how terms would be understood in the commercial community, instead substituting its own understanding.

Restatement § 26 states, "A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent." Whether a party intends to create a binding offer contemplates the parties' understanding and "usages of their community or line of business." *See* Restatement § 26, cmt. a. (1981). In this case, the Panel ignored the fact BS explicitly requested a price "quotation," demonstrating their understanding that the response was not intended to conclude a bargain, but to provide information necessary for BS to make a purchase order.

The Panel states the fact Xentek was responding to a request "signals . . .a specific offer to Boston Scientific to take further action." (p.10). This is not the standard for a commercial offer. Any negotiation necessarily solicits further action from the other party. The further action explicitly requested by the letter was "discussing your requirements in person." The expressed intent is for negotiation, not conclusion.

In contemplating the parties' intent, the Panel again makes no inference favoring Mr. Junker. The Panel's observation that the term "quotation" was thrice included is critical because it denotes objectively and subjectively the letter is not an offer to be accepted, but rather a quote. Eddings testified he sent the letter hoping to eventually elicit a purchase order. Appx00392-00395. BS then asked for another "quote" in response. Appx00818-00819. The Panel failed to consider why both parties intentionally and repeatedly used "price quotation" terminology.

The Panel disregarded industry practice and ordinary commercial meaning conflating "price quotation" with "price list", evident by frequent use of the term "unsolicited price quotation." A quotation is, by definition, provided in response to a request for a seller to quote prices. A price list, on the other hand, is a list of prices provided generally to the public, unsolicited. *See* Restatement § 26, cmts. a,b. The use of the term "price quotation" by both the perspective buyer and seller, as here, makes clear the parties understood these to be preliminary negotiations, not offers. This is the very purpose of the price quotation, and why the law recognizes they are not commercial offers for sale.

That commercial terms can be assembled from the various data provided by the letter does not evince an understanding that any specific combination of those terms is intended to be a commercial offer. However, the Court has inferred intent merely from the inclusion of a certain number of generic commercial terms, despite all other indicia of intent. By ruling intent can be inferred from the inclusion of necessary commercial terms alone (p.14), and inclusion of those necessary commercial terms is all that is needed to invoke the on-sale bar (p.11), the Court has removed the requirement of clear and convincing evidence of intent to make an offer. Indeed, the Court has removed the requirement that an invention be subject to a commercial offer for sale, ruling instead that it merely needs to be the subject of a communication containing certain necessary terms, regardless of the explicit intent of that communication. To learn merely quoting various price-for-quantity scenarios could result in a binding contract would be a shocking reversal of accepted commercial practice and have a profound chilling effect on commercial communication. The Court's ruling leaves businesses clueless on how they can give adequate pricing information to prospective buyers without unintentionally being bound or subject to the on-sale bar as they can no longer protect themselves by explicitly stating they are merely quoting prices. Why should sellers have to refrain from providing certain commercial details to avoid a court recharacterizing their communication? And what set of terms, exactly, puts one in danger?

Creating a national law of contract by use of, inter alia, the Restatement, dictates adherence to its core principles. The Restatement indicates the word quote is "commonly understood as inviting an offer" (Restatement § 26, cmt. c). This should be sufficient to reasonable infer that these were preliminary discussions. The Panel disregarded this common sense understanding and, ignoring the facts, made new law. There must be uniform contract law at the Federal Circuit and for invalidity issues, there should be no "close" cases. Mercantile security requires unambiguous application of federal contract law, and this decision inserts doubt into any self-described quotation including significant terms.

B. The Panel misapplied its own law of on-sale bar and quotations regarding "simple acceptance."

The Court stated BS could accomplish simple acceptance by responding "We'll take 5,000 sets of the 4F-6F Medi-Tech Peelable Sheath." Op. p. 13. However, this is not simple acceptance but a purchase order, itself the commercial offer for sale. Even ignoring the ambiguities of size and product in this hypothetical,[3] it does not contain all necessary terms. There is no delivery date or timeline, nor is there any payment term, e.g. cash or credit. Nor is there specificity, for example, as to whether "Net 30" refers to invoice date or delivery date. It is unreasonable to infer businesses would view this quote as an offer amenable to simple acceptance.

[3] Note FN1 above, Medi-Tech is not the infringing product and not the subject of the quote. Also, 4F-6F is not a size, but a range of sizes, an indefinite term guiding future negotiation.

Indeed, the Court's FN1 makes clear what the Panel characterized as a simple acceptance would not create a binding contract. The use of FOB merely relates to title and does not determine date of delivery (which Eddings left indefinite because there was no product to sell). Appx00390-00391, Appx00395, Appx00409-00410.

The Panel's attempts to distinguish *Merck & Die v. Watson Lab'ys, Inc.*, 822 F.3d 1347 (Fed. Cir. 2016) and *Cargill, Inc. v. Canbra Foods, Ltd.*, 476 F.3d 1359 (Fed. Cir. 2007) are inapposite and indeed each case conflicts with the Panel's ruling. In *Merck* there were significant ongoing discussions and details in the offer. It was made in response to a specific request by the buyer to "purchase two kilograms" of product and then offered price and delivery location of that exact amount. The Panel characterized *Merck* as including "essential price, delivery, and payment" terms as if corresponding to Xentek's quote. But in *Merck*, it was the seller who was accepting by meeting the buyer's purchase order (offer). Notably, the fax soliciting the purchase order didn't call itself a "quote," the buyer selected an exact amount, and the offer responded with detailed terms containing that amount.

Cargill, similarly, included a letter responding to a request for a specific quantity of canola oil, and included the price and quantity under contract conditions. Again, *Cargill* was essentially meeting a buyer's purchase order and as this Court found "powerful evidence of a sales transaction," this indicates a more detailed discussion and not the preliminary negotiations involved here. Under the Court's construct, BS could have replied "I accept 1 million sets, in batches of 10,000, delivery FOB 30 days – here's a check," and Xentek would be bound. Obviously no business would take such a risk. Hence a purchase order comes from the buyer in response to a quote, and the seller then has the opportunity to accept.

The Panel asserts "[t]he letter further specifies that the shipment will be 'FOB Athens, Texas'." (p. 10). But the letter does not so specify, it merely states "prices are for" that circumstance, with the understanding prices would vary if shipped under different terms. Further, this is not a delivery term, but one relating to title transfer. By stating Xentek would have to "get back" to them if BS had wanted to purchase, Xentek acknowledges that a delivery date could not be determined. It was quoting a product still in development, not making an offer for sale.

Unlike *Merck* and *Cargill*, there is no quantity specified in the letter. The Panel states the letter makes multiple offers, but the letter merely states varying prices per unit when purchased at various exemplar quantities. No one in the commercial world would view this letter as giving only 4 quantity options to the prospective buyer, but would instead understand how their specific (and so far indefinite and uncommunicated) desired quantity would affect the price. And in that, only generally. No commercial buyer wanting 8,500 units would believe they were instead bound to purchase either 5,000 or 10,000 units, nor that in ordering 8,500 units, they would pay the price listed for either 5,000 or 10,000 units. What is called for is *further negotiation* to arrive at an agreed price for the buyer's specific needs. And Xentek didn't give the price for 5,000 or 10,000 sets, as it would have had it intended to sell exactly 5,000 or 10,000 sets. Quoting a piece part price rather than a total price shows the quantity was indeterminate. In *Merck*, the buyer requested a price for a specific quantity it intended to purchase. In this case, BS sought a quote in response to a Xentek sales pitch, and there is no evidence BS ever even contemplated an actual purchase of Xentek's product, much less a specific quantity. There is no evidence of any actual quantity discussed between the parties at any time.

The Panel dismisses the letter's call for further negotiation by quoting *Cargill*, "expressing a desire to do business in the future does not negate the commercial character of the transaction then under discussion." However, the letter does not express a desire "to do business in the future", but a desire to negotiate yet undetermined necessary terms of the transaction then under discussion. Rather than supporting the Panel's assumption (FN2) that in post-critical quotations unchanged price terms indicate a firm price, these unchanged terms instead demonstrate negotiations have stalled.

In both *Merck* and *Cargill*, the seller received what Xentek was hoping its price quotation might eventually elicit: a purchase order, as is the normal course of business in industry. The Panel should have recognized that even in a close case, their own precedent warrants a finding Xentek's 1/8/99 letter was a quotation subject to additional negotiations, not a commercial offer.

III. On-sale bar is not applicable to quotations by one who violated an NDA and infringed the patent with no right to sell that could form a binding contract.

This Court previously found this alleged offeror was an infringer and had violated a non-disclosure agreement with the patentee. This application of the on-sale bar leads to the anomalous result that the very entity who stole the invention, infringed the patent, and violated the patentee's confidential disclosure, could invoke the doctrine with a price quote. Mr. Eddings was quoting a product he was not legally entitled to sell. *See Junker v. Eddings*, 396 F.3d 1359, 1368 (Fed. Cir. 2005). The underlying bench trial made clear Mr. Eddings violated a non-disclosure agreement by quoting the product in the first place. *See Junker v. Med. Components, Inc.*, No. 13-4606, 2021 U.S. Dist. LEXIS 7694 (E.D. Pa. Jan. 14, 2021). The public policy behind the on-sale bar is to prevent an inventor from exploiting his invention early, not to convert on-sale to a public use defense by a thief and infringer.

The Panel's decision is at odds with all notions of fairness and proper application of 35 USCS § 102(b) which is to prevent *inventors* from exploiting their invention without filing for a patent. *Ushakoff v. United States*, 164 Ct. Cl. 455, 327 F.2d 669 (1964). The Panel cited *Pfaff v. Wells Elecs*, 525 U.S. 55, 67 (1998), yet disregarded the very purpose of on-sale doctrine, to prevent inventors from exploiting their inventions a year or more before filing. This doctrine is specific to the inventor and should not be invoked by an infringer or one who violates a non-disclosure agreement. Indeed, in *Pfaff*, the Court noted the purpose of the rule is, in part, so "[a]n inventor can both understand and control the timing of the first commercial marketing of his invention." *Pfaff v. Wells Elecs*, 525 U.S. 55, 67 (1998). Here, Mr. Eddings, who was secretly quoting to third parties in violation of Mr. Junker's rights, had been found by this Court to have made an "unauthorized use of the design Junker had developed." *Junker*, *supra*, 396 F.3d at 1368. This denied Mr. Junker understanding and control of first commercial market timing. This anomalous result merits re-evaluation by this Court.

IV. Conclusion

Based on the above, Larry G. Junker respectfully seeks panel rehearing or *en banc* review of the Panel's decision to address these critical issues of national importance to the business community and market and consistency and fairness in application of the on-sale bar.

Respectfully submitted, Dated: March 11, 2022

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ADDENDUM [OPINION OF PANEL NEXT PAGE]

United States Court of Appeals for the Federal Circuit

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LARRY G. JUNKER,
Plaintiff-Appellee

v.

MEDICAL COMPONENTS, INC., MARTECH MEDICAL PRODUCTS, INC.,
Defendants-Appellants

____

2021-1649

____

Appeal from the United States District Court for the Eastern District of Pennsylvania in No. 2:13-cv-04606-MSG, Judge Mitchell S. Goldberg.

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Decided: February 10, 2022

____

JAMES D. PETRUZZI, The Petruzzi Law Firm, Houston, TX, argued for plaintiff-appellee. Also represented by LAURA MAUPIN, Maupin Redman, Livingston, TX.

ALFRED W. ZAHER, I, Montgomery McCracken Walker & Rhoads LLP, Philadelphia, PA, argued for defendants-appellants. Also represented by JOSEPH MONAHAN.

____

Before DYK, REYNA, and STOLL, *Circuit Judges*.

STOLL, *Circuit Judge*.

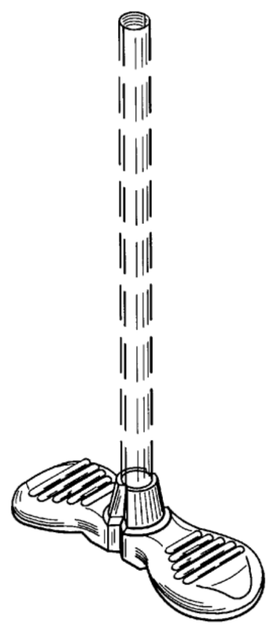
Larry G. Junker, the named inventor of U.S. Design Patent No. D450,839, sued Medical Components, Inc. and Martech Medical Products, Inc. (collectively, "MedComp") for infringement of the sole claim of the D'839 patent. The parties filed cross-motions for summary judgment, debating whether a letter sent before the critical date was a commercial offer for sale of the claimed design, rendering the claim invalid under the on-sale bar, 35 U.S.C. § 102(b). The district court granted Mr. Junker's motion for summary judgment of no invalidity under the on-sale bar. The district court thereafter held a bench trial on several remaining issues in the case, including MedComp's remaining invalidity challenges, infringement, and damages. The court again ruled in Mr. Junker's favor. The court rejected each of MedComp's invalidity challenges, found that each of the accused products infringed the D'839 patent claim and that the infringement was willful, and awarded Mr. Junker $1,247,910 in damages under 35 U.S.C. § 289, which allows recovery of an infringer's profits from sale of the infringing products.

MedComp appeals the district court's summary judgment of no invalidity under the on-sale bar, the judgment of infringement, and the damages award. For the reasons below, we agree with MedComp that the pre-critical date letter was a commercial offer for sale. Because there is no dispute that the claimed design was ready for patenting, we reverse the district court's summary judgment of no invalidity. We therefore do not reach the remaining issues on appeal.

BACKGROUND

I

The D'839 patent, at the heart of the dispute on appeal, is titled "Handle for Introducer Sheath," and includes a single claim for "[t]he ornamental design for a handle for introducer sheath, as shown and described." D'839 patent, claim. Figure 1 shows a perspective view of the claimed design (represented with solid lines):



Id. Fig. 1. Mr. Junker filed the application that led to the D'839 patent on February 7, 2000. Thus, the critical date for analyzing the on-sale bar under § 102(b)[1] is February 7, 1999, one year before the filing date.

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1 Congress amended § 102 when it enacted the Leahy–Smith America Invents Act (AIA). Pub. L. No. 112–29, § 3(b)(1), 125 Stat. 284, 285–87 (2011). However, because the application that led to the D'839 patent

A

Mr. Junker started working in the medical device industry in the 1970s. In the late 1970s, Mr. Junker started his own company for purchasing and reselling catheter kits. These kits typically included a needle, syringe, guidewire, and introducer sheath that were used for inserting a catheter into the vein of a patient. Mr. Junker's company also designed and manufactured some components in the kits, including the introducer sheath. In the mid-1980s, Mr. Junker began developing a new design for the introducer sheath based on his experience observing catheter-insertion procedures. Mr. Junker focused on the design for the introducer sheath's handle, eventually settling on a handle with large, rounded Mickey-Mouse-shaped ears that made it easier for doctors to grasp the introducer sheath during catheter-insertion procedures. The handle was designed such that the sheath could be peeled apart into two pieces when removing the sheath while leaving the catheter in place in the patient's body. These products are referred to as "peelable," "peel-away," or "tearaway" introducer sheaths.

Mr. Junker, however, did not have the proper machinery to manufacture the product. He began reaching out to other companies to handle the actual manufacture of his new design. Eventually, in 1998, Mr. Junker developed a business relationship with James Eddings, the founder of a medical device company called Galt Medical. At their first meeting in August 1998, Mr. Junker and Mr. Eddings entered into a non-disclosure agreement (Mr. Junker on behalf of his company and Mr. Eddings on behalf of Galt), after which Mr. Junker told Mr. Eddings about his new design for the introducer sheath handle. The next month, in September 1998, Mr. Eddings informed Mr. Junker that

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was filed before March 16, 2013, the pre-AIA § 102 applies. *See id.* § 3(n)(1), 125 Stat. at 293.

Galt could manufacture Mr. Junker's product. Around this same time, Mr. Eddings also founded a new company, Xentek Medical, to develop, manufacture, and sell tearaway introducer sheath products.

Over the course of the next several months, Mr. Junker and Mr. Eddings continued to discuss Mr. Junker's new design. Mr. Eddings enlisted the help of an engineer, Richard Gillespie, to sketch out Mr. Junker's proposed design. After some back and forth, Mr. Gillespie provided Mr. Junker with a sketch of the design. This sketch, however, was lacking the handles with Mickey Mouse ears that Mr. Junker had envisioned. In a fax dated December 16, 1998, Mr. Junker relayed his critiques of the sketch to Mr. Eddings, noting the absence of larger, rounded portions on the handle and providing a rough sketch of his design as he had imagined it. Mr. Eddings asked Mr. Gillespie to modify the sketch accordingly. In January 1999, Mr. Eddings' company, Xentek, developed and provided to Mr. Junker a prototype of the product that included all of the features of his design, including (importantly) a handle with Mickey Mouse ears.

B

In early January 1999, Mr. Eddings, through Xentek, began communicating with Boston Scientific Corporation regarding a peelable introducer sheath product. In response to a request from Boston Scientific, on January 8, 1999, Xentek sent Boston Scientific a letter detailing bulk pricing information for variously sized peelable introducer sheath products. The letter stated:

> Thank you for the opportunity to provide this quotation for the Medi-Tech Peelable Sheath Set. When we first received this request for quotation we were under the mistaken impression that you wanted the exact configuration as the drawing that was provided which would have required extensive tooling expense. Subsequently, we have learned

> that this is not the case and are pleased to submit this quotation for a product of our design.
>
> . . .
>
> The principals of Xentek Medical have extensive experience in the design, development and manufacture of this type of medical device. If you should have any specific dimensional requirements this product could generally be tailored to your specifications.

J.A. 1572.

The January 8, 1999 letter also included a price chart (shown below), and specified that the "prices are for shipment in bulk, non-sterile, FOB [free on board] Athens, Texas on a net 30-day basis":

	ORDER QUANTITIES			
Size	**5,000**	**10,000**	**25,000**	**50,000**
4F-6F	$4.45	$4.25	$4.05	$3.95
7F-8F	4.70	4.50	4.30	4.20
11F	5.05	4.85	4.75	4.70

J.A. 1573. Mr. Eddings concluded the letter by noting his appreciation for "the opportunity to provide this quotation" and that he "look[ed] forward to discussing [Boston Scientific's] requirements in person." *Id.*

Mr. Eddings sent additional letters to Boston Scientific in January and February 1999.

II

In 2013, Mr. Junker sued MedComp, accusing four of MedComp's products of infringing the claimed design. MedComp, in response, raised affirmative defenses of invalidity, unenforceability, and noninfringement and filed counterclaims seeking a declaratory judgment that the claimed design is invalid, unenforceable, and not infringed.

Following several years of discovery, in 2017, the parties filed cross-motions for summary judgment on several issues, including, as relevant here, invalidity under the on-sale bar. The crux of the parties' disagreement was whether the January 8, 1999 letter from Xentek to Boston Scientific—which was sent before the critical date—was a commercial offer for sale of a product embodying the claimed design. The district court held that it was not as a matter of law. *See Junker v. Med. Components, Inc.*, CIVIL ACTION No. 13-4606, 2019 WL 109385, at *10 (E.D. Pa. Jan. 4, 2019). In so holding, the district court determined that the letter was a preliminary negotiation, not a definite offer. *Id.* The court specifically focused on the fact that the letter thrice uses the word "quotation" and concludes with an invitation to further discuss specific requirements. *Id.* at *9–10. The district court acknowledged that the letter included numerous, specific, commercial terms (such as payment terms, shipment terms, and delivery conditions), supporting a conclusion that the letter was a commercial offer for sale. The court ultimately determined, however, that the presence of these terms did not outweigh the other language in the letter suggesting that Xentek and Boston Scientific were engaged in preliminary negotiations. *Id.* at *10. The district court accordingly granted Mr. Junker's motion for summary judgment of no invalidity under the on-sale bar.

The case then proceeded to trial on the remaining issues, namely MedComp's remaining invalidity defenses, the questions of infringement and willfulness, and damages. As to invalidity, the district court determined that MedComp had failed to prove, by clear and convincing evidence, invalidity of the claimed design based on any of its various asserted theories. *Junker v. Med. Components, Inc.*, CIVIL ACTION No. 13-4606, 2021 WL 131340, at *1 (E.D. Pa. Jan. 14, 2021). It also found that Mr. Junker had demonstrated, by a preponderance of the evidence, that each of the accused products infringed the claimed design, and that the infringement was willful. *Id.* The district court awarded Mr. Junker $1,247,910 in disgorged profits under 35 U.S.C. § 289. *Id.* No enhanced damages were awarded in connection with the willfulness finding.

MedComp appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

DISCUSSION

I

We begin and end with MedComp's challenge to the district court's summary judgment of no invalidity under the on-sale bar. We review the district court's summary judgment under the law of the regional circuit, here the Third Circuit. *See SRI Int'l, Inc. v. Cisco Sys., Inc.*, 930 F.3d 1295, 1306 (Fed. Cir. 2019). "The Third Circuit reviews a grant of summary judgment de novo, applying the same standard as the district court." *Id.* (citing *Gonzalez v. Sec'y of Dep't of Homeland Sec.*, 678 F.3d 254, 257 (3d Cir. 2012)). Summary judgment is appropriate when, drawing all justifiable inferences in the nonmovant's favor, there exists no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

II

A patent claim is invalid under § 102(b) if "the invention was . . . on sale in this country, more than one year prior to the date of the application for patent in the United States." Section 102(b)'s on-sale bar is triggered if, before the critical date, the claimed invention was both (1) the subject of a commercial offer for sale and (2) ready for patenting. *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 67–68 (1998). "Whether the on-sale bar applies is a question of law based on underlying factual findings." *Meds. Co. v. Hospira, Inc.*, 827 F.3d 1363, 1371 (Fed. Cir. 2016) (en banc). We review the ultimate determination of whether a claim is invalid under the on-sale bar de novo. *Id.*

The material facts here are not in dispute. The parties agree that the January 8, 1999 letter speaks for itself. They also agree that the products described in the letter embody the claimed design. And they agree that the claimed design was ready for patenting. The question before us is therefore a simple one: Whether the January 8, 1999 letter is a commercial offer for sale of the claimed design, or merely a quotation signaling the parties were engaged in preliminary negotiations. Because the facts are not disputed, we review the question of whether this particular communication constitutes a commercial offer for sale (a question of law) without deference. *See In re Kollar*, 286 F.3d 1326, 1329 (Fed. Cir. 2002); *see also, e.g.*, *Linear Tech. Corp. v. Micrel, Inc.*, 275 F.3d 1040, 1049–52 (Fed. Cir. 2001). For the reasons below, we hold that the letter is a commercial offer for sale of the claimed design.

In making this determination, we look to the specific facts and circumstances presented in this case, "apply[ing] traditional contract law principles" along the way. *Merck & Cie v. Watson Lab'ys, Inc.*, 822 F.3d 1347, 1351 (Fed. Cir. 2016) (quoting *Allen Eng'g Corp. v. Bartell Indus., Inc.*, 299 F.3d 1336, 1352 (Fed. Cir. 2002)). "Only an offer which rises to the level of a commercial offer for sale, one which the other party could make into a binding contract by simple acceptance (assuming consideration), constitutes an offer for sale under § 102(b)." *Id.* at 1351 (quoting *Grp. One, Ltd. v. Hallmark Cards, Inc.*, 254 F.3d 1041, 1048 (Fed. Cir. 2001)). To help guide our determination of whether a given communication rises to the level of a commercial offer for sale, we often rely on resources such as the Uniform Commercial Code, Restatement (Second) of Contracts, and other similar treatises. *See, e.g.*, *Meds. Co.*, 827 F.3d at 1375–76 (discussing Uniform Commercial Code); *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 855 F.3d 1356, 1365 & n.5 (Fed. Cir. 2017) (citing favorably

Williston on Contracts (4th ed. 2013), Restatement (Second) of Contracts (1981), and Corbin on Contracts (1999)), *aff'd*, 139 S. Ct. 628 (2019). "In determining whether an offer [has been] made[,] relevant factors include the terms of any previous inquiry, the completeness of the terms of the suggested bargain, and the number of persons to whom a communication is addressed." Restatement (Second) of Contracts § 26 cmt. c (1981).

With this background in mind, we turn to the language in the January 8, 1999 letter. As stated on the face of the letter, Xentek was directly responding to a "request for quotation" from Boston Scientific, and the letter was addressed to Boston Scientific alone. J.A. 1572. This signals that the letter was not an unsolicited price quotation or invitation to negotiate, but rather a specific offer to Boston Scientific to take further action. *See* Restatement (Second) of Contracts § 26 cmt. c (explaining that a relevant factor for determining whether an offer is made is "the number of persons to whom a communication is addressed").

The letter also contains a number of necessary terms typical for a commercial contract. For instance, the letter specifies that the prices provided are for "shipment in bulk, non-sterile." J.A. 1573. Thus, the letter provides specific delivery conditions—the product will be shipped in "bulk" and will be "non-sterile." The letter further specifies that shipment will be "FOB Athens, Texas." *Id.* FOB (which stands for free on board) is a standard commercial term used to allocate the risks and responsibilities of the buyer and seller with respect to delivery, payment, and loss of the product. *See Free on Board*, Black's Law Dictionary (11th ed. 2019). The letter also provides a payment term, "net 30-day basis," J.A. 1573, meaning that payment is due in full within 30 days of delivery.

Finally, and importantly, Xentek's letter specifies multiple different purchase options for its peelable sheath products. For example, the letter offers 5,000 sets of size

4F-6F Medi-Tech Peelable Sheath at a price of $4.45 per set and offers discounted prices if the purchase quantity is increased (e.g., the price per set decreases to $4.25 for 10,000 sets of the same size sheath, $4.05 for 25,000, and $3.95 for 50,000). The letter also offers Boston Scientific the option to purchase two additional sizes of Xentek's Medi-Tech Peelable Sheath Set—7F-8F and 11F—with similarly discounted pricing as the purchase quantity increases.

While the letter concludes with an invitation to further discuss Boston Scientific's specific requirements in person, "expressing a desire to do business in the future does not negate the commercial character of the transaction then under discussion." *Cargill, Inc. v. Canbra Foods, Ltd.*, 476 F.3d 1359, 1370 (Fed. Cir. 2007). The completeness of the relevant commercial sale terms in the letter itself signals that this letter was not merely an invitation to further negotiate, but rather multiple offers for sale, any one or more of which Boston Scientific could have simply accepted to bind the parties in a contract.[2]

We have determined that communications with similarly complete and definite commercial terminology were commercial offers for sale within the meaning of § 102(b). For example, in *Merck*, we disagreed with the district court's determination that a certain fax did not rise to the level of a commercial offer for sale of the claimed invention. The fax specified a product, set forth the price of the product ($25,000 per kilogram), the location for delivery (the buyer's research and development center), payment terms

[2] We also note that subsequent communications between Xentek and Boston Scientific after the critical date used the exact same commercial terms, providing some indication that these terms were definite, not in flux. *See, e.g.*, J.A. 1577 (February 16, 1999 letter from Xentek to Boston Scientific).

(net 60 days), and the amount to be purchased (two kilograms, with the option to purchase additional product). 822 F.3d at 1349. We explained that this was not just "an unsolicited price quote sent to numerous potential customers." *Id.* at 1351 (citing Restatement (Second) of Contracts § 26 cmt. c). Rather, the "fax was sent in direct response to [the buyer's] request to purchase two kilograms" of the product. *Id.* We also found it highly relevant that the fax "provid[ed] essential price, delivery, and payment terms." *Id.* Because the fax "contained all the required elements to qualify as a commercial offer for sale," we reversed the district court's determination that the claims were not invalid under the on-sale bar. *Id.* at 1351, 1355.

In a similar vein, in *Cargill*, we agreed with the district court that the relevant letter was a commercial offer for sale. That letter was sent to confirm a request for a certain amount of canola oil. 476 F.3d at 1369. The letter "explicitly set[] forth an amount of oil to be delivered . . . , at a specified unit price, and under a standard contract designation, FOB (free on board)." *Id.* We explained that this was "powerful evidence of a sales transaction," *id.*, and accordingly affirmed the district court's summary judgment of invalidity under the on-sale bar.

Here, as in *Merck* and *Cargill*, the letter—which specifies multiple sized products for sale, different bulk pricing options available for each product, payment terms (net 30-day basis), and delivery terms and conditions (bulk shipment, non-sterile, FOB)—contains all the required elements to qualify as a commercial offer for sale. That is sufficient to invoke § 102(b)'s on-sale bar.

Mr. Junker argues that the letter omits essential terms—which size product is being purchased and in what quantity—and, therefore, the letter is not an offer that could be made into a binding contract by simple acceptance. Appellee's Br. 15. We are not persuaded. The standard Mr. Junker proposes—that the offer must specify the exact amount of product the buyer desires to qualify as an offer for sale—is too stringent. Under § 102(b), the question is merely whether there is an offer for sale. As explained above, the letter here offers for sale multiple sizes of products with tiered pricing depending on the number of sets desired. That there were multiple offers does not mean that there was no offer to be accepted. And that the letter does not specify the exact amount Boston Scientific desires likewise does not mean that there is no offer to be accepted. Rather, the letter comprises multiple different offers that Boston Scientific could have accepted by simply stating, for example, "We'll take 5,000 sets of the 4F-6F Medi-Tech Peelable Sheath" or "10,000 sets of the 11F Medi-Tech Peelable Sheath."

Mr. Junker also argues, as the district court determined, that the January 8, 1999, letter was merely a price quotation inviting further negotiations, not a definite offer. Appellee's Br. 15–16, 19. To be sure, the fact that the letter uses the word "quote" three times is an important fact supporting the district court's conclusion that the letter is a quotation, not a definite offer. *See* Restatement (Second) of Contracts § 26 cmt. c. ("[T]he word 'quote' is commonly understood as inviting an offer rather than as making one, even when directed to a particular customer."). This fact makes the question before us closer than in either *Merck* or *Cargill*. "But just as the word 'offer' does not necessarily mean that an offer is intended, so the word 'quote' may be used in an offer." Restatement (Second) of Contracts § 26 cmt. c. While the precise label used for a given communication is relevant, it is not controlling. Rather, the terms of the communication must be considered in their entirety to determine whether an offer was intended, or if it was merely an invitation for an offer or further negotiations. A quotation typically leaves many terms necessary to a contract—such as place of delivery, payment terms, and the like—unexpressed. Corbin on Contracts § 2.5, at 157 (2018); *accord* Restatement (Second) of Contracts § 26 cmt. c (explaining that a quote "may omit the quantity to be sold, time and place of delivery, terms of payment, and other terms"). Where, however, "the quotation . . . contains detailed terms," as is the case here, "it may well be deemed an offer." Corbin on Contracts § 2.5, at 161. For the reasons above, we conclude that the specificity and completeness of the commercial terms in the letter outweigh the three references to "quotation" and mention of possible future discussions. Taken as a whole, the overall language of the letter signals Xentek's intent to make a commitment and invite Boston Scientific to act rather than merely negotiate.

CONCLUSION

We have considered the parties' remaining arguments and find them unpersuasive. For the foregoing reasons, we agree with MedComp that the January 8, 1999 letter was a commercial offer for sale of the claimed design. Because the parties do not dispute that the invention was ready for patenting, we reverse the district court's summary judgment of no invalidity. The effect of our determination renders the sole claim of the D'839 patent invalid and we therefore need not reach MedComp's remaining arguments on appeal.

REVERSED

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/s/ James D. Petruzzi
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