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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

OANDA Corporation,

Plaintiff,

v.

GAIN Capital Holdings, Inc.;
GAIN Capital Group, LLC.

Defendants.

Civil Action No. 2:20-cv-5784

Judge: Hon. Brian Martinotti

Motion Date: October 19, 2020

OANDA'S OBJECTION AND MOTION TO STRIKE GAIN'S NEW EVIDENCE OR, IN
THE ALTERNATIVE, FOR LEAVE TO FILE A SUR-REPLY IN OPPOSITION TO
GAIN'S MOTION TO STAY

Having failed to satisfy its burden of establishing that a stay is warranted at the first time of asking, GAIN tries to salvage its motion by submitting new evidence in reply. In its moving papers, GAIN quoted statistics about petitions filed with the PTAB, which showed that review was instituted on 67% of petitions filed, and 62% of those instituted petitions resulted in all claims being found unpatentable (with an additional 18% resulting in some claims being found unpatentable). (Dkt. 34-1 at 2.) As OANDA pointed out in its Opposition, those bare statistics did not make it any less speculative for the Court to try to predict the outcome of GAIN's petition. (Dkt. 36 at 4-5.) Indeed, based on the statistics GAIN cited, there was barely a 40% chance of all claims being found unpatentable here, and about a 50/50 chance of even some claims being held unpatentable. (*Id.*)

Realizing that the statistics it provided to the Court in its motion did not actually help its argument, GAIN now improperly submits with its reply brief some additional statistics, attached as Exhibit C to the supplemental Declaration of Natalie Morgan ("Supplemental Morgan Declaration"). (Dkt. 38-4.) Submitting new evidence with a reply brief is improper. *See Conner v. Perdue Farms, Inc.*, No. CIV.A. 11-888 MAS LH, 2013 WL 5977361, at *6 (D.N.J. Nov. 7, 2013) (describing "introducing new evidence at the reply stage" as "an effort to avoid the rules"). OANDA therefore asks the Court to strike Exhibit C to the Supplemental Morgan Declaration, and to disregard all argument in GAIN's reply that relies upon it.

In the alternative, if the Court is inclined to consider this new evidence, OANDA seeks leave to submit the sur-reply attached hereto as Exhibit 1, which is limited solely to addressing these additional statistics. As explained in that sur-reply, GAIN's use of these additional statistics is misleading, and provides no basis to determine that a stay of these proceedings is warranted.

Date: October 14, 2020

Respectfully Submitted,

By: /s/ Erik Dykema

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"SO ORDERED."



CERTIFICATE OF SERVICE

I, Erik Dykema, certify as follows:

I am an attorney of the State of New Jersey and a member of the firm Koning Zollar LLP, counsel for Plaintiff OANDA Corporation (“Plaintiff”) in this matter.

On 14 Oct. 2020 I caused a copy of the foregoing document, and exhibits, to be served on counsel of record in this matter via CM/ECF.

/s/ Erik Dykema

Erik Dykema