Paper No. _____
Filed: December 16, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TD AMERITRADE HOLDING CORP., TD AMERITRADE, INC., AND TD AMERITRADE ONLINE HOLDINGS CORP.,
Petitioner

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.,
Patent Owner

Case CBM2014-00135
Patent 6,772,132

Patent Owner's Request for Rehearing under 37 C.F.R. § 42.71(c)

I. Introduction

Trading Technologies ("TT") requests rehearing of the Decision on Institution because the Panel misapprehended or overlooked facts that establish that the '132 patent does not qualify as a CBM patent. Most importantly, the Decision overlooked the explicit scope of the claims, which recite particular features of a graphical user interface ("GUI") that distinguish the claims from the prior art and were the reasons why the claims were allowed as novel and non-obvious during original examination and confirmed as such in reexamination. As a result, the Decision overlooked (and failed to address) the metes and bounds of CBM review defined by Congress. Indeed, the Decision contradicted the intent of Congress. While the claimed invention is used in the financial industry, the claimed invention is not directed in any way to a business method. Rather, the claims are directed to novel and non-obvious technology—the features of a graphical device. As such, the claims are outside the purview of CBM review as a threshold matter. In addition, by overlooking these claim limitations, the Decision misapprehended and misapplied the technological invention exception. The '132 claims clearly meet the technological invention exception.

II. Standard of Review

On rehearing, a decision is reviewed for abuse of discretion.[1] An abuse of discretion "occurs when a court misunderstands or misapplies the relevant law," or

[1] 37 C.F.R. § 42.71(c).

makes erroneous factual findings.[2] A decision lacking evidentiary support in the record abuses discretion.[3] So does a decision based on an erroneous view of the law.[4] Because the Decision misapplies the law and lacks evidentiary support in the record, the Panel abused its discretion and thus erred in instituting trial.

III. Current State of the Proceeding

The claims of the '132 patent are directed to technology embodied in a GUI that is used for trading, which is a financial activity. But the '132 patent cannot be subjected to Section 18 review because, as explained in the Preliminary Response, it claims a novel GUI tool, not a method of doing business.[5] TT pointed to explicit statements by Congress confirming that a patent claiming a novel GUI (like the '132 patent) would not be eligible for Section 18 review.[6] The Decision did not respond.

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[2] *Renda Marine, Inc. v. U.S.*, 509 F.3d 1372, 1379 (Fed. Cir. 2007).

[3] *MGIC v. Moore*, 952 F.2d 1120, 1122 (9th Cir. 1991).

[4] *Atl. Research Mktg. Sys. v. Troy*, 659 F.3d 1345, 1359 (Fed. Cir. 2011) (emphasis added).

[5] Preliminary Response, p. 2.

[6] Preliminary Response, p. 2-3.

TT cited abundant evidence showing GUIs are technology.[7] The Decision agreed.[8] TT showed how the claims of the '132 patent recite particular features of a GUI.[9] Again, the Decision agreed that the claims require specific GUI features.[10]

TT also provided volumes of third-party testimony on the claimed GUI's significant improvement over prior trading systems,[11] an improvement recognized by the Federal Circuit.[12] But the Decision ignored this evidence. In addition, TT pointed

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[7] Preliminary Response, p. 43-44 (citing other government agencies, college and university programs, and legislative history discussion of GUIs).

[8] Decision, p. 11 (referring to GUIs as technology).

[9] Preliminary Response, pp. 18-23 (showing how the claims recite GUIs).

[10] Decision, p. 11 (finding claim 1 recites "a certain arrangement on a GUI and, via a single action of a user input device on a particular location in the GUI").

[11] Preliminary Response, p. 16-17.

[12] Preliminary Response, p. 18 (quoting the Federal Circuit's summary of the claims as "The patents claim software. . . . The software's graphical user interface ("GUI") includes a 'dynamic display for a plurality of bids and for a plurality of asks in the market for the commodity and a static display of prices corresponding to the plurality of bids and ask' . . . . The claimed invention facilitates more accurate and efficient orders in this trading environment.")

out how the prosecution history tied allowance to the claimed elements of the GUI.[13] The reexamination of the '132 patent again confirmed the claims for the same reasons.[14] The Decision ignored this evidence too.

As the Panel noted, TT "argue[d] that the claims recite a technical feature because they combine structural and functional features of the claimed GUI tool in a novel and non-obvious way."[15] TT also "argue[d] that the claims solve the technical problem of submitting orders to the exchange with speed and accuracy with the technical solution of the combined structural and functional features of the claimed GUI tool."[16] But the Decision failed to meet these arguments. Indeed, the Decision did not address any of the claimed structural and functional features of the GUI tool that are what distinguished the claims from the prior art. Instead, the Decision simply stated that "[a]s written, claim 1 requires the use of a display, an input device, and a GUI (i.e., software), which all were known technology."[17] But this misapprehends the fact that the invention *is* a GUI with specifically claimed features that were lacking in the prior art. Just as surely as a new display device or a new input device would be a

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[13] Preliminary Response, pp. 24-26.

[14] *Id.* at p. 52.

[15] Decision, p. 10.

[16] *Id.* at p. 10.

[17] *Id.* at p. 11.

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