

Paper No. _____
Filed: May 6, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CQG, INC. AND CQGT, LLC
Petitioners

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.
Patent Owner

Case CBM2015-00057
Patent 6,766,304

Patent Owner's Preliminary Response

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I. INTRODUCTION

More than a decade ago, CGQ filed a declaratory judgment (“DJ”) action against Trading Technologies International, Inc. (“TI”) challenging the validity of U.S. Patent No. 6,766,304 (“the ’304 patent”). The court has already fully resolved CQG’s invalidity challenges at trial, including the two arguments repeated in the Petition. Accordingly, the Board should not institute this proceeding for at least four independent reasons.

First, 35 U.S.C. § 325(a) and AIA Section 18 bar CQG’s petition because it previously filed a civil action challenging the validity of the ’304 patent. CQG’s arguments to the contrary are based upon an incomplete and inaccurate analysis of the facts and the law. Second, because the grounds in the Petition already reached the merits during litigation, instituting this proceeding would expand CBM review beyond its intended purpose—as a litigation alternative. Third, because CQG repeats its losing litigation arguments without pointing to any new facts or any change in the law, it provides no reason to reverse the court’s analysis. Indeed, the facts and the law show CQG’s arguments lack merit. Accordingly, CQG fails to demonstrate that its arguments will more likely than not succeed. Fourth, the ’304 patent claims are directed to an improvement to technology, making the patent ineligible for CBM review at least under the technological exception. The testimony of CQG’s own declarants confirms this, flatly contradicting unsupported statements made in the Petition.

II. CQG FILED A DJ ACTION ON THE '304 PATENT, PRECLUDING CQG FROM SEEKING CBM REVIEW

CQG requests covered-business method (“CBM”) review of the '304 patent, alleging that the claims are unpatentable under 35 U.S.C. §§ 101 and 112. Pet. 31-32. CQG, however, previously filed a DJ action challenging the validity of the '304 patent under 35 U.S.C. §§ 101 and 112. “A post-grant review may not be instituted under [Section 18] if, before the date on which the petition for such a review is filed, the petitioner or real part in interest filed a civil action challenging the validity of a claim of the patent.” 35 U.S.C. § 325(a)(1). Accordingly, the statute precludes institution of this proceeding. CQG’s arguments to the contrary are without merit.

A. The Parties’ Litigation History

1. CQG Filed a DJ Action Challenging the Validity of the '304 Patent in Colorado

The dispute between CQG and TT began nearly ten years ago when CQG filed a DJ action against TT (the “Colorado DJ Action”). Ex. 1003. CQG does not dispute that the Colorado DJ Action challenged the validity of the '304 patent, including on all grounds asserted in the Petition. Specifically, CQG’s complaint in the Colorado DJ Action alleged that the “'304 Patent. . . and each and every . . . claim thereof, [is] invalid and unenforceable for failure to comply with one or more provisions of Title 35 of the United States Code, including without limitation, Sections 101, 102, 103, and/or 112.” Ex. 1003, 4.

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