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Paper 14
Entered: September 16, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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CQG, INC. and CQGT, LLC,
Petitioner,

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.,
Patent Owner.

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Case CBM2015-00057 (Patent 6,766,304 B2)
Case CBM2015-00058 (Patent 6,772,132 B2)

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Before SALLY C. MEDLEY, MEREDITH C. PETRAVICK, and PHILIP J. HOFFMANN, *Administrative Patent Judges*.

MEDLEY, *Administrative Patent Judge*.

DECISION
Request for Rehearing
*37 C.F.R. § 42.71*

## INTRODUCTION

CQG, Inc. and CQGT, LLC (collectively, "Petitioner"), filed a Request for Rehearing (CBM2015-00057, Paper 14, "Req. Reh'g" [1]) of the Decision Denying Institution of Covered Business Method Patent Review (Paper 13, "Decision" or "Dec.") in both proceedings. Because the rehearing arguments presented are the same for the two cases, we decide both rehearing requests in one decision. In the rehearing requests, Petitioner argues that we misapprehended or overlooked (1) that the dismissal of the Colorado DJ Action was final, thereby rendering the action a nullity, (2) that we should follow other Board cases and grant institution with similar facts, (3) that counterclaims cannot bar institution of a CBM proceeding, and (4) that actions taken after dismissal of the Colorado DJ Action were not a result of the order dismissing the Colorado DJ Action. Req. Reh'g 1–2.

## ANALYSIS

When rehearing a decision on petition, the Board will review the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion may be determined if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors. *Arnold Partnership v. Dudas*, 362 F.3d 1338, 1340 (Fed.

[1] Citations are to CBM2015-00057.

Cir. 2004). For the reasons that follow, Petitioner has not shown that the Board abused its discretion.

In the Decision, we determined that Petitioner's filing of the Colorado DJ Action before filing its Petitions prevented us from instituting a covered business method patent review of either the '304 or '132 patents. Dec. 9. Petitioner argues that we overlooked the fact that the order of dismissal of the Colorado DJ Action was final without any conditions or procedures for reinstatement. Req. Reh'g 3–5. Petitioner does not identify where in its petition this argument was made previously. A rehearing request is not proper for advancing arguments not made previously. 37 C.F.R. § 42.71(d).

In any event, we are not persuaded by Petitioner's arguments that we misinterpreted *Brennan v. Kulick*, 407 F.3d 603 (3d Cir. 2005), which Petitioner argues makes clear that "a naked dismissal without prejudice devoid of any conditions must be treated as a final order of dismissal." Req. Reh'g 4–6. Petitioner's arguments are misplaced. We did not find that the dismissal without prejudice was a naked dismissal. Dec. 3–4. As explained in our Decision, the order was pursuant to "agreement of the parties" which we found, based on substantial record evidence, included all that was in the Proposed Minute Order (Ex. 1012). *Id.* Petitioner does not show sufficiently that we abused our discretion by making that finding. Rather, Petitioner's rehearing request does not take into account all of the language of the order, but focuses only on certain words of the order, while ignoring other words.

We also are not persuaded by Petitioner's argument (Req. Reh'g 6–10) that we should follow other Board cases and grant institution with "identical facts," because those cases are not based on identical facts. Indeed, Petitioner does not direct us to where in any of the dismissal orders of those cases the dismissals were based on an agreement of the parties that included all of the content in the Proposed Minute Order of these cases.[2]

Petitioner argues that the Decision erred in determining that "DJ claims can effectively continue as counterclaims" in violation of 35 U.S.C. § 325(a)(3) and that counterclaims of invalidity are irrelevant to a Section 325(a)(1) analysis. Req. Reh'g 10–11. Notwithstanding that this is a new argument, not presented previously, the argument is without merit. The requirements of 35 U.S.C. § 325(a)(3) are of no moment to whether Petitioner is barred under 35 U.S.C. § 325(a)(1). Unequivocally, section 325(a)(1) precluded us from instituting a covered business method patent review because, prior to filing its petitions, Petitioner filed a civil action challenging the validity of a claim of the challenged patents.

We also are not persuaded by Petitioner's arguments that it did not add an invalidity counterclaim after dismissal of the Colorado DJ Action. Req. Reh'g 11–14. Per the Amended Answer, Affirmative Defenses and Counterclaims submission filed with the Illinois Court (Ex. 1014), Petitioner

[2] Petitioner argues that the agreement of the parties (e.g., the Proposed Minute Order) is silent as to any consolidation. Req. Reh'g 8, fn 3. The Proposed Minute Order (Ex. 1012) contemplates, as part of the parties' agreement, granting an already filed motion to reassign and *consolidate*. Ex. 1012.

included the same assertions of invalidity (page 7, paragraph 10) that it included in the Colorado DJ Action (Ex. 1003, ¶ 18). It is of no moment that the original answer in the Illinois Infringement Action already included a counterclaim directed to invalidity. Petitioner, by way of the order from the Illinois Court was authorized to amend its answer in the Illinois Infringement Action, and Petitioner took full advantage of doing so by maintaining and including assertions of invalidity. Lastly, we find unpersuasive Petitioner's argument that because Rule 15(a)(2) of the Federal Rules of Civil Procedure permits liberal amendment of counterclaims, that that is the reason Petitioner chose to file an Amended Answer; not because the Illinois Court authorized the amended answer. Req. Reh'g 14–15. Again, this is a new argument not presented previously. More importantly, however, the argument is unsupported by record evidence, which tends to show the opposite. The Amended Answer, Affirmative Defenses and Counterclaims (Ex. 1014) was filed with the Illinois Court immediately after, and on the same day as, the court's order granting Petitioner leave to file that paper.

For all of the above reasons, Petitioner's Requests for Rehearing are *denied*.

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