UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TRADESTATION GROUP INC.; TRADESTATION SECURITIES, INC.; IBG LLC; and INTERACTIVE BROKERS LLC
Petitioners

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.
Patent Owner

CBM2015–00161
Patent 6,766,304

PETITIONERS' ADDITIONAL BRIEFING IN LIGHT OF *CQG* AS AUTHORIZED BY THE BOARD'S JANUARY 23, 2017 ORDER

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The Federal Circuit's ***nonprecedential*** opinion in *Trading Techs. Int'l, Inc. v. CQG, Inc.*, 2017 WL 192716 (Fed. Cir. Jan. 18, 2017) ("*CQG*") does not affect these CBMs. The parties are not contemplating settlement. And Petitioners are not aware of proceedings—other than *CQG*, these CBMs, and the CBMs' underlying litigation—that could affect the challenged patents.

I. The nonprecedential decision in *CQG* does not affect these proceedings because the records are entirely different.

CQG does not control these CBMs. It involved a different party, in a district court proceeding, without any record evidence, arguing that claims of two of the challenged patents reflect a different abstract idea than those addressed in these CBMs. *Id.* at *3. First, as non-parties, Petitioners are entitled to a full and fair opportunity to litigate the issues. Depriving Petitioners of this opportunity would not only be an improper use of offensive collateral estoppel, but it would also violate Petitioner's due process rights. *In re Trans Tex. Holdings Corp.*, 498 F.3d 1290, 1297 (Fed. Cir. 2007). The Board has recognized the factual nature of the § 101 analysis, and refused to apply collateral estoppel to prevent a petitioner—who lost a district court § 101 challenge—from challenging eligibility. *Interthinx, Inc. v. Corelogic Solutions, LLC*, CBM2012-7, Paper 58 at 5-7 (PTAB Jan. 30, 2014).

Second, *CQG* is ***nonprecedential***. Other Federal Circuit panels or lower tribunals may look to a nonprecedential decision for guidance, but are not bound by its holdings. Fed. Cir. Rule 32.1(d); *see Symbol Tech's, Inc. v. Lemelson Medical,*

277 F.3d 1361, 1368 (Fed. Cir. 2002). Here, Petitioners presented compelling, concrete evidence that the claims cover an abstract idea and lack an inventive concept—evidence that the Federal Circuit advised *must* be considered, if it had been before them. *CQG*, at *4. With different parties and entirely different records, the Board can and should reach a different result.

A. The ’556, ’056, and ’411 patent claims were not at issue in *CQG* and cannot be affected by its holding.

CQG does not affect the ’556, ’056, and ’411 because those patents were not at issue in the case. *See id.* at *1. Eligibility under § 101 is analyzed on a claim-by-claim basis. *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2355 (2014). None of the ’556, ’056, and ’411 claim a static price axis, which the Federal Circuit held is the inventive concept in *CQG*. *CQG.*, at *3. Indeed, the Court relied on this critical distinction of the ’411 in its decision in *Trading Tech’s Int’l., Inc. v. Open E Cry, LLC*, 728 F.3d 1309, 1315, 1320 (Fed. Cir. 2013). And, the ’556 and ’056 patents are from a different patent family than the ’132 and ’304. The ’556 is directed to calculating and displaying profit and loss information; the ’056 is directed to an entirely different GUI than the ’132 and ’304. Neither the ’056 nor ’556 purport to solve the alleged problem of a trader missing a price. Thus, *CQG* has no bearing on the ’056, ’556, or ’411 patents.

B. The PTO is not bound by the court’s denial of judgment as a matter of law based on a record devoid of evidence.

The Federal Circuit's reasoning in *CQG* extends only as far as the record before the district court and, in turn, the Federal Circuit. *Ballard Med. Prods. v. Wright*, 821 F.2d 642, 643 (Fed. Cir. 1987) ("An appellate court may consider only the record as it was made before the district court."). That record lacked any evidence showing that the subject matter had "long existed" and was "routine or conventional." *CQG*, at *3. That is not the case here.

While subject matter eligibility may ultimately be a question of law, it is "rife with underlying factual issues." *Ultramercial, Inc. v. Hulu, LLC*, 722 F.3d 1335, 1339 (Fed. Cir. 2013), *vacated sub nom. WildTangent, Inc. v. Ultramercial, LLC*, —— U.S. ——, 134 S.Ct. 2870 (2014). The relevant facts here involve whether the subject matter was well-known and routine or conventional. *See CQG*, at *4. Because these inquiries apply to both steps of the eligibility analysis, the Board must independently consider the evidence of record in *these* CBMs before reaching its determination on either step. *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016).

C. The CBMs' records differ from the district court's.

Context is important: "the public interest in innovative advance is best served when close questions of eligibility are considered along with the understanding flowing from review of the patentability criteria of novelty, unobviousness, and enablement …." *CQG*, at *4. But in *CQG*, the defendant had made a stra-

tegic decision not to challenge the validity of the patents or to submit art for its § 101 challenge. Thus, the Federal Circuit lacked any record of the prior art.

Here, however, the records establish that TT merely appropriated a well-known way to display trading data and added conventional GUI functions. Weiss, for example, demonstrates that the claimed GUIs have a pre-electronic trading analog. Weiss describes a NYSE specialist's book, which is a pencil and paper approach to plotting bids and asks along a price axis in the same format as the GUIs in TT's patents. ('182 Ex. 1020, 44-46.) Weiss also teaches that the NYSE displayed this book on a CRT—demonstrating how conventional it was to put traders' pencil and paper plots on a display. (*Id*. at 46.) Gutterman demonstrates another pre-electronic trading analog, describing a system for arranging and displaying a broker's deck on a touchscreen display that arranges bids and asks along a price axis in the same format as TT. ('182 Ex. 1011, 6:33-7:14; 12:1-56; FIGS. 2b, 2d.)

TSE ('182 Ex. 1017), Intex ('182 Exs. 1046, 1047), Silverman ('182 Ex. 1010) and Buist ('182 Ex. 1030) apply this well-known arrangement in the field of electronic trading. Intex's electronic trading system that displayed bids and asks along a vertical price axis preceded TT's GUIs by at least 15 years. ('182 Ex. 1047.) Indeed, Thomas, TT's expert, admitted that all of the claimed elements were known at the time of the invention. ('182 Ex. 2169, ¶99.) And Cooper ('182 Ex. 1022) and Schneiderman ('182 Ex. 1023) show just how conventional the

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