Paper No. ____
Filed: June 15, 2016

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.

Petitioner

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.

Patent Owner

Case CBM2015-00161[1]
U.S. Patent 6,766,304 B2

Patent Owner's Motion for Additional Discovery

[1] Case CBM2016-00035 has been joined with this proceeding.

Patent Owner ("TT") submits this motion under 37 C.F.R. § 42.51(b)(2),[1] as authorized by the Board. Ex. 2140. TT seeks discovery of the documents listed in Exhibit 2152[2], and the databases listed in Exhibit 2153.[3]

I. INTRODUCTION

Petitioners refuse to produce highly relevant evidence in their possession and already produced to TT in the litigation, and which clearly contradicts positions being taken before the Board. The evidence sought is the most relevant with respect to certain issues, speaking directly to the legal and factual issues of these proceedings. Petitioners claim that the information is irrelevant, and object to TT's use of the documents based on the district court protective order.

The district court judge in the co-pending litigation ordered limited additional discovery notwithstanding the stay explaining: "*I believe the discovery*

[1] TT notes that it submits identical motions in CBM2015-000161, -172, -179, -181, and -182. Although certain of these proceedings do not include instituted prior art grounds, the evidence discussed herein is equally applicable to all proceedings, given the Board's embedding of obviousness-type analysis within CBM and/or § 101 analysis.

[2] The relevance of each document is listed in Exhibit 2155.

[3] TT maintains that this is Routine discovery as it is facially contrary to Petitioners' positions.

materials will be beneficial, both when the case resumes and also before the PTAB." Ex. 2142 (emphasis added). The trial judge thus took the extraordinary step of re-opening discovery in a stayed matter to bring forward highly relevant evidence for the benefit of the Board. *Id*. This evidence is crucial to the Boards' meaningful consideration of patentability under §§ 101 and 103, as well as CBM arguments, and is at a minimum, appropriate for production onto this record as Additional Discovery. Without access to this discovery that is of no burden for Petitioners to provide and which is most pertinent for discrediting Petitioners' assertions, TT will be materially prejudiced. The production ordered by the district court, despite the stay and over objections, was scheduled to be completed June 10, with depositions on June 8, 9, and 13. Noting the trial court's schedule, the Board moved dates for TT's responses to June 17. *See* CBM2016-00182, Paper 38, at 6-7 But Petitioners have refused production here.

The documents relate to for example, non-obviousness, including secondary considerations of non-obviousness, the state-of-mind of a skilled artisan at the time of the invention through the development of Matrix (*see*, *e.g.*, Ex. 2144 [redacted], the development history of the claimed features at TS (including evidence tending to show copying by TradeStation) and the importance of the claimed features to IB (*see*, *e.g.*, Ex. 2156 [redacted]

[redacted]. The parties have agreed to the default protective order for only a handful of the documents for the purposes of this Motion, and so TT has only summarized each documents relevance in Ex. 2155.

Such evidence supports the inventive concept analysis under § 101, as well as CBM analysis. Other evidence shows that TS and IB view their products as implementing the claimed features as "technological" and as an "order entry tool", contradicting Petitioners § 101 and CBM arguments. (*e.g.*, Ex. 2143 [redacted]; Ex. 2145 [redacted]; Ex. 2157 [redacted]. Further, IB's head of software development has stated that [redacted] Ex. 2158. This is contrary to the position taken by the Petitioner's expert, Mr. Román, who opined that electronic trading screens are purely aesthetic.

The requested documents are easily identifiable and accessible: (1) 95

documents, **identified by Bates number or other identifier understandable by litigation counsel** (Ex. 2152); (2) transcripts of TS and IB depositions held on June 8, 9, and 13, 2016, as ordered by the district court (*id*); and (3) documents improperly withheld by Petitioners because they allegedly include identifying information of *customers* (Ex. 2153).

II. LEGAL FOUNDATION

Secondary considerations, when present, *must* be considered in determining obviousness. *Nike Inc. v. Adidas AG*, 812 F.3d 1326, 1339 (Fed. Cir. 2016). "In fact, we have expressly stated that when secondary considerations are present . . . it is *error not to consider them*." *Id.* (quoting omitted) (remanding to PTAB for consideration of objective indicia). When "considerable record evidence on objective indicia, including unexpected results, expert skepticism, copying, commercial success, praise by others (even from the accused infringer []), failure by others, and long-felt need" is available, as here, it should be addressed. *Mintz v. Dietz & Watson Inc.*, 679 F.3d 1372, 1379 (Fed. Cir. 2012). A tribunal's obligation under *Graham*'s fourth factor is not waived "by some procedural requirement that ducks consideration of evidence presented . . . ." *Id*. at 1378.

A patent is a significant property right to which due process protections apply, and CBMR provides a means by which petitioners seek to invalidate that grant. U.S. Const. amend. V.; 35 U.S.C. § 261; *Festo Corp. v. Shoketsu Kinzoku*

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