



Steven F. Borsand
Executive Vice President, Intellectual Property
Trading Technologies International, Inc.
Direct line: 312.476.1018
steve.borsand@tradingtechnologies.com

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Hon. Michelle K. Lee
Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office
600 Dulany St., MDW 10D44
Alexandria, VA 2231

Re: Abuse of Covered Business Method Review Process

Dear Director Lee:

We write to inform you of an abuse of the post-grant review process that poses a serious threat to our company, Trading Technologies International, Inc. (“TT”), and likely to other similarly-situated patent owners.

As explained in detail below, CBM petitions are being filed by a group of TT’s competitors against TT patents that are clearly outside of the jurisdictional boundaries of Section 18 as they are not covered business method patents. The patents are directed to technology—innovative structural and functional features of tools embodied in graphical user interfaces (“GUIs”) and are not in any way directed to a business method or practice. To make matters worse, these competitors are misusing the CBM review process as part of a strategy of litigation gamesmanship against TT. This improper litigation gamesmanship includes:

- Intentionally delaying the filing of CBM petitions (for years) while taking a “wait and see” approach based on events in the district court litigation and other CBM filings;
- Serially filing delayed CBM petitions on the same or related patents;
- Timing the filing of the CBM petitions in an effort to maximize delay of the district court litigation;
 - For example, on two occasions, CBM petitions were filed only after the district court decided to lift previously-entered stays;
- Forum shopping by selectively pursuing grounds to seek multiple “bites at the apple”;

- For example, waiting to file CBM petitions on certain grounds only after losing in district court and refraining from including in filed CBM petitions alleged “key” grounds that are still being pursued in district court; and
- Coordinating CBM petition filings amongst the group of defendants to limit the effects of estoppel on members of the group.

Defendants’ conduct and use of the CBM review process cannot be explained by anything other than litigation gamesmanship. This goes against the whole point of Section 18, which was to provide a faster and cheaper alternative to litigation in which parties seek to promptly raise legitimate defenses.

TT respectfully submits that the conduct described herein merits the attention of the Director for at least two important public policy reasons: (1) preventing abuse of the CBM review process by litigation gamesmanship; and (2) ensuring that the PTAB stays within the statutory bounds in clear-cut cases. If a strong message is not sent to discourage litigation gamesmanship and provide clarity on straightforward jurisdictional issues, petitioners will continue to push the limits and patent owners will be forced to unfairly face significant costs (both in terms of time and money) to fight improper petitions. You are especially qualified to consider these issues based on your experience and technical background.

TT requests that you exercise your discretion as Director to promptly put a stop to these improper CBM petitions. Otherwise, TT will unfairly face significant expense to fight the petitions and be faced with attempts to even further delay of the just resolution of its claims of infringement against its competitors.

Background

TT is the plaintiff in a patent infringement suit that was filed more than five years ago, in early 2010, against three groups of defendants: Tradestation, CQG, and Interactive Brokers Group (“IBG”) (“2010 Litigation”).¹ On July 15, 2015, these defendants made in-court statements threatening to begin a process over the coming weeks of filing CBM petitions against “most (if not all)” of the sixteen patents-in-suit, *see* Attachment A,² and explained to the court how the labor would be divided amongst the defendants. *See* Attachment B. On Monday, July 20, 2015, the

¹ The 2010 cases against these defendants are captioned as follows: *Trading Techs. Int’l, Inc. v. Tradestation Sec., Inc.*, Case No. 1:10-cv-00884 (N.D. Ill.); *Trading Techs. Int’l, Inc. v. CQG, Inc. et al.*, Case No. 1:10-cv-00718 (N.D. Ill.); and *Trading Techs. Int’l, Inc. v. IBG LLC*, Case No. 1:10-cv-00721 (N.D. Ill.). These cases have been consolidated under Case No. 1:10-cv-715 (N.D. Ill.). There is also one more case, *Trading Techs. Int’l, Inc. v. FuturePath Trading, LLC*, Case No. 1:10-cv-00720 (N.D. Ill.), in the consolidated case but that is expected to settle very shortly. There were additional cases filed in 2010, but most have settled. A second case from 2005 is pending against CQG, *Trading Techs. Int’l, Inc. v. CQG, Inc. et al.*, Case No. 1:05-cv-04811 (N.D. Ill.), which is in the post-trial motion stage. Importantly, all of the remaining defendants are members of a joint defense group.

² The patents-in-suit are all directed to particular structural and functional features of a specialized GUI tool that happens to be used for electronic trading. The patents-in-suit are from three different families as set forth in the Appendix. For each defendant, the accused products are the same for all of the patents-in-suit

defendants began implementing their plan, when Tradestation filed the first of the promised CBM petitions (CBM2015-00161, attached as Attachment C).

The recently-filed petition and the threatened conduct to abuse the post-grant review process poses a serious threat to TT—a small Chicago-based operating company that employs about 300 people. The defendants’ recently-filed and forthcoming petitions are a litigation tactic to seek multiple bites at the apple and delay litigation contrary to the AIA’s purpose. Moreover, the patents are not directed to business methods or practices and are clearly not within the jurisdictional purview of Section 18.

As background, TT relies on its patent portfolio in the manner intended by the patent system. TT owns numerous patents that publically disclose and claim innovative technological improvements (e.g., in terms of speed, accuracy and usability) to the technology of interactive GUI tools that it has created and sells. TT relied on the patented innovations of MD TRADER®³ to obtain critical investments at a time when it was losing money. The main inventor of some of the key inventions in MD TRADER assigned the inventions to TT expecting that TT would protect them with patents and commercialize them to turn the company around.⁴ TT did just that, and its MD TRADER product has been key to TT’s success ever since its launch in August 2000. Indeed, MD TRADER and the patented inventions embodied therein proved to be revolutionary. *See e.g.*, Exhibit 2201, CBM2014-00135, ¶ 32 (summarizing praise from over 30 prominent participants in the industry). Patent protection for the innovative features is critical because, once the product was released, competitors were able to see and copy the inventions (and many have done so).

For the most part, TT has been able to avoid litigation and settle with the vast majority of its competitors, including all of its traditional long-time competitors. Some newer companies have also approached TT for licenses before launching their own products incorporating the patented technology. Since 2004, TT has entered into 29 agreements involving its patents relating to the innovations in MD TRADER to protect itself from unfair competitive advantages created by copying of its significant contributions to the technology used in order entry GUI tools. Each of these agreements involves competitors honoring the patents in some manner: some dropped the infringing technology from their products, some took royalty-bearing licenses to practice the patented inventions, some agreed to consent judgments, and some paid for past use of the patented inventions. Unfortunately, TT has been forced to litigate against a handful of competitors that have refused to honor the patents.

One of TT’s first patents directed to the technology in MD TRADER is U.S. Patent No. 6,766,304 (“the ’304 patent”). Before issuance, the ’304 patent (as well as U.S. Patent No. 6,772,132 (“the ’132 patent”) underwent a rigorous examination at the PTO, including twice through a special quality review process at the time called the “second pair of eyes.” The ’304/’132 patents and other related family members (like many patents in Art Unit 3600) disclose and claim a technological improvement upon prior technology. They are not “business method patents.” Indeed, both the UK and the EPO—which ban business method patents—granted the foreign counterparts to this family of patents.

³ MD TRADER is TT’s commercial product embodying the inventions of the patents-in-suit and continues to be an important product for TT today.

⁴ These inventions are disclosed and claimed in the “Brumfield family” identified in the Appendix

After issuance, the '304 patent continued to be rigorously tested. The PTO confirmed the original claims in reexamination (Control No. 90/008,577) after considering hundreds of alleged prior-art references and arguments raised by various defendants in litigation.⁵ It also survived several scorched-earth litigations, including two jury trials in which TT prevailed.⁶ And the Federal Circuit affirmed district court determinations rejecting invalidity arguments.⁷ Recently, a federal district court judge in Illinois determined that the '304 patent (as well as the '132 patent) claims patent-eligible subject matter under 35 U.S.C. § 101 and that the claims satisfy the written description requirements of 35 U.S.C. § 112, ¶ 1.⁸

The attached petition filed by Tradestation is directed to the '304 patent. This petition is substantially identical to a petition filed by CQG earlier this year (it even uses CQG's expert declaration).⁹ The petition asks the PTAB to re-decide the identical issues under § 101 and § 112, ¶ 1, already decided by the district court judge in TT's favor only a few months ago—defenses that CQG lost. Importantly, both of these issues (§§ 101 and 112) will be heading the Federal Circuit for final resolution shortly.

The Director and PTO have wide discretion to decline institution of post-grant review for any reason. *See* 35 U.S.C. § 324; *see also* 37 C.F.R. § 42.208. The Director's power to implement safeguards against abuses, such as those outlined in this letter, lies in the text of the AIA itself. *See e.g.*, 35 U.S.C. 324(d) (providing Director with discretion to “stay, transfer, consolida[te], or terminat[e]” proceedings, taking “into account whether . . . the same or substantially the same prior art or arguments previously were presented to the Office.”). This power allows the Director to act as a gatekeeper to prevent abuse of the post-grant review process. The Tradestation '304 CBM petition and the threatened future filings amount to a severe abuse of the post-grant review process that deserves the attention of the Director. As explained below, these petitions should be promptly denied for at least two reasons, each of which is equally important from a public policy perspective.

⁵ The related '132 patent was also confirmed at the same time in a reexamination involving the same alleged prior art. Later, the PTO declined to institute yet another reexamination request filed by one of the defendants at the time as not raising a substantial new question of patentability. The analysis supporting patentability in the original examinations, subsequent examination, and the various reexaminations applies equally to many of the various continuations in the Brumfield family of patents.

⁶ *Trading Techs. Int'l v. eSpeed Inc.*, No. 1:04-cv-05312 (N.D. Ill.) and *Trading Techs. Int'l, Inc. v. CQG, Inc. et al.*, No. 1:05-cv-04811 (N.D. Ill.). Both cases involved the '304 and '132 patents.

⁷ *Trading Technologies Intern., Inc. v. eSpeed, Inc.*, 595 F.3d 1340 (Fed. Cir. 2010). The Federal Circuit has also considered other patents in the same family. *See Trading Techs. Int'l v. Open E Cry, LLC et al.*, 728 F.3d 1309 (Fed. Cir. 2013) (reversing district court grant of summary judgment of invalidity for lack of written description for the '411, '768, '374, and '055 patents).

⁸ *See e.g., Trading Techs. Int'l, Inc. v. CQG, Inc. et al.*, No. 05-cv-4811, Dkt. 1073 (Feb. 24, 2015) (patent not invalid under 35 U.S.C. § 101). Opinion attached as Attachment E. The district court also granted judgment as a matter of law in TT's favor near the end of the trial on the same §112 defense being raised in Tradestation's petition.

⁹ The PTAB declined to institute CQG's petition because CQG is barred by its previously-filed declaratory judgment action, CBM2015-00057, Paper 12 (PTAB, Jul. 10, 2015).

Litigation Gamesmanship Through the Use of the CBM Review Process Unfairly Burdens Patent Owners in Contravention of the AIA

First, the defendants are using these petitions for litigation gamesmanship to improperly burden TT with serial attacks on its patents, to perpetually delay the litigation, and to seek multiple bites at the apple for certain defenses, in contravention of the purpose of the AIA. Post-grant reviews are intended to provide a “faster, less costly alternative[] to civil litigation,” but the framework must also “reduce the ability to use post-grant procedures for abusive serial challenges to patents.” Cong. Rec. S951 (Feb. 28, 2011) (statement of Sen. Grassley). Unlike *inter partes* reviews, which have a one-year bar to preclude serial filings (*see* 35 U.S.C. § 315(b)), CBM proceedings have no explicit statutory timing provisions, so the Office should be vigilant to enforce the AIA’s intent by protecting patent owners against delays and serial abuse of the CBM process. The need to protect patent owners from serial post-grant attacks echoes testimony by Hon. Paul Michel (Ret.), former Chief Judge of the United States Court of Appeals for the Federal Circuit, who urged that “a ban on serial attacks on the same patents” should safeguard patent owners and prevent abuse of post-grant reviews. Hearing before Subcommittee on Intellectual Property, Competition, and the Internet (Feb. 11, 2011) (statement of Hon. Paul Michel (Ret.)). The defendants’ burgeoning petitions discredit this purpose.

The 2010 Litigation against the three remaining defendants began in earnest in 2010 after TT’s attempts to settle with these defendants failed. Since the beginning, the defendants have pursued a strategy of delay. First, the defendants convinced the district court to put the cases on hold to consider on summary judgment what it called “key” dispositive issues that would “vastly simplify the case” and that stood as “significant barriers” to settlement with respect to several of the Brumfield patents and one of the Friesen patents (U.S. Patent No. 7,533,056—“the ’056 patent”). *See* Dkt. 181 (Attachment F); Dkt. 176 (Attachment G). For the Brumfield patents, the defendants contended that certain of those patents were invalid under § 112 based on collateral estoppel from a previous decision in a different case. For the ’056 patent, defendants asserted lack of written description under § 112. In early 2012, the district court granted summary judgment in TT’s favor on the ’056 patent (rejecting the § 112 defense) and against TT on several of the Brumfield patents (including U.S. Patent Nos. 7,676,411 (“the ’411 patent”) and 7,685,055 (“the ’055 patent”)) based on collateral estoppel. TT appealed this decision and the Federal Circuit reversed the application of collateral estoppel, remanding substantive merits of the § 112 defense for the ’411 and other patents.¹⁰

For the entire period from initial consideration of the summary judgment motions (in 2011) to receiving the mandate from the Federal Circuit in early 2014, the rest of the case was stayed. After the reversal, in early 2014 the defendants again tried to convince the district court to delay the case. This time they asked the court to focus only on what they called the “determinative” substantive § 112 issue for certain Brumfield patents for which they wanted to re-file a summary judgment motion. *See* Dkt. 528 (Attachment H). On April 21, 2014, the district court denied this request and ordered the parties to submit schedules for the case.

It was not until after the district court finally indicated that the case was going to proceed, that in May of 2014 (almost 2 years after the CBM process first became available in September of 2012), defendants’ joint defense partner TD Ameritrade (with whom TT recently settled) filed

¹⁰ The Federal Circuit completely reversed on the ’055 patent, rejecting the § 112 defense on the merits

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