

IN THE UNITED STATES PATENT TRIAL & APPEAL BOARD

**TRADESTATION GROUP, INC. AND
TRADESTATION SECURITIES, INC.**

Petitioners,

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.

Patent Owner

**Case CBM2015-00161
U.S. Patent No. 6,766,304 B2**

**OPPOSITION TO
PATENT OWNER'S MOTION FOR ADDITIONAL DISCOVERY**

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I. Introduction

TradeStation desires review of the '304 patent, which it has been accused of infringing in a lawsuit filed by TT in 2010. There is no evidence to suggest that any other party is the real-party-in-interest in this proceeding, and TT should not be permitted to run up the costs of the proceeding, interject delay, and engage in improper and invasive litigation-driven discovery of matters wholly unrelated to this petition (i.e., discussions between co-defendants relating to *other* TT patents).

So were TT's request only for communications and agreements between TradeStation and CQG that discussed funding or control of the instant petition (i.e., for review of the '304 patent), the issue could easily be resolved. No such communications or agreements have ever existed, in writing or otherwise. CQG did not control TradeStation's decision to file the petition, nor did CQG instruct TradeStation to file the petition, nor did CQG request that TradeStation file the petition. CQG did not participate in the preparation of this petition other than to the extent its earlier-filed petition served as its basis, nor will it exercise any control moving forward. Indeed, prior to its filing, no person outside of TradeStation's counsel at Fish & Richardson even reviewed the petition. No person outside of TradeStation's counsel had any control of the content of the petition. CQG has not funded TradeStation's petition and will not fund its participation in this proceeding. TradeStation is represented by separate counsel from CQG, both in the TT litigation

and for the instant petition. CQG had no opportunity to review or provide comments on the content of the petition before it was filed by TradeStation. In brief, there is simply no basis to conclude that CQG “exercised or could have exercised control over a party’s participation” in this CBM. TT’s allegations to the contrary amount to nothing more than unfounded speculation that cannot satisfy the relevant *Garmin/Bloomberg* factors to show good cause for additional discovery.

II. Factual and Procedural Background Relevant to Argument

TT sued various entities on the ’304 and several other patents in 2010 in N.D. Ill. CQG had been sued in 2005 in that court, but was sued again in 2010 on patents related to the ’132 and ’304 patents asserted in the 2005 case against it, and others. The cases were consolidated at TT’s request. The Defendants in those 2010 cases won an early summary judgment on invalidity under 35 U.S.C. § 112. The CAFC reversed on procedural grounds. *Trading Techns. Int’l, Inc. v. Open E Cry, LLC*, 728 F.3d 1309, 1323 (Fed. Cir. 2013). TD Ameritrade then filed five CBMRs, four of which were initiated (on U.S. Patents 7,533,056; 7,676,411; 6,772,132; and 7,685,055). CQG filed CBMRs against two patents it confronted at trial in early 2015 (the ’132 and ’304) in TT’s 2005 lawsuit. TT never claimed any of these CBMRs should have named other defendants in the 2005 or 2010 litigations as real-parties-in-interest. After CQG’s CBM petitions were denied on procedural grounds, CBM2015-00057 and -00058, and TD Ameritrade settled shortly before the hearing

on its initiated CBMs, TradeStation began to file its own requests, first this petition on the '304 patent, and then later on an unrelated patent (CBM2015-00172).

Ultimately, TradeStation and the remaining defendants jointly retained TD Ameritrade's former firm to re-file on the patents that settled on the eve of hearing before the Board. All three remaining defendants joined in the CBM2015-00179 petition, while TradeStation and Interactive Brokers jointly filed CBM2015-00181 and CBM2015-00182. As CQG was procedurally barred from filing on the '132 patent, it was deliberately excluded from the joint effort by TradeStation and Interactive Brokers on CBM2015-00182.

Since CQG's filings were public on the '304, and had been denied only for procedural reasons, it was most economical for TradeStation to simply copy the arguments from CQG's filings and reuse its evidence. However, CQG had no role whatsoever in determining whether TradeStation would file, what TradeStation would do, what arguments it would make, what counsel it would use, when it would file or how it would proceed. CQG did not pay any filing fees or costs. No agreements were made or exist between CQG and TradeStation on the '304 CBMR.

Public PRPS filings make clear there are communications among CQG and TradeStation concerning the CBM petition where they did jointly file with the other remaining co-defendant, Interactive Brokers, CBM2015-00179, since all three are named as real-parties-in-interest and represented by the same counsel there.

The public record also shows there are communications among CQG and TradeStation (and others) regarding the consolidated lawsuit in the Northern District of Illinois, and the two Federal Circuit appeals that it has spawned over the past five years. These communications are ongoing communications even now as the joint defendants are filing a brief on September 24, 2015, by order of the district court.

III. Argument

A. TT Has Not Shown More than a Mere Possibility that Something Useful Will Be Found.

TT's motion is premised on precisely two sets of facts, neither of which is in dispute. **First**, TradeStation's CBM petition (including the expert declaration) is substantially similar to that previously submitted by CQG. Indeed, TradeStation acknowledged this point in its initial filing. *See* Paper 1 at 4 ("Portions of this petition and its exhibits, including the declaration of Dr. Mellor, are substantially identical to CQG's petition and exhibits (except the portions concerning the effect of the declaratory judgment action have been removed).")

Second, in response to an "emergency" motion filed by TT to lift a stay in its pending 16-patent lawsuit, the defendants "respectfully request[ed] a short period of time to coordinate on these PTAB actions." (Ex. 2002 at 3.) A later case filing included the statement "[f]or CQG's part, it is preparing to file CBMR petitions on the '411, '374, '768, and '724 patents in the next several weeks." (Ex. 2003 at 8.)

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