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Filed: October 2, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TRADESTATION GROUP, INC. AND
TRADESTATION SECURITIES, INC.

Petitioner

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.

Patent Owner

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

PATENT OWNER'S REPLY TO PETITIONER'S OPPOSITION TO MOTION FOR ADDITIONAL DISCOVERY[*]

[*] Authorized by email from the Board. Ex. 2013.

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I. PETITIONER ADMITS COOPERATION, BUT ARGUES LEGAL CONCLUSIONS, NOT DISCOVERY

The Opposition fails to analyze all of the relevant *Bloomberg* factors and instead argues the legal conclusion of RPI. Petitioner admits that it "is no secret" that it coordinated with CQG across petitions (Paper 14 ("Opp.") at 8-9), but summarily concludes that this coordination does not amount to "funding, control, or direction" (*id.* at 13). The legal conclusion of funding or control—and ultimately RPI—is not the issue here. The issue is if discovery is warranted on a highly fact-dependent issue so that the Board—not Petitioner—can determine if CQG is an RPI. Trial Practice Guide, 77 Fed. Reg. 48756, 48759 (Aug. 14, 2012).

Petitioner seeks to avoid discovery of the underlying facts by making self-serving admissions couched in legal conclusions. But Petitioner never expressly states that it did not communicate with CQG—even as to this proceeding. Instead, Petitioner asserts that none of the communications amounted to "funding," "control," or "direction." *E.g.*, Opp. at 4, 13. If such statements could suffice, then no RPI discovery would ever be had.

Patent Owner requires discovery because reasonable minds may differ on conclusions drawn from the same underlying facts. For example, Petitioner asserts that the communications did not amount to CQG control over timing. Opp. at 3, 9. But on the objective evidence, the Board could conclude that CQG was involved in the timing decision. For example, CQG signed a brief attesting that a petition

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would be filed on July 20—this proceeding's filing date. Ex. 2002 at 3. CQG could not have made that representation *unless* it knew about this '304 petition and its timing. Petitioner never explains why the likely communications on timing are irrelevant to the highly fact-dependent RPI question. They are relevant and should be produced, even if they do not amount to control on their own.

Petitioner points to no case showing that coordination across proceedings on several patents cannot rise to the level of RPI. Nor do they respond to TT's point that the division of the patents, with each party playing its "part" (Ex. 2003 at 8), amounts to payment-in-kind. Given RPI's highly fact-dependent nature, and Petitioner's admission that coordination and communications exist, any communications regarding timing and division of labor are relevant to determining RPI. Petitioner should not be permitted to avoid discovery by unilaterally concluding its and CQG's actions are not relevant or do not rise to the level of RPI.

Petitioner asserts that additional discovery would be "an [e]xercise in [f]utility" because TT can "easily generate equivalent information . . . by other means." Opp. at 11. While TT believes that the public information establishes that CQG is an RPI, that does not mean no additional non-public information exists to further support such a finding. The details of the coordination Petitioner and CQG explained to the district court are not all public, including the steps taken to coordinate the petitions, the conversations about the filings, or the discussions

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