

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
Patent No. 6,766,304 B2

Before SALLY C. MEDLEY, MEREDITH C. PETRAVICK, and
PHILIP J. HOFFMANN, *Administrative Patent Judges*.

PETRAVICK, *Administrative Patent Judge*.

DECISION
Denying Motion for Additional Discovery
37 C.F.R. § 42.51

i. Introduction

Patent Owner filed a motion for additional discovery on September 16, 2015 (Paper 12, "Mot."), and Petitioner filed an opposition to the motion on September 21, 2015 (Paper 14, "Opp."). Patent Owner filed a reply on October 2, 2015. Paper 17, ("Reply").

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Petitioner seeks discovery on the issue of whether CQG, Inc. and CQG, LLC (collectively, “CQG”) is an unnamed real-party-in-interest (“RPI”) in this proceeding. U.S. Patent No. 6,766,304 B2 (“the ’304 patent”), the subject of this proceeding, was also the subject of covered business method patent review CBM2015-00057. Institution was denied in CBM2015-0057, pursuant to 35 U.S.C. § 325(a)(1), because CQG, the petitioner, filed a civil action challenging the validity of the patent prior to filing the petition for covered business method patent review. *CQG, Inc. v. Trading Tech. Int’l, Inc.*, Case CBM2015-0057, slip op. at 1–9 (PTAB Jul. 10, 2015) (Paper 13).

ii. Overview of Arguments

Patent Owner argues that CQG is an unnamed RPI because Petitioner and CQG are coordinating, allegedly, the filing of the petition challenging the ’304 patent in this proceeding and the petitions in other proceedings, in a quid pro quo manner. *See* Mot. 1–3, 7–8; Reply 2 (“the division of the patents, with each party playing its ‘part’ . . . amounts to payment-in-kind”). Patent Owner argues that, if CQG is a RPI, institution should be denied under 35 U.S.C. § 325(a)(1).

Patent Owner, thus, seeks additional discovery as to whether CQG is an unnamed RPI. *Id.* at 3. Patent Owner seeks the following discovery:

All communications and agreements between TradeStation and CQG relating to the filing or preparation of any post-grant proceeding (filed or anticipated) of any TT patent, or other documents referencing such communications and agreements between TradeStation and CQG.

Mot. 1.

Petitioner opposes Patent Owner's request because the request is unduly broad and not limited to communications and agreements between Petitioner and CQG regarding the filing of the petition challenging the '304 patent. Opp. 1. Petitioner states: "were TT's request only for communication and agreements between TradeStation and CQG that discussed funding or control of the instant petition . . . , the issue could be easily resolved. No such communications or agreements have ever existed, in writing or otherwise." *Id.*

Petitioner states that public records show that there are communications between Petitioner, CQG, and other parties regarding jointly filed petitions requesting covered business method patent review of Patent Owner's patents other than the '304 patent, and between Petitioner, CQG, and other defendants regarding consolidated proceedings in the Northern District of Illinois and appeals to the Federal Circuit. *Id.* at 3. Petitioner argues, however, that "[t]he fact that defendants coordinated on a different patent does not establish any likelihood that the requested discovery will show those same parties coordinated on [the '304 patent.]" *Id.* at 9 (emphases omitted).

iii. Analysis

In covered business method patent reviews, additional discovery may be ordered if the party moving for the discovery shows good cause as to why the additional discovery is needed. 37 C.F.R. §§ 42.51(b)(2), 42.224. As stated in the legislative history, "[g]iven the time deadlines imposed on these proceedings, it is anticipated that, regardless of the standards imposed in [35

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U.S.C. §§ 316, 326], PTO will be conservative in its grants of discovery.”
154 Cong. Rec. S9988-89 (daily ed. Sept. 27, 2008) (statement of Sen. Kyl).

As the movant, Patent Owner bears the burden of establishing good cause. *Id.* We generally consider five factors (the “*Garmin/Bloomberg* factors”) in determining whether good cause exists for granting additional discovery requests. *See Garmin Int’l, Inc. v. Cuozzo Speed Techs. LLC*, Case IPR2012-00001, slip op. at 6–7 (PTAB Mar. 5, 2013) (Paper 26) (informative), as modified by *Bloomberg, Inc. v. Market-Alerts Pty, Ltd.*, Case CBM2013-00005, slip op. at 4 (PTAB May 29, 2013) (Paper 32). These factors are: (1) there must be more than a mere possibility of finding something useful; (2) a party may not seek another party’s litigation positions or the underlying basis for those positions; (3) a party should not seek information that reasonably can be generated without a discovery request; (4) instructions and questions should be easily understandable; and (5) the discovery requests must not be overly burdensome to answer. *Garmin*, slip op. at 6–7; *Bloomberg*, slip op. at 5.

a. First Factor—More Than a Possibility and Mere Allegation

The first *Garmin/Bloomberg* factor considers whether there exists more than “mere possibility” or “mere allegation that something useful [to the proceeding] will be found.” *Garmin*, slip op. at 6; *Bloomberg*, slip op. at 5. Under this factor, a party should provide a specific factual reason for reasonably expecting that discovery will be useful. *Bloomberg*, slip op. at 5. In this context, “useful” means favorable in substantive value to the moving party’s contention. *Id.* The requester of information should already be in possession of a threshold amount of evidence or reasoning tending to show

beyond speculation that something useful will be uncovered.” *Garmin*, slip op. at 7.

Patent Owner alleges that the additional discovery will produce communications between Petitioner and CQG showing an alleged cooperative scheme to file petitions challenging Patent Owner’s patents, including the ’304 patent. *See* Mot. 1–11; Reply 5. Patent Owner argues that this information is useful because it will establish that CQG is an RPI. Mot. 4–5. To support its argument that something useful will be uncovered, Patent Owner relies upon: 1) the fact that the petition in this proceeding is a substantial copy of CQG’s petition in CBM2015-00057, including the identical expert report, 2) the fact that Petitioner and CQG jointly filed petitions for review of patents other than the ’304 patent, and 3) statements made by the defendant in a related proceeding in the United States District Court, Northern District of Illinois. Mot. 2–7; Reply 1–2.

The statements made by defendants, in the related district court proceedings, are taken from documents titled “Response of Certain Defendants to Trading Technologies’ ‘Emergency’ Motion” (Ex. 2002) and “Supplemental Response of Certain Defendants to TT’s Emergency Motion” (Ex. 2003). Those statements and some additional information for context, are reproduced below.

Defendants plan to request that the PTAB decide the validity of TT’s patents, by refiling challenges to most (if not all) of the patents-in-suit. . . . Given these very recent developments, Defendants respectfully request a short period of time to coordinate on these PTAB actions. Defendants expect a Covered Business Method Review Petition on one of the patents in suit to be filed by Monday, July 20 with additional petitions to be filed in the coming weeks.

(Ex. 2002, 3) and

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