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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, Virginia 22314

Re: Continued Abuse of Post-Grant Review Process

Dear Director Lee:

Since our initial letter dated August 10, 2015 regarding CBM2015-00161 (“First Letter”), CQG, Interactive Brokers Group (“IBG”) and TradeStation have made good on their promise to file more CBM petitions against TT’s patents. So far, they have filed four additional CBM petitions since our First Letter:¹

- On August 12, TradeStation filed CBM2015-00172 against the ’556 patent.
- On September 2, IBG, TradeStation, and CQG jointly filed CBM2015-00179 against the ’056 patent.²
- On September 11, IBG and TradeStation jointly filed CBM2015-00181 and CBM2015-00182 against the ’411 and ’132 patents, respectively.

As explained herein, the new filings continue the abuse of the CBM process against GUI patents that are clearly not CBM patents as discussed in the First Letter.

TT and others raised concerns that some would abuse the post grant review process provided by the Leahy-Smith America Invents Act (“AIA”) as part of litigation gamesmanship. TT discussed this specific concern with former Director Kappos before and shortly after passage of the

¹ There may be more petitions coming as petitioners have stated to the District Court that they plan on coordinating to file CBM petitions on “most (if not all)” of the patents-in-suit. Thus, there may be additional CBM petitions filed in the near future on some or all of the following 11 U.S. Patent Nos.: 7,127,424; 7,212,999; 7,412,416; 7,567,929; 7,680,724; 7,685,055; 7,693,768; 7,702,566; 7,725,382; 7,813,996, and 7,904,374.

² An anonymous reexamination was also filed the same day against the ’056 patent (Reexamination Control No. 90/013,578) that asserts one of the same alleged prior art grounds and contains very similar language.

AIA. He assured us that petitioners would not be incented to pursue such improper tactics and informed us that the Director had discretion to prevent such abuse. Consistent with this, the USPTO recently issued a study and report to Congress on the implementation of the Leahy-Smith America Invents Act in which states:

To protect parties from harassment, the AIA required the USPTO to establish regulations prescribing sanctions for abuse of discovery, abuse of process, and any other improper use of the proceeding. Further, the AIA protects patent owners from unwarranted multiple proceedings by providing that the Director may reject the petition because the same or substantially same prior art or arguments previously were presented to the USPTO.

Study and Report to Congress on the Implementation of the Leahy-Smith America Invents Act, September 2015, 38-39 (emphasis added). TT submits that the petitions discussed in this and our First Letter represent the very type of conduct contemplated by the AIA's provision of discretion to the Director.

As explained below, the new petitions merit your attention for the same reasons set forth in the First Letter:

- (1) the new petitions represent a continuation of the abusive litigation tactics and gamesmanship; and
- (2) all of the patents challenged in the new petitions claim new and specific features and functionality of a GUI—putting them outside the statutory jurisdiction of Section 18.

Recently, the Federal Circuit held that jurisdictional issues are the only decisions on institution that can be appealed because it goes to the USPTO's very authority under the AIA. *Versata Dev. Grp., Inc. v. SAP Am. Inc.*, 793 F.3d 1306, 1319-24 (Fed. Cir. 2015) (finding whether a patent qualifies as a CBM is a “defining characteristic” of the USPTO’s “authority to invalidate” because it subjects a patent “to a special [USPTO] power to invalidate.”); *See also Achatos Reference Publ'g, Inc. v. Apple Inc.*, Nos. 2014-1767, 2014-1788, 2015 WL 5711943, at *6 (Fed. Cir. Sept. 30, 2015). For the same reason, this important threshold jurisdictional issue merits the Director's attention.

Accordingly, TT respectfully requests that you exercise your discretion as Director (pursuant to, *inter alia*, 35 U.S.C. §§ 324-325 and 37 C.F.R. § 42.208) to promptly deny institution of all of these improper and abusive petitions. By halting this abusive behavior, you will protect TT from having to unfairly spend millions of dollars more defending against improper litigation tactics. To date, TT has already been forced to expend significant resources defending its GUI patents in 12 different CBM proceedings (the previous 7 from TD Ameritrade and CQG and the current 5 discussed herein). Further, and perhaps most importantly, rejecting these abusive petitions will set a precedent discouraging improper use of the post-grant review procedures.

PETITIONERS HAVE NOT RESPONDED TO TT'S FIRST LETTER

Before addressing the new petitions, TT notes that none of the petitioners have submitted a substantive response to our First Letter. The only response was a failed attempt by TradeStation to have the PTAB panel sanction TT for sending the First Letter. *See* CBM2015-00161, Paper 8 (P.T.A.B. Aug. 24, 2015).³ TT submits that the petitioners' silence on the substance of our First Letter is due to petitioners having no meritorious response.

³ TT does not believe there is anything improper about this or our First Letter. Anyone is permitted to communicate with the Director on any issue, including issues over which the statute specifically provides

THE NEW PETITIONS CONTINUE THE LITIGATION GAMESMANSHIP DISCUSSED IN THE FIRST LETTER

As discussed in our First Letter, the petitioners' actions are litigation gamesmanship intended to abuse and harass TT. The petitioners have intentionally delayed the filing of these CBM petitions (for years) while taking a "wait and see" approach based on events in the district court litigation and other CBM filings. This intentional, multi-year delay for each of the new CBM petitions is summarized below:

- '411 and '132 Patents (CBM2015-00181 and CBM2015-00182):
 - **Waited Almost 3 Years to File.** TT filed its infringement complaint against IBG on February 3, 2010 and TradeStation on February 9, 2010. The CBM program was available to both of these parties on September 16, 2012. IBG and TradeStation filed CBM2015-00181 and CBM2015-00182 on September 11, 2015. Therefore, they waited almost 3 years (1091 days) to file petitions against these patents. Defendant CQG did not join in either of these petitions.
 - **Did Not Join TDA CBM Petitions.** IBG and TradeStation had the opportunity to join the substantially identical TD Ameritrade CBM petitions against the '411 and '132 patents on May 19, 2014. They knowingly chose to not join. Notably, these new petitions make prior art arguments that are very similar to prior art grounds on which the PTAB denied institution in the previous CBMs filed by TD Ameritrade against the '132, '304 and '411 patent. *See* CBM2014-00135, Paper 19 (P.T.A.B. Dec. 2, 2014) ('132 patent); CBM2014-00136, Paper 19 (P.T.A.B. Dec. 2, 2014) ('304 patent); CBM2014-00133, Paper 19 (P.T.A.B. Dec. 2, 2014) ('411 patent).
 - **Did Not Join CQG CBM Petitions.** IBG and TradeStation had the opportunity to join the CQG CBM petitions against the '132 patent on January 9, 2015. They knowingly chose to not join.⁴
- '056 Patent (CBM2015-00179):
 - **Waited Almost 3 Years to File.** TT filed its infringement complaints against CQG and IBG on February 3, 2010 and TradeStation on February 9, 2010. The CBM program was available to all of these parties on September 16, 2012. The petitioners filed CBM2015-00179 on September 2, 2015. Therefore, they waited almost 3 years (1081 days) to file a petition against this patent.
 - **Did Not Join TDA CBM Petition.** IBG, CQG, and TradeStation had the opportunity to join the substantially identical TD Ameritrade CBM petition against the '056 patent on May 19, 2014. They knowingly chose to not join.
- '556 patent (CBM2015-00172):
 - **Waited Almost 3 Full Years to File.** TT filed its infringement complaint against TradeStation on February 9, 2010. The CBM program was available to TradeStation on September 16, 2012. TradeStation filed CBM2015-00172 on August 10, 2015.

discretion to the Director. TT has copied petitioners' counsel on both this letter and the First Letter. Neither letter constitutes a replacement for TT's preliminary response in any proceeding. If necessary, TT intends exercise its statutory right to file preliminary responses to petitioners' various petitions. The preliminary responses may contain some of the arguments set forth in these letters as well as additional arguments that have not been raised in the letters that TT did not feel rise to the level of meriting Director attention at this time. Please advise us if you believe there is anything improper about TT sending these letters.

⁴ The PTAB denied institution of the CQG petitions finding that CQG is barred by its previously filed declaratory judgment action. CBM2015-00057, Paper 12 (P.T.A.B. July 10, 2015). Recently, the PTAB denied CQG's request for rehearing on this issue. CBM2015-00057, Paper 15 (P.T.A.B. Sept. 16, 2015).

Therefore, they waited almost 3 full years (1059 days) to file a petition against this patent. Neither IBG nor CQG joined this petition. While this is the first petition filed against the '556 patent, it is clear that TradeStation intentionally delayed in filing this petition. In addition, TradeStation and the other defendants successfully argued that the district court should stay the entire court proceedings (involving the '556 patent and ten additional patents) based on the 5 petitions filed by TD Ameritrade in May of 2014 by arguing that the 5 challenged patents “go to the heart of this case” and that the unchallenged patents “are in the same patent families” or are “technologically related.” Memorandum in Support for Motion to Stay, at 9, *Trading Techs. Int'l, Inc. v. BCG Partners, Inc.*, No. 1:10-cv-00715, Dkt. No. 546 (May 22, 2014) (Attachment I); TradeStation Joins Motion for Stay, *Trading Techs. Int'l, Inc. v. BCG Partners, Inc.*, No. 1:10-cv-00715, Dkt. No. 558 (June 11, 2014) (Attachment J).⁵

In addition to the above-identified new petitions, on the same day that CBM2015-00179 regarding the '056 patent was filed (September 2, 2015), an anonymous reexamination request was also filed against the '056 patent (Reexamination Control No. 90/013,578). The '056 reexamination request sets forth one of the prior art grounds asserted in the earlier TD Ameritrade petition (CBM2014-00131) and in the contemporaneously filed CBM2015-00179 petition.⁶ Also, the '056 reexamination request uses very similar language and many of the same exhibits and expert reports used in the petitions for CBM2014-00131 and CBM2015-00179. Given the similarity of the arguments and the fact that the '056 reexamination request was filed on the same day as the '056 CBM petition, TT submits that the '056 reexamination request is also part of the defendants' abusive strategies (prepared by one or more of the petitioners or an entity coordinating with them). For these reasons, TT also requests that you exercise your discretion under 35 U.S.C. § 325(d) and MPEP 2286.01 to terminate this reexamination proceeding.

It is also important to note that all of the grounds raised in the above-identified petitions and the '056 reexamination request, as well as the petition for CBM2015-00161 that was the subject of our First Letter, are grounds that have been known to the petitioners since the beginning of the litigation years ago—they do not contain any newly-discovered grounds that merit a post-grant review proceeding to challenge the patents.⁷

⁵ TT realized that it inadvertently did not attach several documents cited in its First Letter. Accordingly, the following documents from *Trading Techs. Int'l, Inc. v. BCG Partners, Inc.*, No. 1:10-cv-00715 (N.D. Ill.) are attached hereto: Dkt. No. 543, cited in footnote 11 of the First Letter, is attached as Attachment K; Dkt. No. 617, cited in footnote 13 of the First Letter, is attached as Attachment L. Also, Dkt. No. 876 from *Trading Techs. Int'l, Inc. v. CQG, Inc. et al.*, No. 1:05-cv-04811 (N.D. Ill.), which was cited in footnote 14 of the First letter, is attached as Attachment M.

⁶ The petition in CBM2015-00179 raises the same primary alleged prior art but also raises one additional secondary reference. However, the arguments are substantially the same.

⁷ There are additional reasons why petitioners' actions constitute abuse. For example, two of the new petitions (CBM2015-00181 and -00182) request that the patents be invalidated based on prior art grounds already considered by the USPTO. Importantly, petitioners know that the USPTO allowed the claims of these patents (multiple times in examinations, quality review and reexaminations) over closer and more relevant art than the art presented in the petitions. The petitioners also know, or should know, that the claims have been upheld after multiple litigation challenges based on that same closer and more relevant art that was considered by the USPTO. Yet, these petitions do not mention the history at the USPTO or in litigation (aside from merely acknowledging the fact that there was a reexamination). TT respectfully submits that (1) the fact that the petitions pursue lesser prior art grounds than what has already been considered and (2) petitioners' lack of transparency each independently justify a denial of institution. The post-grant review

THE PATENTS SUBJECT TO THE NEW PETITIONS ARE DIRECTED TO GUI TECHNOLOGY AND ARE CLEARLY NOT COVERED BUSINESS METHOD PATENTS

For the same reasons set forth in our First Letter, the patents attacked by the petitioners' latest round of CBM petitions are not within the jurisdictional scope of Section 18. The claims of each of these patents are directed to technology – particular structural and functional features of GUI tools. The claims are not directed to performing a business method or practice on a conventional computer or using a generic display. In fact, the claims are not directed to business methods or business practices in any way. Rather, they are directed to particular features of a GUI and the claims were found by the USPTO (multiple times) to be novel and non-obvious over other GUI prior art based on the claimed GUI features – not based on alleged innovations in the steps of a business process or practice.

A. The claims of the '132, '304 and '411 patents are directed to structural and functional technological features of a GUI tool, not to a business method or practice.

As an example, we will briefly address the particular claimed features of the '132, '304, and '411 patents, which are the subject of CBM2015-00182, -00161 and 00181 respectively. The '304 and '411 patents are continuations of the '132 patent and share the same specification. The independent claims of all three patents are directed to a combination of features of a GUI, an embodiment of which is shown in Figures 3 and 4 of the specification, reproduced below:

proceedings were touted as providing the advantage to patent owners of a “gold-plated” patent if the patent is ultimately upheld. This was based on the estoppel provisions and on the assumption that petitioners would bring their best arguments to the PTAB and not use the proceedings as petitioners are to seek delay, harass TT and seek a second “bite of the apple” on previously rejected arguments that are less relevant than what the USPTO already considered. By advancing only lesser grounds, the petitioners avoid any real consequence of the AIA’s estoppel provisions because estoppel only applies to the arguments in the petitions. The lesser prior art grounds of these petitions are throwaway arguments that would not be raised in the litigation. Indeed, in the recent trial regarding the '132/'304 patents, CQG did not even raise a prior art invalidity defense. In TT’s discussions with former Director Kappos before and after passage of the AIA, this issue was specifically discussed and it was agreed that tactics of raising lesser arguments would be improper and outside the spirit of the law. TT was informed that this concern was one of the reasons why the Director has discretion to deny institution of or terminate any post-grant review proceeding.

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