IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TRADING TECHNOLOGIES INTERNATIONAL, INC. Plaintiff, v. BCG PARTNERS, INC., Defendant.	Case No. 10 C 715 (Consolidated with: 10 C 718, 10 C 720, 10 C 721, 10 C 726, 10 C 882, 10 C 884, Judge Virginia M. Kendall Magistrate Geraldine S. Brown

SUPPLEMENTAL RESPONSE OF CERTAIN DEFENDANTS
TO TT'S EMERGENCY MOTION

This Court should grant TT's motion solely as it relates to the stay entered under the Leahy-Smith America Invents Act ("AIA"), Pub. L. No. 112-29, 125 Stat. 284, 329-31 (2011) and simultaneously enter a new stay under the Court's inherent and discretionary power to manage its docket.[1] *See Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 980 (7th Cir. 2005) (district courts possess the inherent power to control the disposition of cases on its docket; incidental to that power is the power to stay proceedings). Alternatively, the Court should take briefing on case management.[2]

[1] Defendants TradeStation Securities, Inc. & TradeStation Group, Inc., IBG LLC & Interactive Brokers LLC, and CQG, Inc. & CQGT, LLC ("Defendants") file this supplemental response under the Court's July 16, 2015 supplemental briefing schedule, which granted Defendants leave to file additional briefing in opposition to TT's emergency motion (Dkt. 604). Dkt. 610.

[2] If the Court is not inclined to consider a discretionary stay under its inherent powers at this time (and Defendants believe that there are ample grounds to do so), then Defendants reserve their right to move for a discretionary stay or a stay under the AIA as additional CBMR petitions are filed and/or instituted.

There are only two issues that need to be decided by this Court: (1) whether the consolidated case should remain stayed, and (2) if so, whether the current stay should be the mechanism for staying the case prospectively. Although Defendants assert that the case should remain stayed, the current stay likely should be dissolved under the AIA and a new stay implemented. (The law under the AIA is not well-developed, but Defendants do not contest that the dismissal of the TD Ameritrade covered business method review proceedings removed the original basis for the stay and the law currently requires an instituted proceeding for an AIA stay.)

The parties do not dispute the following relevant facts. TD Ameritrade filed and successfully obtained institution on four Covered Business Method Review ("CBMR") reexamination proceeding petitions with the U.S. Patent and Trademark Office's ("PTO") Patent Trial and Appeal Board ("PTAB") on May 19 and 20, 2014 regarding the validity of U.S. Patent Nos. 7,533,056 ("the '056 patent"), 7,685,055 ("the '055 patent"), 6,772,132 ("the '132 patent"), and 7,676,411 ("the '411 patent"). Dkt. 583 at 1-2. In instituting those CBMR petitions in December 2, 2014, the PTAB found that each of the patents were more likely than not invalid under 35 U.S.C. § 101, and in the case of the '056 and '055 patents, also invalid under § 103. *Id.* at 2. On March 25, 2015 this Court entered the current stay under Section 18(b)(1) of the AIA, finding that a stay "is most efficient for the parties, best conserves judicial resources, and avoids piecemeal litigation." *Id.* at 1-2, 4, 11; Jul. 16, 2015 Hr'g Tr. at 4:5-18 (J. Kendall). TT immediately appealed that decision under Section 18(b)(2) of the AIA. (Dkt. 585).

Despite the pending CBM proceedings and appeal, TT and TD Ameritrade settled earlier this month.[3] Dkt. 599 (joint stipulation of dismissal); Dkt. 601 (order of dismissal of TD Ameritrade action). As part of that settlement, TT and TD Ameritrade jointly moved the PTO to terminate the pending CBMR proceedings, Ex. A (Rule 28(j) letter) at Ex. 1, which was granted on July 7, 2015. *Id*. Thus, the statutory basis under which this Court had the authority to grant the March 25, 2015 stay under the AIA—i.e., the pendency of the TD Ameritrade CBMR proceedings—no longer exists. Dkt. 609 at 2; Dkt. 604 at 2.

However, TT should not be able to duck the trial at the PTAB to come back to this Court. Defendants are now filing new petitions. A petition on the '304 patent was filed today; more are coming forthwith.

I. The Court Should Terminate the Current Stay to Prevent TT from Needlessly Burdening the Federal Circuit with an Unnecessary Appeal.

Despite TT's suggestion that it requires emergency relief to address an urgent matter, its concerns are self-imposed. *See* Jul. 16, 2015 Hr'g Tr. at 5:18-20 ("[W]e don't want to drop the appeals, but we want to get whatever we need to get to the Federal Circuit as soon as possible."). Contrary to TT's cries of emergency, nothing prevents it from moving on its own to dismiss its interlocutory appeal. Indeed, the very case it trumpeted in the July 16, 2015 hearing in support of its motion, *Intel. Ventures II LLC v. JPMorgan Chase & Co.*, 781 F.3d 1372 (Fed. Cir. 2015), suggests that TT should have dismissed the appeal weeks ago, because the Federal Circuit was divested of statutory appellate jurisdiction without a pending CBMR proceeding. Jul. 16, 2015

[3] Contrary to TT's strawman, there is nothing nefarious about TT's settlement with TD Ameritrade. Rather, Defendants advised the Court that they were not privy to the TD Ameritrade settlement discussions simply to make clear that it was TT, not the Defendants, who waited 7 months, indeed just days before trial in each of TD Ameritrade's CBMR proceedings, to settle and avoid a final determination on the validity of patents that the PTO found more likely than not invalid.

Hr'g Tr. at 9:20-24 (recent Federal Circuit case interpreting Section 18 of the AIA); *Intel. Ventures II*, 781 F.3d at 1379 ("Absent the existence of a proceeding, jurisdiction is not conferred upon us by § 18(b)(2)."") (emphasis added); *see Super Sack Mfg. Corp. v. Chase Packaging Corp.*, 57 F.3d 1054, 1058-59 ("[A] patentee defending against an action for a declaratory judgment of invalidity can divest the trial court of jurisdiction over the case by filing a covenant not to assert the patent at issue against the putative infringer.").

Recognizing that the Federal Circuit expends tremendous time and effort preparing for oral argument, and cognizant that this Court has the inherent power to enter a new stay, *Tex. Indep. Producers*, 410 F.3d at 980, the sensible course of action here is to terminate the current stay and then, for the reasons set for the below, enter a new stay under the Court's inherent powers. By setting aside questions of statutory appellate jurisdiction and whether this Court's maintenance of the current stay under alternate grounds also moots TT's appeal, the Court may instead simply terminate the AIA-based stay, thereby forcing TT to dismiss its already moot appeal.[4]

II. The Court Should Enter a New Stay Under Its Inherent Power.

The Supreme Court, the Seventh Circuit, and Federal Circuit have long recognized that district courts have the inherent and discretionary power to manage their dockets by staying proceedings. *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of causes on its docket . . . . How this can best be done calls for the exercise of judgment, which must

[4] By terminating the current stay, not only would the Federal Circuit lack statutory appellate jurisdiction, but TT would also lack Article III standing without a redressable harm. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010) ("Standing under Article III of the Constitution requires that an injury be . . . redressable by a favorable ruling."); *see also* Ex. A at 1 (TT will withdraw appeal if AIA stay is lifted).

weigh competing interests and maintain an even balance."); *P&G v. Kraft Foods Global, Inc.*, 549 F.3d 842, 848-49 (Fed. Cir. 2008); *Tex. Indep. Producers*, 410 F.3d at 980 (7th Cir. 2004).

This inherent and discretionary power is independent of any statutory scheme and readily applies to stays pending conclusion of PTO reexaminations—including CBMR reexaminations—both before and after enactment of the AIA. Dkt. 583 at 3 (recognizing pre-AIA application of a three-factor stay test in the context of *inter partes* and *ex parte* PTO reexamination proceedings); *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1426-27 (Fed. Cir. 1988) ("Courts have inherent power to manage their dockets and stay proceedings, including the authority to order a stay pending conclusion of a PTO reexamination") (internal citations omitted); *Ignite USA, LLC v. Pac. Mkt. Int'l, LLC*, No. 14 C 856, 2014 U.S. Dist. LEXIS 73412 at *5 (N.D. Ill. May 29, 2014)[5] (applying three-factor stay test to determine whether to stay the case pending post-AIA *inter partes* review reexamination at the PTO under Court's inherent power to manage docket); *P&G*, 549 F.3d at 849 (inherent power to stay is distinct from any statutory scheme authorizing a stay pending PTO reexamination proceedings); *VirtualAgility, Inc. v. Salesforce.com*, 759 F.3d 1307, 1316 (Fed. Cir. 2014) (acknowledging that a motion to stay could be granted [under a court's inherent powers] even before the PTAB rules on a [CBMR] post-grant review petition . . . ."); *Intel. Ventures II*, 781 F.3d at 1379 (acknowledging court's ability to issues a stay in view of a CBMR petition under its inherent authority).

Regardless of the type of PTO reexamination requested or instituted—i.e., whether the proceeding is a pre-AIA *inter partes* or *ex parte* reexamination or post-AIA CBMR, *inter partes*, or post grant review reexamination proceeding—courts in this district consider the same three-factor test when deciding to stay an action pending a requested or already instituted

[5] Copies of unpublished decisions cited in this supplemental response are included in Exhibit F.

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