

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

_____ )	
TRADING TECHNOLOGIES )	Case No. 10 C 715
INTERNATIONAL, INC. )	<b>(Consolidated with:</b>
)	10 C 716, 10 C 718,
Plaintiff, )	10 C 720, 10 C 721,
)	10 C 726, 10 C 882,
v. )	10 C 883, 10 C 884,
)	10 C 885, 10 C 929,
BCG PARTNERS, INC. )	10 C 931)
)	
Defendant. )	Judge Virginia M. Kendall
_____ )	

**REPLY MEMORANDUM IN SUPPORT OF THE IBG DEFENDANTS'  
MOTION TO STAY PROCEEDINGS PURSUANT TO SECTION 18(b)  
OF THE AMERICA INVENTS ACT**

Defendants IBG LLC and Interactive Brokers LLC (collectively, “IBG”) submit this short brief in further support of its motion to stay these consolidated cases pending the outcome of TD Ameritrade’s petitions for CBM Review and in response to TT’s opposition brief. IBG has affirmatively requested that its case, Case No. 1:10-cv-00721, be stayed for all the reasons set forth by TD Ameritrade. Dkt. No. 546. For those same reasons, it would be most efficient to stay *all* the consolidated cases. IBG notes that at least TradeStation affirmatively supports this (Dkt. No. 558) and none of the other defendants object to the requested stay.

TT’s arguments against a stay are not persuasive for the reasons TD Ameritrade articulated in its reply brief (Dkt. No. 561), and IBG incorporates them here. In addition, TT’s argument that this Court should deny defendants a stay because the non-petitioning defendants (*i.e.*, all defendants other than TD Ameritrade) have not affirmatively agreed to be bound by estoppel (Opp. at 11) should be rejected. TT’s argument is contrary to the plain language of the statute, is contrary to the legislative history, would have little practical benefit, and has been rejected by Courts in post-AIA decisions.

First, the statute clearly applies estoppel to only CBM “*petitioners*” (like TD Ameritrade)<sup>1</sup> but allows any “*party*” to request a stay. *Compare* AIA § 18(a)(1)(D) (“The *petitioner* . . . may not assert . . . that the claim is invalid on any ground that the petitioner raised during that transitional proceeding” (emphasis added)), *with* AIA § 18(b)(1) (“If a *party* seeks a stay of a civil action . . . .” (emphasis added)). Congress could have extended estoppel to any party moving for a stay, but did not.

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<sup>1</sup> IBG did not participate in the preparation or filing of the CBM petitions and is not participating in the review process at the USPTO. In fact, the other defendants were not informed of TD Ameritrade’s intention to file CBM petitions until just a few days before TD Ameritrade informed TT of its intentions.

Second, in adopting the four-factor test, Congress specifically intended that courts consider those four factors exclusively and *not consider whether the movant has agreed to be bound by an extra-statutory estoppel*:

By adopting this four-factor test, rather than one of the three-factor tests used by other courts, *the amendment also precludes the use of additional factors that are not codified* here and that have occasionally been used by some district courts. For example, a few courts have occasionally employed a different de facto fourth factor: whether the challenger offers ‘to forego invalidity arguments based on prior art patents and/or printed publications considered during an ex parte reexamination process.’ The proceeding authorized by this amendment, at subsection (b)(1)(D), sets its own standard for determining what issues may still be raised in civil litigation if a patent survives PTO review. *By codifying the exclusive set of factors that courts are to consider when granting stays, the amendment precludes courts from inventing new factors such as extra-statutory estoppel tests.*

See Dkt. No. 546-5 (emphasis added) (Ex. E, 157 Cong. Rec. S1364 (daily ed. Mar. 8, 2011) (statement of Sen. Schumer)). Thus, this Court should not, as TT urges, consider whether any defendant would or would not agree to an extra-statutory estoppel in deciding whether to grant a stay.

Third, practically speaking, it is unlikely that other defendants will re-raise an argument rejected by a final decision of the PTAB. If they do, TT has the PTAB’s determination in its favor. Thus, the risk of “re-litigation” of the CBM grounds is unrealistic. Moreover, while the benefits to be gained from a stay are real and many, requiring all defendants to agree to estoppel gains little, only the elimination of the exact grounds raised in the CBM petitions.

Fourth, TT erroneously relies in its opposition upon a pre-AIA case (*i.e.*, cases pre-enactment of the exclusive four-factor test) in support of its estoppel argument.<sup>2</sup> Such cases are

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<sup>2</sup> See *Tesco Corp. v. Weatherford Int’l, Inc.*, 599 F. Supp. 2d 848 (S.D. Tex. 2009). While TT also relies upon *Credit Acceptance Corp. v. Westlake Services, LLC*, No. CV 13-01523 SJO (MRNx), 2013 WL 7144391, at \*3 (C.D. Cal. Dec. 30, 2013) which is post-AIA, the court did

irrelevant. By contrast, in the AIA proceedings context, Courts have rejected TT's argument and found that there are benefits to be gained from a stay absent any estoppel. *See Intellectual Ventures II LLC v. Huntington Bancshares Inc.*, No. 2:13-CV-00785, 2014 WL 2589420, at \*4 (S.D. Ohio June 10, 2014) (rejecting a proposal to condition a stay on the defendants' agreement to be estopped); *Pi-Net Int'l, Inc. v. Hertz Corp.*, Nos. CV 12-10012, CV 12-4270, CV 12-4036, 2013 WL 7158011, at \*4 (C.D. Cal. June 5, 2013) (simplification factor weighing in favor of a stay despite the defendant not being bound by estoppel effects); *e-Watch, Inc. v. ACTi Corp.*, No. SA-12-CA-695-FB, 2013 WL 6334372, at \*7 (W.D. Tex. Aug. 9, 2013), *adopted by* 2013 WL 6334304, at \*1 (W.D. Tex. Aug. 26, 2013).

Today, TT filed as a "Notice of Filing Supplemental Authority" additional argument regarding estoppel.<sup>3</sup> Dkt. No. 560. Neither case TT relies upon supports its argument that the Court should deny a stay because there is no extra-statutory estoppel applicable to the non-petitioning defendants (like IBG). Both cases TT submits concern *inter partes* review – not CBM Review. *See* Dkt. Nos. 560-1 & 2. Thus, neither court considered the express legislative history described above that says that Courts should not consider extra-statutory estoppel in considering whether to grant a stay in CBM cases. *See* Dkt. No. 546-5 (Ex. E, 157 Cong. Rec. S1364 (daily ed. Mar. 8, 2011) (statement of Sen. Schumer)). TT's "Supplemental Authority" is inapposite.

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not address whether extra-statutory estoppel should apply (or whether a lack of estoppel should preclude a stay) because there was no dispute regarding estoppel.

<sup>3</sup> IBG notes that TT could have included at least one of the cases it newly relies upon in its opposition but did not. TT also waited an entire week to make this submission – until mid-day on the deadline for IBG's reply brief. TT's submission is untimely. Further, TT's submission is improper because it does not merely submit the allegedly new authority but includes additional argument. TT's untimely and improper submission should be stricken.

Accordingly, TT's argument that this Court should deny a stay unless all defendants agree to an extra-statutory estoppel should be rejected. For the foregoing reasons, and for the reasons set forth in support of TD Ameritrade's Motion to Stay (Dkt. No. 546) and TD Ameritrade's Reply (Dkt. No. 561), IBG respectfully requests that the Court stay IBG's case and all the consolidated cases pending the outcome of TD Ameritrade's petitions for CBM Review.

Dated: June 18, 2014

Respectfully submitted,

/s/ Natalie J. Morgan

Michael Brett Levin  
Wilson Sonsini Goodrich & Rosati  
650 Page Mill Road  
Palo Alto, CA 94304  
(650) 493-9300

Natalie J. Morgan  
Wilson Sonsini Goodrich & Rosati  
12235 El Camino Real, Suite 200  
San Diego, CA 92130  
(858) 350-2300

Steven P. Mandell (ARDC No. 6183729)  
MANDELL MENKES LLC  
One North Franklin St., Suite 3600  
Chicago, Illinois 60606  
Telephone: (312) 251-1000  
Facsimile: (312) 251-1010

*Attorneys for Defendants IBG LLC and Interactive  
Brokers LLC*

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