

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

IBG LLC, INTERACTIVE BROKERS LLC, TRADESTATION GROUP,
INC., TRADESTATION SECURITIES, INC., TRADESTATION
TECHNOLOGIES, INC., AND IBFX, INC.,
Petitioner,

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.,
Patent Owner.

Case CBM2015-00181
Patent No. 7,676,411 B2

Before SALLY C. MEDLEY, MEREDITH C. PETRAVICK, and
JEREMY M. PLENZLER, *Administrative Patent Judges*.

PLENZLER, *Administrative Patent Judge*.

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

Patent Owner filed a motion for additional discovery on November 19, 2015 (Paper 16, “Mot.”), and Petitioner filed an opposition to the motion on November 27, 2015 (Paper 19, “Opp.”). Patent Owner filed a reply on December 3, 2015. Paper 21, (“Reply”). Patent Owner 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.¹ Patent Owner argues that CQG is an unnamed RPI because CQG allegedly prepared the petition in this proceeding. *See* Mot. 1.

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 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. 37 C.F.R. §§ 42.51(b)(2), 42.224. 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

¹ Section 322(a) of Title 35 of the United States Code provides that a petition for post grant review under 35 U.S.C. § 321 may be considered only if, among other things, the petition identifies all real parties-in-interest. 35 U.S.C. § 322(a)(2).

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.

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.* “[T]he 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 that CQG prepared the petition for this proceeding. *See* Mot. 4–6. Patent Owner argues that this information is useful because it will establish that CQG is an RPI. *Id.* at 4, 6–8. Whether a non-identified party is a real party-in-interest to a proceeding is a highly fact-dependent question. *Office Patent Trial Practice Guide*, 77 Fed. Reg. 48,756, 48,759 (Aug. 14, 2012) (“Trial Practice Guide”) (citing *Taylor v. Sturgell*, 553 U.S. 880 (2008)). “A common consideration is whether the non-party exercised or could have exercised control over a party's participation in a proceeding.” *Trial Practice Guide*, 77 Fed. Reg. at

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48,759 (citing *Taylor*, 553 U.S. at 895). “The concept of control generally means that ‘it should be enough that the nonparty has the actual measure of control or opportunity to control that might reasonably be expected between two formal coparties.’” *Id.* (quoting Charles Wright, et al., 18A Federal Practice & Procedure §§ 4449, 4451 (2d ed. 2011))

Patent Owner contends that Petitioner and CQG acknowledge that CQG prepared the petition for this proceeding. Mot. at 4–6. To support its contentions, Patent Owner relies on statements made in the related district court proceeding. *Id.* These statements 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

Defendants have already advised the Court that they “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 [including those] which were on the cusp of trial [before the PTAB].” For CQG’s part, it is preparing to file CBMR petitions on the ’411, ’374, ’768, and ’724 patents in the next several weeks.

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(Ex. 2003, 8). Based on these statements, Patent Owner contends that “Petitioners and CQG admitted to the district court that CQG prepared, or at least assisted with preparing, the petition for the ’411 patent.” Mot. 5.

Petitioner argues that Patent Owner has not shown more than a mere possibility that something useful will be discovered. Opp. 5–10. In response, Patent Owner contends that “Petitioners do not deny cooperation, aid, or labor division with CQG.” Reply 1. We read Petitioner’s Opposition, however, as affirmatively representing that CQG did not control or have the opportunity to control this proceeding. *See* Opp. 2 (“[Patent Owner] twists and contorts these two statements to create the false impression that CQG participated as an RPI in the present proceeding.”). Petitioner notes that it was “diligent in properly naming all RPIs in this proceeding, and took pains to avoid creating a factual basis for the suggestion that CQG had any control over the content of this petition, or the decision to file it.” *Id.* at 7–8. We have no reason to question Petitioner’s representation of CQG’s lack of involvement. *See* 37 C.F.R. § 42.11 (“Parties and individuals involved in the proceeding have a duty of candor and good faith to the Office during the course of a proceeding.”). And as pointed out by Petitioner, nothing of record persuasively contradicts that representation. In particular, CQG’s statement made in the related district court proceeding that “it” was preparing to file a petition on the involved patent does not mean that that petition was used by Petitioners in any way for this proceeding, or that CQG controlled or had opportunity to control the instant proceeding.

As a result, Patent Owner’s evidence and reasoning do not tend to show that discovery will produce communications between Petitioner and

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