

Paper No. ____
Filed: August 16, 2016

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.

Petitioners

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.

Patent Owner

Case CBM2015-00181
U.S. Patent 7,676,411

**PATENT OWNER'S MOTION TO SUBMIT SUPPLEMENTAL
INFORMATION AND BRIEFING UNDER 37 C.F.R. § 42.223(b)**

Patent Owner (“TT”) moves to submit supplemental information and briefing under 37 C.F.R. § 42.223(b), as authorized by the Board. Paper 91.¹

Although TT has been trying to submit this information for months, Petitioners have objected due to the district court protective order (“PO”) under which the information was produced. Because Petitioners only recently withdrew their PO objections, TT could not have provided this information earlier.

It is in the interests of justice for TT to be permitted to submit supplemental information and briefing because Petitioners’ documents and testimony directly support TT’s positions on non-obviousness and patent eligibility, while contradicting the position of Petitioners and their experts. Petitioners’ experts falsely claim that GUIs are not technological in nature, GUIs are not functional and instead are merely an arrangement of known elements on a computer screen that have no purpose beyond aesthetics, and that there is no inventive concept disclosed and claimed in TT’s patents. And yet, evidence from Petitioners’ files tells a

¹ Pursuant to the Board’s order, TT has only summarized the supplemental information without directly filing them and interprets the Board’s order to preclude quoting from the documents as well. However, the language of the documents strongly supports TT’s position and TT would welcome the opportunity to submit quotes, excerpts, and the documents themselves.

different story. There is no burden or prejudice to Petitioners that will result from TT submitting such information as they may address it in their Reply due September 9, 2016. Thus, TT seeks to submit the documents described below along with a 10-page supplemental brief.

I. THE INFORMATION REASONABLY COULD NOT HAVE BEEN SUBMITTED EARLIER DUE TO PETITIONERS' REPEATED CONFIDENTIALITY OBJECTIONS AND THE TIMING OF RECEIPT OF THE INFORMATION

TT could not have reasonably submitted the information it seeks to supplement the record with earlier. *See* 37 C.F.R. § 42.223(b). First, TT did not receive all of the documents, testimony, or authentication of the evidence until the second week of June, after TradeStation (“TS”) and IB depositions from June 8-13, 2016. *See infra* § II. Thus, the earliest TT could have possibly submitted this body of evidence (if not for Petitioners’ PO objections) was after those depositions.

Second, TT could not submit this information in its Patent Owner Responses (“PORs”) due two weeks later because Petitioners have continuously, and strategically objected to TT’s reliance or filing of any of Petitioners’ confidential information based on the fact that Petitioners produced such information under the district court’s PO², and not the PTAB’s. Indeed, TT has acted diligently from even

² Petitioners have objected based the district court PO that provides that confidential information “shall not be used for any purpose other than in this

before the date discovery was completed (June 13) to make this evidence of record, engaging Petitioners numerous times to try to resolve the PO issues to use the documents produced in the litigation in the PTAB. For example, in early May, TT requested that Petitioners produce this information in the PTAB proceedings under the default PO (*see* Ex. 2395), but Petitioners refused this streamlining, demanding TT instead seek the information as Additional Discovery (*see* Ex. 2396).

In late May, TT's litigation counsel again requested that Petitioners agree that TT could use the information at the PTAB notwithstanding the PO, but Petitioners again objected, delaying weeks to confer on this point. Ex. 2397. TT's PTAB counsel repeated its request to Petitioners' PTAB counsel on May 31 (Ex. 2398), and held conferrals on June 2 (Ex. 2399 at 1-3) and June 7 (Ex. 2400). The disagreement culminated with the Board call on June 13, where Petitioners admitted that "documents that are merely proprietary to [TS] could be reproduced separate from the litigation without violating that protective order." Ex. 2140, 18:22-19:9. The Board authorized TT to file a Motion for Additional Discovery by June 15, but Petitioners' objections based on the PO still stood in the way of TT filing or referencing Petitioners' information in that motion.

Proceeding." Ex. 2407, ¶11. The PO was entered more than a year before enactment of the AIA creating CBM and IPR proceedings, and the PTAB itself.

As such, TT filed an emergency motion with the district court, noticed for June 15, seeking permission to bring such documents to the Board's attention. On June 14, Petitioners reached out to TT and offered to "moot" TT's district court motion (*see* Ex. 2401) and later agreed that TT could reference and file a representative sample of the documents in its Motion. TT agreed to the proposal and withdrew its district court motion. However, this Board denied TT's motion for Additional Discovery on Friday, June 24. As TT's PORs were due the following Monday, on June 27, there was no time for TT to seek relief from the district court prior to filing the PORs.

On July 1, TT sought relief from the district court PO to file the materials in an offer of proof before the PTAB. The district court granted the motion on July 7, stating that the basis was "because the PTAB has to have all material, relevant information, to make its determination. And to have all of this relevant information that I've deemed to be appropriate in this litigation and not have it in front of them doesn't move the proceeding" Ex. 2402, 13:17-21.

TT requested a call with the Board on July 8 to seek authorization to file an offer of proof. The Board held the call on July 15 and on July 19, the Board denied TT's request but suggested that TT seek supplemental information and briefing at this stage of the proceeding. Paper 82 at 6.

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