Paper No. _____
Filed: August 24, 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.

Petitioner

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.

Patent Owner

_____

Case CBM2015-00182
U.S. Patent 6,772,132

_____

PATENT OWNER'S REPLY IN SUPPORT OF ITS MOTION TO SUBMIT SUPPLEMENTAL INFORMATION AND BRIEFING UNDER 37 C.F.R. § 42.223(b)

Petitioners' opposition makes clear that they erected their objections to TT's use of the requested information under the district court PO simply as a roadblock. Rewarding such tactics would not serve the interests of justice. Instead, the interests of justice support allowing TT to submit these documents and briefing because the information supports TT's positions on patent eligibility and nonobviousness, and is the most credible evidence from Petitioners.

I. TT Was Not In A Position To Submit The Information Earlier

TT was in no position to use this information before June 2016. TT did not have most of the information (6/8/16 and 6/9/16 Bartleman transcripts, 6/13/16 Galik Transcript, Exhibits 2156, 2158, PDX 3046) before May/June of 2016. These documents were produced as a direct result of the district court's order that certain discovery be completed for potential use in the PTAB. Ex. 2142.

The three documents TT's litigation counsel received at the end of 2015, (Exhibits 2143-2145) were produced by TS within over a hundred thousand pages of documents in the November/December 2015 time frame, which took months to cull to the relevant documents. Regardless, these documents were not authenticated until the depositions in June of 2016. And TT had no testimony on any of them, including PDX 3043 (TT webpage evidencing copying) until the June depositions.

Thus, TT could not have gone to the district court with a list of what it sought to use in its Patent Owners Response ("POR") until mid-June, when TT did

just that. TT indeed withdrew its district court motion after Petitioners offered to "moot" it, but there was no obligation by TT to proceed on the same issue in two forums simultaneously (or in the district court first), and Petitioners' "contrary" cases do not establish otherwise. For instance, the dispute in *Meyer* was whether Patent Owners' could file a motion for additional discovery without violating the PO (absent Petitioners' consent to discuss the documents therein, which TT had here). Likewise, both *Daifuku* and *Electronic Frontier* addressed whether litigation counsel could disclose confidential information to PTAB counsel under the litigation PO. Here, TT has always shared at least one litigation and PTAB counsel (Mr. Borsand) and thus there have never been such issues. Further, these non-precedential decisions contrast with other panels' holdings that a district court PO does not bar the PTAB from ordering production. *Cf. Chevron N. America, Inc. v. Milwaukee Elec. Tool Corp.*, IPR 2015-00595, Paper 31, at 4 (Oct. 30, 2015); *Brunswick Corp. v. Cobalt Boats, LLC*, IPR2015-01060, Paper 20 (Dec. 28, 2015).

Petitioners' opposition still provides no basis for their objections, but notes that they "reasonably exercised their right" under the PO." Paper 88, at 4. This shows that Petitioners have never been concerned about any alleged sensitivity of the information, but needlessly blocked TT's use to gain a strategic advantage. The record demonstrates TT's diligent efforts to try to resolve the dispute without burdening this Board or the district court. For example, TT requested that TS

approve of TT's reliance on Exhibit 2144 (Matrix Requirements) on May 26, 2016, but TS refused to evaluate the request or confer until weeks later at the Bartleman depositions. Ex. 2397. On June 3, TT also sent a list of specific documents it sought to use (*see* Ex. 2399) and elaborated on how it would use the documents on June 8 (Ex. 2400). TT could not have relied on the information in this proceeding until the PO objections were resolved, which they now are.

II. The Interests Of Justice Support That TT Be Able To Submit This Information and Supplemental Briefing

The interests of justice dictate that this information be submitted and briefed as it strongly supports objective indicia and patent eligibility. While Petitioners argue that it is disputed whether MD_Trader embodies the claimed invention, this is not the case. The Federal Circuit recognized MD_Trader's embodiment by the claimed invention, and TT's POR provides claim charts from its expert, Chris Thomas, mapping the independent claims to MD_Trader. Ex. 2233; *see also* Ex. 2169B, at ¶¶ 108-114 (further explaining how MD_Trader is embodied).

Petitioners' argument that TT is changing its theory midstream by arguing that Matrix and Booktrader are commercial embodiments of the claimed inventions similarly fails. TT's POR shows widespread adoption of the invention by competitors (Paper 66, at 46) and provided Mr. Thomas's claim charts mapping the claimed features to the Matrix and Booktrader products. Ex. 2233. Further, Mr. Thomas also explained public evidence of copying by Matrix. *Id.* at ¶¶ 115-121.

Such evidence detailing copying and commercial success of products that embody the claimed invention is highly relevant to secondary considerations of nonobviousness. *Gambro Lundia AB v. Baxter Healthcare Corp.*, 110 F.3d 1573, 1579 (Fed. Cir. 1997) (finding commercial success and touting of advantages of infringing product, along with prominence of patented technology in ads "require[d] a holding of nonobviousness."); *see Brown & Williamson Tobacco Corp. v. Philip Morris Inc.*, 229 F.3d 1120, 1130 (Fed. Cir. 2000) (success of an infringing product is evidence of "commercial success of the claimed invention").

Petitioners also claim that TT has not shown a nexus between commercial success, copying, and the claimed features. This is not the case as detailed below and may also be inferred from the evidence. *See Brown*, 229 F.3d at 1130 (inferring nexus between claims and commercial success due to the "prominence of the patented technology in [the infringer's] advertising").

There is no prejudice or burden to Petitioners. TT's proposed supplemental arguments do not take Petitioners by surprise: TT extensively identified relevant portions of the information along with its argument.

A. Bartleman Transcripts, Exhibits 2144 and PDX 3043

Mr. Bartleman's testimony as TS's CEO and former head of Product Management for the Matrix product contradicts Petitioners' position that the claimed invention is not technological, but abstract. Further, when Bartleman's

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.