

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

IBG LLC and INTERACTIVE BROKERS LLC,
Petitioner,

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC,
Patent Owner.

CBM2016-00009
Patent 7,685,055 B2

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

PETRAVICK, *Administrative Patent Judge*.

ORDER

*Denying Authorization to file
Supplemental Authority and to file a Motion to Strike
37 C.F.R. § 42.20 (b)*

On December 14, 2016, a conference call was held between counsel for the parties and Judges Medley, Petravick, and Plenzler. A transcript of the call appears in the record. Ex. 2343. Patent Owner requested the call to

seek authorization to file supplemental submissions and authorization to file a motion to strike. For the reasons below, Patent Owner's requests are denied.

Supplemental Submissions

Patent Owner requested authorization to file additional submissions explaining the relevance of the following decisions that issued after the Patent Owner's Response was filed on July 21, 2016: *In re Nuvasive, Inc.*, No. 2015-1670 (Fed. Cir. Dec. 7, 2016); *GoPRo, Inc. v. Contour IP Holding LLC*, IPR2015-01080, Paper 55, 18–28 (PTAB Oct. 26, 2016); *Apple Inc. v. Samsung Elecs. Co.*, 839 F.3d 1034 (Fed. Cir. Oct. 7, 2016); *Arendi S.A.R.L. v. Apple Inc.*, 832 F.3d 1355 (Fed. Cir. Aug. 10, 2016); *Amdocs (Israel) Ltd. v. Openet Telecom, Inc.*, No. 2015-1180 (Fed. Cir. Nov. 1, 2016); and *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299 (Fed. Cir. Sept. 13, 2016). Ex. 3005, 3–4. Petitioner opposed Patent Owner's request.

Patent Owner's request is denied. As the movant, Patent Owner has the burden of proof of establishing that it is entitled to the relief requested. 37 C.F.R. § 42.20(c). Based upon the information presented during the call (*see* Ex. 2343), we determine that Patent Owner did not establish good cause to file the additional submissions. Patent Owner did not sufficiently explain why these decisions add some more than what was already discussed in its substantive papers. For example, Patent Owner indicated that *GoPRo, Inc.*, a non-precedential, non-binding Board decision, relates to the meaning of printed publication under 35 U.S.C. § 102(b). In *GoPRo, Inc.*, the Board applied the standard for determining whether a prior art is a printed publication enunciated in *Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 1348 (Fed. Cir. 2016). IPR2015-01080, Paper 55, 21. The Patent

Owner's Response already addresses the standard from *Blue Calypso*. Paper 32, 44.

In as much as Patent Owner's request was an attempt to make the Board aware of these decision, we see no harm in making the decisions of record. The Board is generally aware of decisions issued by it and the Federal Circuit. Per this order, the decisions are made of record.

Motion to Strike

On November 11, 2015, Patent Owner requested authorization to file a motion to strike Petitioner's Reply (Paper 42) because it allegedly raises new arguments for the first time. Ex. 3006, 1–2. At that time, the Board authorized Patent Owner to file a listing identifying the portions of the Reply that allegedly raise new arguments and authorized Petitioner to file a listing identifying where the alleged new arguments were first raised in the record. *Id.* at 1. The listings appear in the record as Papers 44 and 48.

On December 14, 2016, Patent Owner again requested authorization to file a motion to strike, arguing that cross examination testimony of David Rho indicated that the Reply and the supporting Declaration of Mr. Rho contained new arguments. Ex. 3005, 2. Petitioner denied that Mr. Rho's testimony indicated such and opposed Patent Owner's request. *Id.* at 1.

Patent Owner's request to file a motion to strike is denied. Pursuant to 37 C.F.R. § 42.23(b), the Reply may only respond to arguments raised in the Patent Owner Response. The Board is capable of determining for itself whether the Reply complies with this rule. When making the final decision, we will consider the listings filed by the parties. Arguments that we determine fail to comply with Rule 42.23(b) will not be considered.

During the December 14, 2016 conference call, Patent Owner requested authorization to file briefing to address the alleged new arguments should Patent Owner's request to file a motion to strike be denied. Ex. 2343, 19:24–21:10. Patent Owner's request to file additional briefing (i.e., a sur-reply) is denied. If we determine that the Reply contains new arguments, then those arguments will not be considered. There is no need for a sur-reply to address arguments that are not considered. If we determine that the Reply does not contain new argument, then Patent Owner had opportunity to address the arguments in the Patent Owner's Response. Patent Owner has not established good cause to file a sur-reply.

Additional Matter

On December 21, 2016, via email, Petitioner and Patent Owner jointly requested that the Board waive the requirement of 37 C.F.R. § 42.70(b) that the parties serve demonstratives at least seven business days before the hearing — here, December 27, 2016. The parties requested that the Board allow service of demonstratives on December 29, 2016 because of the short time period until the hearing and intervening holidays. Ex. 3007. Via reply email, the Board granted the parties' request. *Id.*

It is:

ORDERED that Patent Owner's request for authorization to file additional submissions explaining the relevance of the above decisions is denied;

FURTHER ORDERED that Patent Owner's request for authorization to file a motion to strike is denied; and

CBM2016-00009
Patent 7,685,055 B2

FURTHER ORDERED that Patent Owner's request for authorization to file a sur-reply to address alleged new arguments in the Petitioner's Reply is denied.

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