

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PETROLEUM GEO-SERVICES INC.

Petitioner,

v.

WESTERNGECO L.L.C.

Patent Owner.

Case IPR2014-01477

U.S. Patent No. 7,080,607

**PATENT OWNER'S REQUEST FOR REHEARING
UNDER 37 C.F.R. § 42.71¹**

¹ Patent Owner's Request for Rehearing is based upon the Board's Order entered as Paper No. 60 in IPR2014-00688. Paper No. 60 states that a copy of the Board's Order is to be filed in "the second group of PGS proceedings," which includes the instant proceeding, IPR2014-01477. Accordingly, Patent Owner has filed its Rehearing Request regarding Paper No. 60 in IPR2014-00688 in this proceeding as well. The Rehearing Requests are substantively identical between proceedings; however, Patent Owner has revised portions of the text to reflect that Petroleum Geo-Services Inc. is the only Petitioner in this proceeding, and to accurately cite the evidence relied upon in this request.

Pursuant to 37 C.F.R. § 42.71(d), Patent Owner, WesternGeco L.L.C. (“Patent Owner” or “WesternGeco”), requests rehearing of the Board’s Order (1) denying Patent Owner’s request to file a Motion for Additional Discovery on the subjects of privity and real party-in-interest (“RPI”) as they relate to the relationship between ION Geophysical Corporation and ION International S.A.R.L. (collectively, “ION”) and Petroleum Geo-Services Inc. (“PGS” or “Petitioner”); and (2) setting unequal time limits for petition and reply declaration testimony. Paper No. 29.

I. INTRODUCTION

The opportunity to be heard before forfeiting one’s property is a fundamental right. *See* U.S. CONST. amend. V; amend. XIV § 1. Here, the Board deprives Patent Owner of this fundamental right by refusing to allow it to file a motion for additional discovery on privity between ION and PGS. The focused question of Petitioner’s relationship with ION—which it concedes is broader than what it has disclosed—is potentially dispositive of the entire proceeding. Yet, the Board refuses to even hear Patent Owners’ motion to expose this hidden relationship.

If Petitioner and ION are in privity, or if ION is a RPI to PGS, this review must terminate immediately. It is therefore not surprising that ION and PGS have worked to prevent the disclosure of this information, which is in their sole

possession and otherwise unavailable to Patent Owner. PGS has produced one indemnification agreement between ION and PGS (IPR2014-00688, Ex. 2069)—which ION denies even exists—while publicly conceding that *multiple* indemnification agreements exist. *See* Ex. 2018 at 14. Thus, the existence of additional indemnification agreements is not mere speculation. Despite this, the Board refuses to authorize Patent Owner to file a motion seeking additional discovery on (1) all agreements between PGS and ION containing any warranty, indemnification, or intellectual property defense provisions; and (2) other relevant communications.² *See* Paper No. 29; *see also* Paper No. 10. As strong evidence exists to support Patent Owner’s request to move for additional discovery, Patent Owner respectfully requests that the Board allow its motion to be heard.

Accordingly, Patent Owner respectfully requests that this Board (1) vacate the Order and (2) authorize Patent Owner to file a Motion for Additional Discovery on the subjects of privity and RPI.

II. LEGAL STANDARD

“A party dissatisfied with a decision may file a request for rehearing, without prior authorization from the Board.” 37 C.F.R. § 42.71(d). “The request must specifically identify all matters the party believes the Board misapprehended

² *See infra* at § V.

or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.” *Id.*

Under 37 C.F.R. § 42.71(c), “[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” An abuse of discretion “occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors.” *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *see also Japanese Found. For Cancer Research v. Lee*, 773 F.3d 1300, 1304 (Fed. Cir. 2014) (“An agency abuses its discretion where the decision is based on an erroneous interpretation of the law.”) (internal quotations omitted).

III. THE BOARD’S DENIAL OF PATENT OWNER’S REQUEST TO FILE A MOTION FOR ADDITIONAL DISCOVERY VIOLATES PATENT OWNER’S DUE PROCESS RIGHTS AND CONSTITUTES AN ABUSE OF DISCRETION

The Board’s Order denies Patent Owner authorization to file a Motion for Additional Discovery based on a standard that is impossible to meet. It is undisputed that new privity-related evidence exists that is within Petitioner’s control, and that Petitioner refuses to voluntarily produce it. Nevertheless, the Board denied discovery of this new evidence because Patent Owner had “no new evidence” to present. Paper No. 29 at 3. The Board thus sets up an impossible, deadlock situation: it refuses additional discovery because Patent Owner cannot

present the “new evidence” that Petitioner and ION are withholding. Where case-dispositive evidence exists and is uniquely within the control of Petitioner, the interests of justice dictate that such discovery should be allowed. *See Garmin Int’l, Inc. et al. v. Cuzzo Speed Techs LLC*, IPR2012-00001 Paper No. 26 at 5-7 (Mar. 5, 2013) (considering whether something “favorable to a contention of the party moving for discovery” will be discovered and whether the requester has the ability to generate the requested information from other means as part of the interests of justice standard analysis).

A. The Board’s Denial Violates Patent Owner’s Due Process Rights

The Board’s Order did not simply deny discovery on agreements and communications from Petitioner that would establish privity. The Board’s Order bars Patent Owner from even filing a Motion to request such discovery. This discovery is necessary in the interests of justice, and the Board’s denial of an opportunity to be heard on this issue deprives Patent Owner of the chance to adequately defend its rights in U.S. Patent No. 7,080,607 (“the ’607 patent”).

ION was sued for infringing the ’607 patent in 2009 with its DigiFIN system. PGS—ION’s “launch partner” for DigiFIN from 2007 to present—did not bring this action until the spring of 2014. Section 315(b) establishes, however, that “[a]n inter partes review may not be instituted if the petition requesting the proceeding is filed *more than 1 year after* the date on which the petitioner, real

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