No. 2016-0120

In the
United States Court of Appeals
for the Federal Circuit

In re: TRADING TECHNOLOGIES INTERNATIONAL, INC.,

Petitioner.

On Petition for a Writ of Mandamus to the United States Patent and Trademark Office, Patent Trial and Appeal Board.
Case No. CBM2015-00161.

BRIEF OF *AMICUS CURIAE* SMALL BUSINESS TECHNOLOGY COUNCIL IN SUPPORT OF PETITIONER

Barry F. Irwin, P.C.
Irwin IP LLC
1333 Burr Ridge Parkway, Suite 200
Burr Ridge, IL 60527
Phone: 630.756.3101

Counsel of Record for Amicus Curiae Small Business Technology Council

CERTIFICATE OF INTEREST

Pursuant to Fed. Cir. R. 47.4 and Fed. R. App. P. 26.1, counsel for the *Amicus Curiae* Small Business Technology Council certifies the following:

1. The full name of every party or amicus represented by me is:

Small Business Technology Council

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: N/A.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the amicus curiae represented by me are: The Small Business Technology Council is a council of the National Small Business Association, which is a non-profit corporation having no parent corporation.

4. The names of all law firms and the partners or associates that appeared for the amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Barry F. Irwin of Irwin IP LLC.

Dated: March 15, 2016

Respectfully submitted,

/s/_Barry F. Irwin, P.C._____

Barry F. Irwin, P.C.
Irwin IP LLC
1333 Burr Ridge Parkway, Suite 200
Burr Ridge, IL 60527
Phone: 630.756.3101

Counsel of Record for Amicus Curiae Small Business Technology Council

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STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE, ITS INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE

The Small Business Technology Council ("SBTC"), a council of the National Small Business Association, is a non-partisan, non-profit industry association of companies dedicated to promoting the creation and growth of research-intensive, technology-based U.S. small business. To this aim, SBTC is involved in educational activities for small businesses, government officials, and officials of large companies. Through these activities, SBTC encourages the exchange of ideas and information to help transition research and development and technology into the commercial marketplace, and its mission is to ensure that the technology industry remains an inviting place for small businesses.

The value of patents in the United States has dropped. This has had a detrimental effect on the American Innovation Ecosystem by reducing the value of the primary asset of new technology based startups – their patents.

The recent decision of a particular Patent Trial and Appeal Board ("PTAB") panel in CBM2015-00161 stretches the definition of a covered business method ("CBM") far beyond its intended bounds, and renders the "technological invention" exception a nullity, effectuating an extension of its jurisdiction far beyond its Congressional mandate and the usurpation of judicial authority. The panel decision

also reveals a complete disregard of the principals of stare decisis and abstention, and an erroneous approach to 35 U.S.C § 101 ("Section 101") issues for Graphical User Interface ("GUI") related patents. Mandamus is appropriate here because the panel's decision will affect other patents and the businesses and individuals relying on them.

Pursuant to Fed. R. App. P. 29, all parties have consented to the filing of this amicus brief. No counsel for a party, other than *Amicus Curiae* SBTC, authored this brief in whole or in part, or made a monetary contribution intended to fund preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The panel's decision effectuates the weakening of patent rights by expanding duplicative avenues for challenging patents and misapplying the Section 101 analysis, while disregarding principles of stare decisis and abstention. The decision effectively permits a never-ending stream of patentable subject matter challenges. Patents are the primary asset of new technology based startups, and this decline in their value has had a detrimental, and deterrent, effect on innovation in the United States.

ARGUMENT

The relief sought in Trading Technologies International, Inc.'s mandamus petition should be granted because this case presents issues of great importance – the proper scope of the special CBM Review, the scope of what qualifies as patentable subject matter, and the role of stare decisis and abstention when the United States Patent and Trademark Office ("PTO" or "Patent Office") considers such legal issues already resolved by a federal court. It also involves a technological area of great importance – graphical user interfaces.

In a nutshell, a recent decision of a particular PTAB panel found, in CBM2015-00161, that an unquestionably novel GUI for implementing commodity trading claimed in U.S. Patent No. 6,766,304 ("the '304 Patent") is an apparatus "for performing data processing or other operations used in the practice, administration, or management of a financial product or service," does not solve a technical problem with a technical solution and, as such, qualifies for review under the CBM review procedures of Section 18 of the Leahy-Smith America Invents Act ("AIA"); and, in direct conflict with a decision of a federal district court, that the GUI was, more likely than not, unpatentable subject matter.

As other PTAB decisions have done, this decision stretches the definition of a covered business method far beyond its intended bounds, and renders the "technological invention" exception a nullity, effectuating an extension of its

jurisdiction far beyond its Congressional mandate and the usurpation of judicial authority. As the CBM review provides a duplicative avenue to challenge CBM patents under all grounds available in a district court procedure, but with the application of the much broader "broadest reasonable interpretation standard," it will naturally result in more patents being declared invalid. Such a result weakens patent rights.

The panel decision also reveals a complete disregard to the principals of stare decisis and abstention and an erroneous approach to Section 101 issues for GUI related patents. Indeed, the PTAB's erroneous approach would mean that entire technology based industries, such as software development and GUI development companies, would be ineligible for patent protection. Again, the result of the PTAB decision is to weaken patent rights.

Regarding the CBM jurisdictional issue, on its face, the '304 patent is not a CBM within the jurisdictional bounds of Section 18 – it does not claim data processing or other data operations. This conclusion is supported by the unequivocal legislative history. Exhibit BC to Trading Technologies International, Inc.'s Petition for Writ of Mandamus (Dkt. 2-4) at S5428 ([Mr. Durbin] … "Some companies [have patents for] graphical user interfaces that have been widely commercialized and used within the electronic trading industry to implement trading and asset allocation strategies … Are these the types of patents that are the target of Section 18?" [Mr.

Schuner] "No …. [I]t is not the understanding of Congress that such patents would be reviewed and invalidated under Section 18."). Even if the '304 Patent did claim data processing or other data operations (which is does not), as the Patent Office twice, and this Court once, determined, the '304 patent is exempted from CBM challenges because it claims a GUI that solves a technical problem in ways not taught by the prior art. The claimed GUI, for purposes of CBM jurisdiction, is no different than a physical device (e.g., with press buttons). Yet, the panel concluded that it is not directed to technology. In doing so, the panel ignored that the claimed GUI addressed problems of efficiency, speed, accuracy and usability, and prior judicial determinations finding that the claimed GUI addressed these problems. These are technical problems and it is therefore irrelevant that the claimed GUI may also address a "business problem." In other words, problems with efficiency, speed, accuracy and usability are technical problems regardless of the field of use underlying a GUI.

Regarding the patentable subject matter issue, it should be noted that the '304 patent was not only issued by the Patent Office, but it survived a reexamination challenge, a district court invalidity challenge (affirmed by this Court in *Trading Techs. Int'l, Inc. v. eSpeed, inc.*, 469 F. App'x 914 (Fed. Cir. 2012)), and a post-*Alice Corp. v. CLS Bank* patentable subject matter challenge. *Trading Techs. Int'l, Inc. v. CQG, Inc*., No. 05-cv-4811, 2015 WL 774655 (N.D. Ill Feb. 24, 2015). But,

the PTAB ignored all of that history, and the principals of stare decisis and abstention to reach its determination that the '304 Patent, more likely than not, claimed unpatentable subject matter. Effectively, the PTAB's decision allows a never-ending stream of patentable subject matter challenges without any deference being given to prior judicial determinations. The doctrine of stare decisis aside, at the very least, such redundant consideration of the validity of a patent should be avoided in the interest of judicial administration. *See Colorado River Water Conservation Dist. v. United States,* 96 S.Ct. 1236 (1976); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.,* 103 S.Ct. 927 (1983).

Further, the panel's logic would render almost all GUI patents ineligible under Section 101 because the panel is focusing not on whether the claimed invention is drawn to the general idea underlying the invention or "something more" that transforms the claimed invention into patent-eligible subject matter, *see Alice Corp. Pty. v. CLS Bank Int'l,* 134 S. Ct. 2347 (2014), but on the fact that the GUI is being implemented on a conventional computer and that the applicant did not invent a new piece of hardware. However, nearly all GUI development is done on conventional computers. By adopting this logic, this panel is giving no credence or weight to an entire field of vital technology and innovation.

At least two studies have shown that the value of patents has dropped by as much as over 80% since the passage of the AIA.[1,2] The average market price of a patent has dropped from about one million fifty thousand dollars in the first half of 2011, before the passage of the AIA[3] to about one hundred and ninety thousand dollars in the second half of 2014, a drop of 82%.[4] This is very disturbing as the Federal Reserve Bank of Cleveland states that patents are the number one indicator of regional wealth.[5] Living in a high patenting region can add $8,600 to an average two earner household's income every year.[6]

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[1] Richard Baker, *Guest Post: America Invents Act Cost the US Economy over $1 Trillion*, Patentlyo, June 8, 2015, http://patentlyo.com/patent/2015/06/america-invents-trillion.html.

[2] Jiaqing "Jack" Lu, *Patent Portfolio Valuation as Reflected by Market Transactions: Market Dynamics and the Impact of AIA and Alice*, September 2015, Licensing Economics Review, *available at* http://ssrn.com/abstract=2609415.

[3] The AIA was passed by Congress and was signed into law by President Obama on September 16, 2011. The law represents the most significant change to the U.S. patent system since 1952.

[4] Lu, *Patent Portfolio Valuation*, *supra*.

[5] See Federal Reserve Bank of Cleveland, *Altered States: A Perspective on 75 Years of State Income Growth*, Annual Report 2005. For more detail, see Paul Bauer, Mark Schweitzer, Scott Shane, *State Growth Empirics: The Long-Term Determinants of State Income Growth*, Federal Reserve Bank of Cleveland Working Paper 06-06, May 2006, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022341 (particularly, page 5 provides as follows: "Moreover, within the set of knowledge factors, we find that investments in technology, as measured by the stock of patents, play the largest role in explaining the differences in per capita personal incomes across states.").

[6] Testimony of Robert N. Schmidt, Co-Chair, Small Business Technology Council, Before the Senate Small Business and Entrepreneurship Committee, March 19, 2015, Page 2 and Footnote 20, *available at* http://sbtc.org/wp-

This drop in patent value has been estimated by some to have cost the American economy 1 to 1.9 trillion dollars.[7] This has had a detrimental effect on the American Innovation Ecosystem by reducing the value of the primary asset of new technology based startups – their patents. We saw the number of patent applications decline in 2015,[8] as well as a decline in the number of patents issued to residents of the United States.[9] These are very troubling statistics, and perhaps most troubling, this drop in patent value has also caused some inventors to stop inventing.[10]

If not corrected, the fundamental errors of the PTAB in determining which patents are properly subject to a CBM and its approach to the patentable subject

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content/uploads/2015/03/Testimony-of-Robert-N.Schmidt-to-Senate-SBE-3-16-2015-as-submitted-rev.pdf.

[7] Baker, *supra*. *See also* Kevin A. Hassett & Robert Shapiro, *What Ideas Are Worth: The Value of Intellectual Capital And Intangible Assets in the American Economy*, Sonecon (Sept. 2011) at 2, *available at* http://www.sonecon.com/docs/studies/Value_of_Intellectual_Capital_in_American_Economy.pdf. In that study (page iv), U.S. intellectual capital was worth between $8.1 and $9.2 trillion in 2011. Patents are estimated to be about 25% of that value, for a value of $2.0 to $2.3 trillion. A loss of 82% of the value represents a loss of wealth in America of between and $1.66 and $1.886 trillion.

[8] USPTO Performance and Accountability Report, FY 2015, Nov. 12, 2015 Table 2, page 185, *available at* http://www.uspto.gov/sites/default/files/documents/USPTOFY15PAR.pdf

[9] *Ibid*, Table 8, page 189.

[10] Robert N. Schmidt, New IP Financial Models: Innovation, Wall Street, and Patents, *The Economic Impact and Value of Patents in a Volatile Market*, Thompson Reuters, October 8, 2015, New York City, page 12 and Endnote 129. http://sbtc.org/wp-content/uploads/2015/10/Patent-Policy-A-Small-Business-Perspective-Robert-N-Schmidt-Thompson-Reuters-10.08.15.pdf

matter analysis will further proliferate the drop in value of patents and the deterioration of the American Innovation Ecosystem.

CONCLUSION

Therefore, Small Business Technology Council requests that the Federal Circuit grant the relief requested in Trading Technologies International, Inc.'s mandamus petition.

Dated: March 15, 2016

Respectfully submitted,

/s/_Barry F. Irwin

Barry F. Irwin, P.C.
Irwin IP LLC
1333 Burr Ridge Parkway, Suite 200
Burr Ridge, IL 60527
Phone: 630.756.3101

Counsel of Record for Amicus Curiae Small Business Technology Council.

CERTIFICATE OF COMPLIANCE

This brief complies with the page limitation of Fed. R. App. P. 21(d) and 29(d), and contains 10 pages.

The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman type.

/s/ Barry F. Irwin
Barry F. Irwin, P.C.
Irwin IP LLC
1333 Burr Ridge Parkway, Suite 200
Burr Ridge, IL 60527
Phone: 630.756.3101

Counsel of Record for Amicus Curiae Small Business Technology Council

CERTIFICATE OF SERVICE

I, Barry F. Irwin, being duly sworn according to law and being over the age of 18, upon my oath depose and state that:

On March 15, 2016, I electronically filed the foregoing Brief of *Amicus Curiae* Small Business Technology Council In Support of Petitioner with the Clerk of the Federal Circuit using the CM/ECF System, which will serve email notice of such filing on the following:

Erika Arner
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
Two Freedom Square
11955 Freedom Dr.
Reston, VA 20190
571-203-2700
erika.arner@finnegan.com

Counsel for Petitioner Trading Technologies International, Inc.

Cory C. Bell
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
Two Seaport Lane
6th Floor
Boston, MA 02210
617-646-1641
cory.bell@finnegan.com

Counsel for Petitioner Trading Technologies International, Inc.

Kevin D. Rodkey, Esq.
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
303 Peachtree Street, NE
3500 Suntrust Plaza
Atlanta, GA 30308
404-653-6484
kevin.rodkey@finnegan.com

Counsel for Petitioner Trading Technologies International, Inc.

Steven Borsand
Trading Technologies International, Inc.
222 S. Riverside
Suite 1100
Chicago, IL 60606
312-476-1018
steve.borsand@tradingtechnologies.com

Counsel for Petitioner Trading Technologies International, Inc.

Thomas W. Krause, Esq.
United States Patent and Trademark Office
Office of the Solicitor
P.O. Box 1450
Mail Stop 8
Alexandria, VA 22313
571-272-9035
thomas.krause@uspto.gov

Counsel for Respondent Michelle K. Lee, Director, U.S. Patent and Trademark Office

Timothy C. Meece
Banner & Witcoff, Ltd.
10 South Wacker Drive, Suite 3000
Chicago, IL 60606
Tel: (312) 463-5000

Counsel of Record for Amicus Curiae Bally Gaming, Inc.

Robert Greenspoon
Flachsbart & Greenspoon, LLC
333 North Michigan Ave
Suite 2700
Chicago, IL 60601
312-551-9500
rpg@fg-law.com

Counsel for Amicus Curiae United Inventors Association of the United States of America, U.S. Inventor, Edison Innovators Association, John D'Agostino, Paul Morinville and Frank Cicio

Christopher George
Hanley, Flight & Zimmerman, LLC
150 South Wacker Drive
Suite 2200
Chicago, IL 60606
312-580-1836
cgeorge@hfzlaw.com

Counsel for Amicus Curiae Martin A. Goetz

Six paper copies will be filed with the Court within the time provided in the Court's rules.

/s/ Barry F. Irwin
Barry F. Irwin, P.C.

March 15, 2016