

Fed. Circ. Lets Alice Invalidate Another Trading Tech Patent

By **Dani Kass**

Law360 (July 1, 2019, 10:09 PM EDT) -- The Federal Circuit on Monday continued to hack away at Trading Technologies' electronic trading patents, upholding yet another invalidation from the Patent Trial and Appeal Board based on the U.S Supreme Court's Alice decision.

The three-judge panel upheld the PTAB's invalidation without further comment about a month after holding arguments. The ruling marks the ninth Trading Technologies patent for a graphical user interface that the Federal Circuit has said doesn't hold up since April.

The PTAB's covered business method review was instigated by brokerage firm Interactive Brokers LLC. The pair have been feuding since at least 2010, when Trading Technologies filed an infringement lawsuit in Illinois federal court. Other financial service companies have been sued as well, which has led to a host of challenges at the PTAB. Trading Technologies previously said more than a dozen of its patents have been swept into CBM review.

The board issued its decision on the instant patent in December 2017, saying all 32 of the patent's claims are abstract under Alice v. CLS Bank, in which the justices held that abstract ideas implemented using a computer are not eligible for patent protection.

For example, the PTAB said one claim in Trading Technologies' patent covered placing an order based on market information that's been displayed, which "is a fundamental economic and conventional business practice."

"We are persuaded by petitioner that the method of claim 1 could be performed in the human mind or with the aid of pen-and-paper with little difficulty because the claim requires plotting only a few data," the board's final written decision says.

The patent didn't have an inventive concept to push it past the abstraction hurdle, the PTAB said.

In its August appeal, Trading Technologies said CBM review wasn't appropriate in this case as the patent fell into an exemption for technological inventions. It also said the patent wasn't abstract, as it "set forth the structure, make-up, and functionality of a specific [graphical user interface] tool that improves over prior GUIs."

Interactive Brokers responded that the CBM review was proper, as the patent covers a method of data

processing for financial products and services. It urged the Federal Circuit to uphold both that finding, and the ruling that the patent was abstract.

The PTAB had also looked at whether the patent was obvious over prior art, before deciding it wasn't. Interactive Brokers asked the Federal Circuit to find otherwise, and send the case back with a different obviousness outcome.

Trading Technologies has maintained in its appeals that CBM review is unconstitutional. The Federal Circuit has repeatedly found this argument was waived because Trading Technologies didn't flesh out the issue in its briefs, and it didn't address the issue in Monday's ruling.

The government had filed a brief in the case defending the constitutionality of CBM review, saying it "altered the [the U.S. Patent and Trademark Office's] procedures for reconsidering the validity of issued patents, but it did not alter the substantive provisions governing the conditions of patentability."

Monday's ruling builds on a series of victories for Interactive Brokers. The Federal Circuit in April agreed that four Trading Technologies patents are abstract, and then a month later deemed another four abstract as well, saying they weren't distinguishable from the prior set.

However, more Trading Technologies has had some luck. In February, Trading Technologies persuaded the Federal Circuit to throw out PTAB decisions invalidating a handful of its patents. The court said those patents were ineligible for CBM review, falling into the technological invention exemption. The difference in this case was that these inventions made traders faster and more efficient, not their computers, the court found.

A spokesperson for the USPTO declined to comment. Counsel for Trading Technologies and Interactive Brokers didn't immediately respond to requests for comment Monday.

Circuit Judges Pauline Newman, Timothy B. Dyk and Evan Wallach sat on the panel for the Federal Circuit.

The patent-in-suit is U.S. Patent No. 7,725,382.

Trading Technologies is represented by Michael D. Gannon, Leif R. Sigmond Jr., Jennifer M. Kurcz and Alaina J. Lakawicz of BakerHostetler and in-house by Steve Borsand and Jay Knobloch.

Interactive Brokers is represented by Byron L. Pickard, Robert E. Sokohl, Richard M. Bembem, William H. Milliken and Jon E. Wright of Sterne Kessler Goldstein & Fox PLLC.

The U.S. is represented by Melissa N. Patterson, Mark R. Freeman, Katherine Twomey Allen, Courtney Dixon, Scott R. McIntosh and Joseph H. Hunt of the U.S. Department of Justice's Civil Division and Thomas W. Krause, Joseph Matal and Farheena Yasmeen Rasheed of the USPTO.

The case is Trading Technologies Int'l v. IBG LLC, case number 18-1489, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Matthew Bultman. Editing by Amy Rowe.

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