

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PETROLEUM GEO-SERVICES INC.
Petitioner,

v.

WESTERNGECO LLC
Patent Owner.

Case IPR2014-00687
Patent 7,162,967 B2

Before BRYAN F. MOORE, SCOTT A. DANIELS, and BEVERLY M.
BUNTING, *Administrative Patent Judges*.

MOORE, *Administrative Patent Judge*.

DECISION
Denying Patent Owner's Request for Rehearing
37 C.F.R. § 42.71(d)

I. INTRODUCTION

WesternGeco LLC (“Patent Owner”) filed a Request for Rehearing (Paper 102, “Req. Reh’g”) of the Final Written Decision of the above entitled *Inter Partes* Review (IPR) (Paper 100, “Final Dec.”) of claims 1 and 15 of U.S. Patent No. 7,162,967 B2 (Ex. 1001, “the ’967 patent”). In the Request for Rehearing, Patent Owner argues that the Final Written Decision overlooked and/or misapprehended several matters in the IPR. For the reasons set forth below, the Request for Rehearing is *denied*.

II. ANALYSIS

When considering a request for rehearing, we review the Final Written Decision for an abuse of discretion. 37 C.F.R. § 42.71(c). The party requesting rehearing bears the burden of showing that the Final Written Decision should be modified, and “[t]he request must specifically identify all matters the party believes [we] misapprehended or overlooked.” 37 C.F.R. § 42.71(d).

A. *Service under 315(b)*

Patent Owner argues “[t]he Board attempts to analogize the present case to *Motorola Mobility LLC v. Arnouse Digital Devices Corp.*, IPR2013-00010, Paper 20 (PTAB Jan. 30, 2013), in order to find that PGS [Petroleum Geo-Services Inc.] merely “received a copy” of the complaint.” Req. Reh’g 3. Further, Patent Owner argues “[t]he Board compounded its error by re-writing ‘served’ in Section 315(b) to require ‘service upon a defendant.’ Paper 101 at 42.” *Id.* at 4. We disagree. The Final Decision intended to read “petitioner, real party in interest, or privy of the petitioner is [‘]served[’] with a complaint alleging infringement of the patent” to mean

that the party is served as a defendant in the case rather than served the complaint for the purpose of enforcing a third party subpoena. *Id.* at 6.

The Final Decision states:

Patent Owner’s argument that S.D. Texas L.R. 5-1 “comports” (PO Resp. 44) with the proper interpretation of service under §315(b) is not persuasive as to the intent of Congress with respect to §315(b). *See* 157 Cong. Rec. S5429 (daily ed. Sept. 8, 2011) (statement of Senator Kyl) (“it is important that the section 315(b) deadline afford defendants a reasonable opportunity to identify and understand the patent claims that are relevant to the litigation”).

Final Dec. 42, n. 9. Thus, the Final Decision explicitly reads the requirement that the person “served” under section 315(b) is a defendant in from the legislative history of the statute. On rehearing, Patent Owner argues that “Congress did not intend to redefine the well-understood meaning of ‘service,’ but rather intended to ensure that the length of the Section 315(b) deadline would afford parties, defendants or otherwise, ‘a reasonable opportunity to identify and understand the patent claims that are relevant to the litigation’ while still preventing the harassment of patent holders.” Req. Reh’g 6. However, applying this logic to third parties who are simply served with a subpoena does not insure that such parties have “a reasonable opportunity to identify and understand the patent claims” because a party that is not a defendant may have no reason to evaluate the patent claims involved in the litigation in order to respond to the subpoena.

We decline to read 315(b) to apply the time bar to all third parties who after receiving a copy of a complaint concurrent with a third party subpoena, appear in the case for the purpose of responding to the subpoena. Patent Owner’s reliance on *LG Elecs., Inc. v. Mondis Tech. Ltd.*, IPR2015-00937,

Paper 8 at 4-5 (PTAB Sept. 17, 2015) (precedential) (“*LG*”) is misplaced. Req. Reh’g 5. The Panel in *LG* declined to read a word into 315(b) in a situation where the addition of that word was *not* argued to be supported by legislative history. *LG*, Paper 8 at 5. The *LG* Panel went on to state that the legislative history and “equitable and public policy considerations [do not] favor a ‘broad’ interpretation of § 315(b).” *LG*, IPR2015-00937, Paper 8 at 7–8. Here, as in *LG*, we read the “service” requirement of 315(b) narrowly. We did not misapprehend or overlook anything relating to Patent Owner’s argument regarding the meaning of “service” under 315(b). Thus, we are not persuaded by that argument.

B. We Fully Considered Evidence of RPI and Privity

Patent Owner argues “the Board overlooked relevant evidence of ION’s relationship to PGS and the Petition and compounded that error by preventing WG [WesternGeco LLC] from discovering admittedly existing documents that would have confirmed ION’s status as an RPI and/or privy of PGS. Paper 100 at 34-38.” Req. Reh’g 7. Patent Owner argues that the Board focused on whether ION “controlled” the instant proceeding but “the Board failed to fully consider ION’s broader financial interest in, and ability to fund, the IPR.” *Id.* at 8. Patent Owner does not cite to any rule or cases suggesting a “broader financial interest” or “*ability to fund*” is relevant nor does Patent Owner proffer which, if any, evidence in the record was *not* considered in the Final Decision. *C.f. GEA Process Engineering, Inc. v. Steuben Foods, Inc.*, IPR2014-00041, Paper 135 at 13–16 (PTAB Dec. 23, 2014) (Actual evidence of funding, as opposed to ability to fund, found to show that party was RPI). Thus, Patent Owner has not established the proposition that the Board overlooked some evidence it was required to

consider. A request for rehearing is not an opportunity merely to disagree with the panel's assessment of the arguments or weighing of the evidence. Thus, we are not persuaded by this argument.

C. We Properly Denied Patent Owner's Request For Additional Discovery

Patent Owner argues “[i]n denying WG’s request for additional discovery, the Board overlooked PGS’s own admission that relevant agreements exist that have not been produced and ION’s obvious contradictory statements—PGS and ION could not both be correct in their representations to the Board. Paper 100 at 38–39.” Req. Reh’g 9. We disagree. The Final Decision relies on the fact that Exhibit 2018 shows “Petitioner unambiguously affirmed that Petitioner had made no claims or demands to ION for indemnity with respect to the ’967 patent.” Final Dec. 38. The mere allegation that “relevant” agreements *may* exist, is not inconsistent with Petitioner’s statement.

Patent Owner argues “[t]he Board further erred by basing its Decision on an undisputedly incomplete record.” Req. Reh’g 9. A “complete” record is not the standard for granting discovery. Granting of additional discovery is discretionary with the Board. *See* 35 U.S.C. § 316(a)(5)(B) (“discovery shall be limited to — what is otherwise necessary in the interest of justice”); *see also Cochran v. Kresock*, 530 F.2d 385, 396 (CCPA 1976) (whether a party is entitled to additional discovery is discretionary with the board); *Keebler Co. v. Murray Bakery Products*, 866 F.2d 1386, 1388 n.1 (Fed. Cir. 1989) (standard of review of discovery order on appeal is abuse of discretion).

The first and oft-disputed factor in determining whether additional discovery is necessary in the interests of justice is whether there exists more than a “mere possibility” or “mere allegation that something useful [to the proceeding] will be found.” *Garmin Int’l, Inc. et al. v. Cuozzo Speed Techs LLC*, Case IPR2012- 00001, Paper 20, slip op. at 2-3 (PTAB Feb. 14, 2014), “Order—Authorizing Motion for Additional Discovery” (listing factors to determine whether a discovery request is necessary in the interests of justice) (“the *Garmin* factors”). Under this first factor, a party should already be in possession of evidence tending to show beyond speculation that in fact something useful will be uncovered. *Id.* The discovery-seeking party only needs to set forth a threshold amount of evidence tending to show that the discovery it seeks factually supports its contention. *See Garmin*, IPR2012-00001, Paper 26, slip op. at 8-9, “Decision—On Motion for Additional Discovery” (finding that, with respect to *Cuozzo*’s contention of commercial success, *Cuozzo* failed to present a threshold amount of evidence tending to show that the requested discovery of sales and pricing information involved units with a nexus to the claimed features).

Patent Owner states that “[t]he existence of additional indemnity agreements between PGS and ION is a case dispositive issue, and one on which WG should have been permitted to take discovery.” Req. Reh’g 9. The existence of indemnity agreements is not always case dispositive. *See Zerto, Inc v. EMC Corporation*, IPR2014-01295, Paper 34, 12–13 (PTAB March 3, 2015) (“an indemnification clause, by itself, is not dispositive with respect to whether the indemnitor exercises or could exercise control over an *inter partes* review proceeding.”) (citations omitted); *see also Arris Group, Inc. v. C-Cation Technologies, LLC*, IPR2015-00635, Paper 19, 9–12

(PTAB July 31, 2015) (determining fact that “indemnification claims were made according to the provisions of the [indemnification] Agreements” was not sufficient to show control over the district court proceedings such that a party was in privity with the Petitioner). For example, we determined that the indemnity agreement produced in this case (*see* Patent Owner’s Rehearing Request, Paper 62 (discussing indemnity agreement in evidence)) was not case dispositive.

Patent Owner argues that since the 315(b) bar date has passed, ION cannot be added as an RPI because the filing date of the Petition would have to be reset and more than one year has passed since ION was served with an infringement complaint. Patent Owner Preliminary Response, Paper 26, 15–16.

We determined, based on evidence (Ex. 2022, 2027; Dec. on Inst. 15–16, Paper 33) of the provisions of the indemnity agreement that was eventually produced (Ex. 2069), that the existence of the indemnity agreement did not sufficiently prove ION was a real party in interest to the Petition or privity of Petitioner. Dec. on Inst. 13–17. On rehearing, we determined that “[t]he evidence presented by Westerngeco in its second Preliminary Response with respect to privity and real party-in-interest between ION and PGS, is essentially the same as that set forth in its initial Preliminary Response (Paper 26), and Patent Owner Response (Paper [47]), with respect to PGS and ION.” Paper 98 (Decision Denying Patent Owner’s Request for Rehearing), 5. Thus, we considered Patent Owner’s argument and evidence of record multiple times, including in its May 7, 2015 Request for Rehearing regarding joinder (Paper 65), initial Preliminary Response (Paper 26), and Patent Owner Response (Paper 47).

As noted above, the Board reviewed the agreement that was produced along with all the arguments made by Patent Owner and the statement by Petitioner in Ex. 2018 and determine that additional discovery was not required in the interest of justice. A request for rehearing is not an opportunity merely to disagree with the panel's assessment of the arguments or weighing of the evidence. Thus, we are not persuaded by this argument.

D. We Properly Considered the May 14, 2015 Request for Rehearing

Patent Owner argues that the Board failed to consider its Request for Rehearing filed on May 14, 2015 and thus “failed to *substantively address* any issues that WG raised in its rehearing request and prevented WG from fully developing its arguments. *See* Paper 98 at 2, n. 4.” Req. Reh’g. 10. We disagree. In response to the Patent Owner’s May 7, 2015 Request for Rehearing, we stated “[t]he matters raised by Westerngeco in their second Request for Rehearing were addressed in our Corrected Order (Cor. Order) entered May 19, 2015, denying authorization for a motion for additional discovery. *See* Cor. Order.” Paper 98 (Decision Denying Patent Owner’s Request for Rehearing), 2, n. 4. In that Corrected Order, we referred to the indemnification agreement cited in Patent Owner’s May 14, 2015 Request for Rehearing and we stated “[n]either are we persuaded that we misapprehended or overlooked such evidence in our Decisions to Institute.” Paper 67 (Corrected Order Conduct of the Proceeding), 3–4.

To the extent this statement was unclear, this statement was intended to indicate that we considered the arguments presented in Patent Owner’s May 14, 2015 Request for Rehearing. This is shown by our use of the “misapprehended or overlooked” standard that applies to requests for rehearing. Thus, we considered all arguments and evidence presented in the

case with regard to RPI. Additionally, the Board is not required to “substantively address” all arguments raised by Patent Owner in all papers where some arguments are cumulative of previous arguments, rather the Board must consider and rule on challenges and/or requests made in those arguments. Thus, we are not persuaded by this argument.

E. The New Multi Klient Evidence is Too Late

Patent Owner argues that “[o]ne week after the Board rendered its Decision in this proceeding[] PGS filed an IPR Petition challenging the validity of a WG patent asserted alongside the ’967 patent in the same district court litigation and ***naming Multi Klient as an RPI***. See *Petroleum Geo-Services v. WesternGeco LLC*, IPR2016-00407, Paper 1 at 3 (PTAB Dec. 23, 2015).” Req. Reh’g 11. Patent Owner argues further “PGS’s disclosure of Multi Klient as an RPI in IPR2016-00407 is a *post hoc* admission that Multi Klient should also have been named in this proceeding and confirms that additional discovery was improperly denied.” *Id.* 11–12. The Final Decision has been entered and the record is closed in this IPR. We decline to decide whether such an “admission” would necessarily require a finding that Multi Klient should have been named an RPI in this case. For example, it is unclear when Petitioner became aware of the fact that led it to name Multi Klient as an RPI in the other IPR.

Nevertheless, we find that it is too late to introduce this evidence to support this argument after the Final Decision has been entered. See *Sony Computer Entertainment America LLC v. Game Controller Technology LLC*, IPR2013-00634, Paper 31, 3–5 (PTAB April 2, 2015) (“we determine that Patent Owner’s challenge of whether SAH and SONY should have been

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listed as RPIs in the Petition is untimely at this stage of the proceeding and, thus, is improper”).

III. CONCLUSION

The Request for Rehearing does not demonstrate that the Final Written Decision misapprehended or overlooked any matters in the case.

IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that the Request for Rehearing is denied.

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