UNITED STATES PATENT AND TRADEMARK OFFICE

_____

BEFORE THE PATENT TRIAL AND APPEAL BOARD

_____

BLOOMBERG INC.; BLOOMBERG L.P.;
BLOOMBERG FINANCE L.P.;
THE CHARLES SCHWAB CORPORATION;
CHARLES SCHWAB & CO., INC.;
E*TRADE FINANCIAL CORPORATION; E*TRADE SECURITIES LLC;
E*TRADE CLEARING LLC; OPTIONSXPRESS HOLDINGS INC.;
OPTIONSXPRESS, INC.; TD AMERITRADE HOLDING CORP.;
TD AMERITRADE, INC.; TD AMERITRADE IP COMPANY, INC.; and
THINKORSWIM GROUP INC.
Petitioners,

v.

MARKETS-ALERT PTY LTD.
Patent Owner.

_____

Case CBM2013-00005 (JYC)
Patent 7,941,357

_____

Before JAMESON LEE, SALLY C. MEDLEY, and JONI Y. CHANG,
Administrative Patent Judges.

PATENT OWNER MARKETS-ALERT
REPLY TO PETITIONERS' OPPOSITION TO MOTION TO EXCLUDE
PURSUANT TO 37 C.F.R. §42.64

834609

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

FEDERAL STATUTES

I. INTRODUCTION

Petitioners miss the point of this Motion. This Motion is about the threshold evidentiary deficiencies in Petitioners' expert testimony and New References. Their nearly 10 pages of attorney argument on the potential probative value of this evidence is irrelevant. Indeed, Petitioners' improper focus on credibility and weight only highlights their failure to rebut Markets-Alert's demonstration of, for example, the inherent unreliability of their expert's conclusory opinions or the cumulative nature of the New References.

This wrong direction taken by Petitioners is not surprising. Throughout these proceedings, Petitioners' strategy has been to avoid confronting Markets-Alert's detailed arguments and analysis head-on. Instead, Petitioners have repeatedly attempted to block or expunge from the record Markets-Alert's papers. The last thing that Petitioners want to offer or have the Board consider is detailed analysis. Petitioners would rather turn this proceeding into a battle of competing conclusions.

II. F.R.E. APPLY TO THESE PROCEEDINGS

Petitioners cannot and do not deny that, under 37 C.F.R. §42.62, the Federal Rules of Evidence (FRE) apply to the current proceedings to ensure that evidence is reliable enough to merit full consideration by the Board. Instead, Petitioners

argue that the Board somehow limited motions to exclude to only issues of authenticity and hearsay. This is flatly contradicted by 37 C.F.R. §42.62 and is a mischaracterization of the guidance provided by the Board.

It is true that authentication and hearsay are examples of FRE requirements that must be met pursuant to 37 C.F.R. §42.62. This does not mean, as Petitioners would claim, that the rest of FRE is inapplicable to these proceedings. For example, Petitioners certainly do not argue that the fundamental relevancy requirement in FRE 401 is inapplicable. Moreover, Petitioners never argue that the Board's discretion to exclude evidence for prejudice, confusion, waste or cumulativeness under FRE 403 is inapplicable.

III. EXPERT TESTIMONY IS SUBJECT TO F.R.E.

Petitioners admit that expert opinions must meet the requirement under FRE 702 to be admissible: "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." These requirements reflect a threshold level of reliability that expert opinions must meet. An expert opinion that fails to meet FRE 702 is deemed so inherently unreliable as to be

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.