

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

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TD AMERITRADE HOLDING CORPORATION, TD AMERITRADE,
INC., and TD AMERITRADE ONLINE HOLDINGS CORP.,
Petitioners,

V.

TRADING TECHNOLOGIES INTERNATIONAL, INC.
Patent Owner,
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Case CBM2014-00131

Patent 7,533,056

Case CBM2014-00133

Patent 7,676,411

Case CBM2014-00135

Patent 6,772,132

Case CBM2014-00137

Patent 7,685,055

CONFERENCE CALL

Tuesday, January 20, 2015

BEFORE:

SALLY C. MEDLEY

MEREDITH C. PETRAVICK

PHILIP J. HOFFMANN

REPORTED BY:

DANIELLE GRANT

JOB NO. 13270

TransPerfect Legal Solutions

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2 briefly follow up on a question you had
 3 asked during our initial conference
 4 call. You asked whether the District
 5 Court litigation had been stayed, and
 6 we did not know at the time. We have
 7 since learned, and now report that
 8 petitioner moved to stay the District
 9 Court litigation based on these
 10 proceedings. But to our knowledge the
 11 motion has not been ruled on and the
 12 litigation is still ongoing.
 13 We do note, however, that the
 14 defendants in another litigation,
 15 regarding the 132 and 304 patents, CQG,
 16 also recently moved to stay that
 17 litigation based on these proceedings.
 18 That motion was denied and the Judge
 19 has since indicated that she's going to
 20 issue a ruling on the validity of the
 21 claims under Section 101 by the end of
 22 February.
 23 And to your previous request that
 24 we file mandatory notices about the
 25 happenings in related litigation, is

2 MR. STRANG: Good afternoon. I'm
 3 Jon Strang backup counsel for TD
 4 Ameritrade. With me I have Rob Sokohl
 5 and Rick Bemben who has not entered in,
 6 also Lori Gordon who is lead counsel
 7 across all of the proceedings.
 8 JUDGE MEDLEY: All right. Then
 9 for the patent owner.
 10 MR. GOLDBERG: Joshua Goldberg for
 11 patent owner, and I think we have Cory
 12 Bell on the line and Erika Arner, and
 13 also Kevin Rodkey.
 14 JUDGE MEDLEY: Okay, great. So
 15 this conference call is in regard to
 16 CPN 2014-00131, 133, 135, and 137. We
 17 understand that the patent owner
 18 requested this call initially. We'll
 19 let the patent owner begin, explain
 20 their situation with regard to
 21 discovery that they seek from the
 22 petitioner.
 23 MR. GOLDBERG: Thank you, your
 24 Honor.
 25 As an initial matter, I wanted to

2 this something that you would want us
 3 to file a mandatory notice about?
 4 JUDGE MEDLEY: This is a
 5 third-party that's not involved here --
 6 MR. GOLDBERG: Right.
 7 JUDGE MEDLEY: -- that's involved
 8 in the litigation involving two of the
 9 involved patents in those cases; is
 10 that correct?
 11 MR. GOLDBERG: Yeah.
 12 JUDGE MEDLEY: Yeah, I think we
 13 would want to know what the ruling is.
 14 I don't know that we would use it. I
 15 think we would want to know if and when
 16 a ruling comes out. You don't have to
 17 file it, just let us know and we'll
 18 have our paralegal get the decision.
 19 MR. GOLDBERG: Okay, we'll go
 20 ahead and do that.
 21 JUDGE MEDLEY: I appreciate the
 22 update.
 23 MR. GOLDBERG: As to the matters
 24 that we wanted to raise on today's
 25 call, as you may recall the TSE

2 reference serves as the basis for all
 3 the instituted prior art grounds in
 4 proceedings related to D055 and 056
 5 patents. The petitioner requested
 6 rehearing of the board's denial of
 7 prior art grounds regarding the TSE
 8 reference and the proceeding related to
 9 the '304 patents. And I don't think
 10 that's been ruled on yet.

11 The TSE reference is a Japanese
 12 book, and the translation has been
 13 disputed in multiple proceedings,
 14 including District Court litigations.
 15 Petitioner filed a translation of the
 16 TSE in each of the proceedings. But
 17 petitioner did not file an affidavit
 18 attesting to the accuracy of the
 19 translation to sufficient to comply
 20 with Rule 42.63(b). The only affidavit
 21 filed failed to establish the affiant
 22 had any personal knowledge or expertise
 23 on the matter.

24 We objected and the petitioner
 25 served us with five additional

2 requesting permission to file motions
 3 to strike the TSE reference, and for
 4 immediate summary judgment on all the
 5 prior grounds, in order to simplify the
 6 proceedings going forward.

7 JUDGE MEDLEY: Thank you. So,
 8 petitioner, we'll let you speak. I'm
 9 wondering why no cross?

10 MR. STRANG: Your Honor, there's
 11 several reasons. First a little
 12 background to correct what's going on.
 13 We hired TransPerfect, one of the
 14 leading translation firms in the
 15 country to translate the TSE reference.
 16 And in accordance 42.63(b) we submitted
 17 an affidavit attesting the accuracy of
 18 the translation, and it's with a very
 19 similar affidavit there in several
 20 other cases, including one I'll discuss
 21 very shortly. That affidavit of
 22 accuracy is Exhibit 1005 in the 131
 23 case; 1008 in the 133 case; 1014 in the
 24 135 case; and 1009 in the 137 case.
 25 After institution Trading Technologies

2 declarations on the matter, one by a
 3 manager who arranged for the
 4 translation, I guess, and four
 5 translators since it's a big document
 6 and they broke up across different
 7 translators. We requested that those
 8 declarants be produced for deposition
 9 pursuant to rule 42.51(b)(1)(ii) which
 10 specifies that cross-examination of
 11 affidavit testimony is authorized.
 12 This is a routine discovery issue, your
 13 Honor. The petitioner refused to make
 14 the declarants available for
 15 deposition.

16 It's our view that the declaration
 17 should be given no weight, since we
 18 have no ability to challenge them,
 19 which basically defeats their purpose.
 20 With nothing of weight to dispute the
 21 disputed translations, TSE should be
 22 struck from the record, and as a result
 23 patent owner should be entitled to
 24 summary judgment on all prior grounds.
 25 For this reason we are currently

2 objected to the affidavit only on the
 3 grounds that Mrs. O'Connell's affidavit
 4 did not establish sufficient personal
 5 knowledge. In response we timely
 6 served supplemental evidence that
 7 established sufficient personal
 8 knowledge and that the individual
 9 translators were qualified.

10 In short, she testified that
 11 TransPerfect's translation process is
 12 certified by two different standards,
 13 that they have their own internal
 14 testing certification process. She
 15 named the four translators who are
 16 spread all over the place --
 17 TransPerfect is a global company --
 18 some in California, one in Oregon, one
 19 in the United Kingdom. Trading
 20 Technologies then demanded to
 21 cross-examine the translators. We did
 22 not say that we refused to make them
 23 available, we said that it's not
 24 routine discovery under the rule. And,
 25 in fact, the Board has dealt with this

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2 issue twice before.
3 On August 14, 2000 in Mexichem
4 Amanco Holdings v. Honeywell
5 International, the Board held that
6 cross-examinations of translators is
7 not routine discovery. That's IPR
8 2013-0056, Paper 29, Page 3. And the
9 cite of that is in the e-mail chain
10 between the parties that we supplied to
11 in our e-mail.
12 In that case, just like here, the
13 certification of accuracy was from a
14 manager of a translation company and in
15 particular that affidavit was from the
16 CEO of Legal Translation.bis, which is
17 not nearly as reputable or well-known
18 as TransPerfect. The CEO did not name
19 the translator or contend that he
20 translated the documents himself. On
21 the contrary, he testified that the
22 translation was made by "a competent
23 translator" and "to the best of our
24 knowledge and belief is an accurate
25 translation". His affidavit that was

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2 satisfactory for that Board, in
3 substance, even less trustworthy than
4 our affidavit of accuracy.
5 Now, one time before that the
6 Board went the other way, but there
7 were some very important extenuating
8 circumstances. On January 1, 2014 in
9 Apotex v. Wyeth that's IPR 2014-00115
10 the Board agreed that the deposition of
11 the translator was allowed. But in
12 that case the patent owner timely
13 objected to the translation and
14 quality, pointing out two crucial
15 substantive mistranslation that went to
16 the merit. The original affidavit was
17 defective on its face. It wasn't
18 signed by the declarant, it was signed
19 by somebody else signing the
20 declarant's name. The petitioner had
21 submitted a second affidavit and second
22 translation after institution with a
23 signature that didn't match the first,
24 and it purportedly changed the
25 translation of some key terms that led

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2 right to the arguments of obviousness.
3 Specifically, the affidavit that was
4 originally submitted in that case,
5 which is again IPR 2014-0015, Exhibit
6 1005 was the original affidavit, and
7 you can see that the declarant didn't
8 sign it herself because it had someone
9 else's initials next to the signature.
10 On May 16, 2014 a month after the
11 institution decision, the petitioner
12 provided a new translation and a
13 replacement declaration that modified
14 the submitted translation. The
15 signature is clearly different, you can
16 compare them Exhibit 1047, which is the
17 e-mail -- excuse me, the second
18 declaration. That was served in an
19 e-mail that's shown dated May 19th
20 which is Exhibit 1085. And in that
21 declaration the translator admitted
22 that some things had changed, including
23 key terms in the reference. For
24 example, had retranslated a section
25 from excipient to quote, "lyophilized

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2 powder's supporting agent". And that
3 made a difference to patentability.
4 The situation in that case was
5 recounted in the transcript of the
6 conference call, and that transcript is
7 Exhibit 2154. Wyeth explained at Pages
8 5 and 8 why the translation mattered to
9 obviousness in the case, showing the
10 Board and the expert relied on
11 mistranslated sections. And in
12 particular the Board, they pointed out
13 that the Chinese reference, the only
14 reference at issue, had two
15 mistranslations. One going to whether
16 or not it was lactose or other key
17 ingredients, and another going to what
18 were the excipients.
19 JUDGE MEDLEY: Let me stop you. I
20 don't know that we need to get into
21 that other case.
22 Is it your position, unless it's
23 meritorious unless it was -- they're
24 challenging the translation itself then
25 maybe we should allow

2 cross-examination, but just as a
 3 general routine it shouldn't be
 4 considered routine discovery, is that
 5 your position?
 6 MR. STRANG: Yes, your Honor,
 7 that's our position. Here where they
 8 have not identified any specific
 9 translations that mattered to this
 10 case, we don't see any reason that we
 11 should have to go through the expense
 12 of getting five translators and a
 13 program manager flown all over the
 14 place, at least one is out of the
 15 country, that just doesn't seem in the
 16 interest of an inexpensive alternative
 17 to litigation.
 18 JUDGE MEDLEY: All right. I think
 19 I understand. I have a few questions.
 20 First of all to the patent owner,
 21 you objected to the translation for the
 22 reasons you stated, that the
 23 certification wasn't in compliance of
 24 42.63(b). They submitted their
 25 evidence in response to the objection,

2 according to my understanding -- become
 3 outcome determinative in some previous
 4 District Court litigation and also in
 5 an EPO opposition case.
 6 Now, here the translation on its
 7 face has internal inconsistencies that
 8 I imagine were created because they
 9 were splitting it amongst different
 10 translators. So, for example, when you
 11 look at the table of contents of the
 12 translation, it will say that Section
 13 13-2 is, Notice Input Destination. But
 14 then if you go to Section 13-2 of the
 15 book, that's actually called, About
 16 Notification Output Destination.
 17 JUDGE MEDLEY: You're questioning
 18 the accuracy of the translation?
 19 MR. GOLDBERG: Yeah, we would like
 20 to pursue that now. How the
 21 translation was done; how it was
 22 divided between these different
 23 translators the way it was divided.
 24 Was there anything funny going on. We
 25 think we should be able to explore

2 and it has been served, but not filled.
 3 It's not technically part of the case.
 4 Now, does that overcome the original
 5 objection. That's my first question.
 6 MR. GOLDBERG: Yes. It's not
 7 something considered in great detail,
 8 but I would be inclined to say, yes, it
 9 probably should.
 10 JUDGE MEDLEY: Okay. Then I'm
 11 wondering if it does, why, if there's
 12 nothing challenging, if it kind of
 13 addresses the original concern you had,
 14 then why do you need to cross-examine
 15 the translator?
 16 MR. GOLDBERG: The reason that we
 17 had objected in the first place is
 18 because we wanted to know how this was
 19 translated, and the only way that we
 20 can figure that out is by deposing the
 21 translators.
 22 The reason why that matters is
 23 because the translation as I mentioned
 24 before has been heavily disputed over
 25 the years, and has actually --

2 those issues because they could be
 3 determinative. Now, at the same time
 4 we don't think that we should have to
 5 basically prep the attorneys for TD on
 6 exactly the questions we're going to
 7 ask. We shouldn't have to tell them
 8 here's what all the different little
 9 problems are so that you guys can go
 10 back and come up with kinds of
 11 solutions so that when we depose your
 12 translator they all have these
 13 pre-written answers to give us. We
 14 should be able to impeach them as would
 15 be the case with any other declarant
 16 bringing in whatever documents that we
 17 need in order to impeach and see if the
 18 translations are credible or not.
 19 JUDGE MEDLEY: Okay. Do you know
 20 if you're going to propose having your
 21 own translations done?
 22 MR. GOLDBERG: We have not
 23 determined yet whether we're going to
 24 have a complete translation of our own.
 25 We may have translations of the

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