

Paper No. \_\_\_\_\_  
Filed: June 12, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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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

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**Patent Owner's Motion to Exclude  
Under 37 C.F.R. 42.64(c)**

**TABLE OF CONTENTS**

I. Preliminary Statement .....1

II. Standard .....2

III. The TSE Translation (Ex. 1004) Should Be Excluded .....2

    A. TT Timely Objected to the TSE Translation, Which Was Relied Upon in TD’s Petition and Its Reply.....2

    B. All of the TSE Translation Should be Excluded for Failing to Comply with 37 C.F.R. § 42.63(b).....2

    C. In the Absence of Excluding All of TSE, At Least Pages 101-140 of the TSE Translation (Exhibit 1004) Should Be Excluded for Failing to Comply with 37 C.F.R. § 42.63(b) .....7

IV. Dr. Román’s Supplemental Declaration (Ex. 1042) Should be Excluded .....10

    A. TT Timely Objected to the Supplemental Declaration, Which Was Relied Upon in TD’s Reply .....10

    B. Dr. Román’s Supplemental Declaration Lacks Relevance Under FRE 402 and is Prejudicial under FRE 403 .....10

## **I. Preliminary Statement**

Pursuant to 37 C.F.R. §§ 42.64(c) and 42.61(a) and the Federal Rules of Evidence, Patent Owner Trading Technologies International, Inc. (“TT”), moves to exclude the English translation of the TSE document (Ex. 1004), because the translation fails to comply with the requirements of 37 C.F.R. § 42.63(b) and Fed. R. Evid. 104(b) and 602-604. The original affidavit of Ms. O’Connell (Ex. 1005) is defective because it was not made by a person having personal knowledge of the translation. Because this defect is not curable by supplemental evidence, all of the TSE translation should be excluded. Although subsequent affidavits were prepared by Petitioner TD Ameritrade et al. (“TD” or “Petitioner”), one declarant, Mr. Skidmore, denied that pages 101-140 of Ex. 1004 were his translation. For this additional reason, at least pages 101-140 of Ex. 1004 should be excluded.

TT also moves to exclude the Supplemental Declaration of Kendyl A. Román in Support of Petitioners’ Reply for Covered Business Method Review of U.S. Patent 7,533,056 (Ex. 1042, “Supplemental Declaration”) because portions of the Exhibit lack relevance (FRE 402), exceeding the proper scope of Petitioner’s Reply under 37 C.F.R. § 42.23(b), and at least because of the prejudice resulting from Patent Owner’s inability to respond to the untimely evidence and opinions therein (FRE 403).

## **II. Standard**

A Motion to Exclude must (a) identify where in the record the objection was made,<sup>1</sup> (b) identify where in the record the evidence sought to be excluded was relied upon by an opponent, (c) address objections to exhibits in numerical order, and (d) explain the objection. Trial Practice Guide, 77 Fed. Reg. 48,756, 78,767 (Aug. 14, 2012).

## **III. The TSE Translation (Ex. 1004) Should Be Excluded**

### **A. TT Timely Objected to the TSE Translation,<sup>2</sup> Which Was Relied Upon in TD's Petition and Its Reply**

TT objected to Exhibits 1003-1005 in objections served December 16, 2014. Ex. 2273. TD relies upon the TSE translation (Ex. 1004) for all instituted prior art grounds throughout its Petition and in its Reply. Pet., Paper 4 at 27-53; Reply, Paper 48 at 12-18; I.D., Paper 19 at 19-23.

### **B. All of the TSE Translation Should be Excluded for Failing to Comply with 37 C.F.R. § 42.63(b)**

When TD filed its Petition and the TSE translation, it filed an ineffective

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<sup>1</sup> Under the Rules published May 19, 2015, objections must now be filed. 80 Fed. Reg. 28,561, 28,563. A copy of TT's objections are being filed as Ex. 2273.

<sup>2</sup> The Board determined that TT's original objection to Exs. 1003-1005 preserved its objections to the supplemental evidence (Exs. 1036-1040) and no further objections were necessary. Ex. 3003 at 16:4-12.

affidavit of Ms. Courtney O’Connell (Ex. 1005). Ms. O’Connell’s affidavit fails to comply with § 37 C.F.R. § 42.63(b), which requires that “[w]hen a party relies on a document . . . in a language other than English, a translation of the document into English and an affidavit attesting to the accuracy of the translation must be filed with the document.” A declarant “may testify to a matter *only* if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Fed. R. Evid. 602 (emphasis added). For foreign language translations, a translation not certified as true and accurate is not admissible under the Federal Rules of Evidence or the Board’s Rules. 37 C.F.R. § 42.63(b); *City of N.Y. v. Geodata Plus, LLC*, 537 F. Supp. 2d 443, 448 n.9 (E.D.N.Y. 2007); *cf. Quiroga v. Fall River Music, Inc.*, No. 93-civ-2914, 1998 WL 851574 at \*2 n.3 (S.D.N.Y. Dec. 7, 1998).

The accuracy of Ex. 1004 is a question of fact. Ms. O’Connell’s affidavits (Exs. 1005 and 1040) cannot testify to the factual accuracy of the translation, because she has no personal knowledge of Japanese-English translation or personal knowledge of the underlying source document’s contents. Ex. 2093 [O’Connell Tr.] at 16:16-17; Fed. R. Evid. 602; *Zhongshan Broad Ocean Motor Co., Ltd. v. Nidec Motor Corp.*, IPR2014-01121, Paper 20 at 11-12 (January 21, 2015).

Ms. O’Connell’s affidavits are thus irrelevant to these proceedings. Ms. O’Connell admitted that she (1) speaks only English and, therefore, cannot attest to

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