

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TD AMERITRADE HOLDING CORP., TD AMERITRADE, INC., AND
TD AMERITRADE ONLINE HOLDINGS CORP.,
Petitioner,

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.,
Patent Owner.

CBM2014-00133 (Patent 7,676,411)
CBM2014-00135 (Patent 6,772,132)

Before SALLY C. MEDLEY, MEREDITH C. PETRAVICK, and
PHILIP J. HOFFMANN, *Administrative Patent Judges*.

MEDLEY, *Administrative Patent Judge*.

ORDER
Conduct of the Proceeding
37 C.F.R. § 42.5

On May 11, 2015, a conference call was held between counsel for the respective parties and Judges Medley, Petravick, and Hoffmann. Patent Owner requested the call to discuss expunging Exhibit 2011 from the record.

Exhibit 2011 is described as “Volume 4-A Trial Transcript of the Proceedings Before The Honorable James B. Moran and a Jury, *Trading Technologies International, Inc. v. eSpeed, Inc.*, Case No. 1:04-CV-05312 (N.D. Ill. Sept. 17, 2007).” Paper 34 at 2–3 (“Trial Transcript”).¹ Included in the Trial Transcript is the testimony of Mr. Harris Brumfield. In the Patent Owner Response, Exhibit 2011 is cited with respect to certain portions of Mr. Brumfield’s testimony. *See, e.g.*, PO Resp. 6, 16, and 17.

During the conference call, Patent Owner explained that because the Patent Owner Response relies on Mr. Brumfield’s testimony (Ex. 2011) sparingly, and the testimony is not necessary to the proceedings, Patent Owner seeks to have Exhibit 2011 expunged from the record. Patent Owner further explained that as a result of expunging the exhibit from the record, there would be no occasion for the cross examination of Mr. Brumfield, saving both sides the expense of a deposition.

Petitioner explained that it does not object to Exhibit 2011 being expunged from the record, provided that Patent Owner file a corrected Patent Owner Response to remove not only citations to Exhibit 2011, but also text and statements surrounding the citations. Petitioner explained that it would be prejudiced if the statements are left in the Patent Owner Response, even if Exhibit 2011 is expunged from the record, because it would not be authorized to cross examine Mr. Brumfield regarding the statements that would remain in the Patent Owner Response.

¹ Citations are to CBM2014-00133.

During the call, we discussed the difficulties of having Patent Owner file a corrected Patent Owner Response. These proceedings are contentious and there is not a likelihood that the parties will agree on what should or should not remain in a corrected Patent Owner Response. We are of the opinion that ordering the Patent Owner to file a corrected Patent Owner Response, based on the record of these proceedings, would impede the just, speedy, and inexpensive resolution of these proceedings. 37 C.F.R. § 42.1(b). Moreover, we are not persuaded that Petitioner will be prejudiced if Exhibit 2011 is expunged, but the original Patent Owner Response remains of record. As we explained during the call, the remaining statements without the supporting document (Ex. 2011) would be based on attorney argument and would be given little or no weight. Argument of counsel cannot take the place of evidence lacking in the record. *Meitzner v. Mindick*, 549 F.2d 775, 782 (CCPA 1977). As such, there would be no sufficient reason for Petitioner to cross examine Mr. Brumfield. His testimony no longer would be of record and the statements about what he did or did not do made in the Patent Owner Response would be based on attorney argument, and given little to no weight.

Accordingly, we grant Patent Owner's request to expunge Exhibit 2011 and deny Petitioner's request for us to order Patent Owner to file a corrected Patent Owner Response. 37 C.F.R. § 42.1(b).

Order

It is

ORDERED that Exhibit 2011 be expunged from the record.

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