Paper No. _____
Filed: June 12, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.
Patent Owner

Case CBM2014-00133
Patent 7,676,411

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

TABLE OF CONTENTS

I. Preliminary Statement

Patent Owner Trading Technologies International, Inc. ("TT"), moves to exclude the Supplemental Declaration of Kendyl A. Román in Support of Petitioners' Reply for Covered Business Method Review of U.S. Patent 7,676,411 (Ex. 1027, "Supplemental Declaration"), because portions of Exhibit 1027 lack relevance (FRE 402), since they exceed the proper scope of Petitioner's Reply under 37 C.F.R. § 42.23(b), and are prejudicial to Patent Owner, since Patent Owner is unable to respond to them (FRE 403).

II. Standard

A Motion to Exclude must (a) identify where in the record the objection was made, (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. Dr. Román's Supplemental Declaration (Ex. 1027) Should be Excluded

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

TT objected to Exhibit 1027 in objections served June 5, 2015. Paper 43. TD relies upon the Supplemental Declaration (Ex. 1027) for its 35 U.S.C. § 101 grounds. *E.g.*, Reply, Paper 42 at 4, 8-9, 12, 15, and 24.

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

Rather than further explain the original arguments set out in the Petition, TD's Reply raises several issues for the first time, supported by Dr. Román's Supplemental Declaration. Thus, instead of narrowing the issues before the Board, TD's Reply expands them. 37 C.F.R. § 42.23(b) states "[a] reply may only respond to arguments raised in the corresponding . . . patent owner response." As explained in the Trial Practice Guide, "new evidence necessary to make out a *prima facie* case for [] unpatentability" and "new evidence that could have been presented in a prior filing" are improper. 77 Fed. Reg. 48767. The Board should not allow TD to propose entirely new theories of unpatentability under 35 U.S.C. § 101 when those arguments could have been presented in its Petition.

37 C.F.R. § 42.22(a)(2) requires that "[a] petition . . . must include '[a] full statement of the reasons for the relief requested, including a detailed explanation of the significance of the evidence including material facts, and the governing law, rules, and precedent.'" TD's late evidence to support new "reasons for the relief requested" and new alleged "material facts" lacks relevance under Fed. R. Evid. 402, going beyond TD's originally proposed "reasons for the relief requested."

The new evidence prejudices Patent Owner under Fed. R. Evid. 403 because its own experts cannot now respond to the new observations and opinions, and Patent Owner is precluded from addressing the Supplemental Declaration in its

Patent Owner Response. *See Intri-Plex Technologies, Inc. v. Saint-Gobain Performance Plastics Rencol Limited***,** IPR2014-00309, Paper 83 at 13. The new evidence is also a waste of time, confuses the issues, and could cause undue delay (Fed. R. Evid. 403) because it unnecessarily expands the issues for Oral Hearing, and presents multiple theories (legal and claim construction) that have not been fully briefed for consideration in the Board's Final Written Decision.

For at least the following reason with respect to the instituted 35 U.S.C. § 101 grounds, the Supplemental Declaration is improper:

Citing to the Supplemental Declaration at ¶ 4, TD argues for the first time that "[a]side from the recitation of conventional and generic computer terms and processes. . . claim 1 could be performed in the human mind or with the aid of pen-and-paper with little difficulty because the claim requires plotting only two data points (highest bid and lowest ask)." *See* Reply at 4. Similarly, citing to the Supplemental Declaration at ¶ 6, TD argues for the first time that "[p]lotting data along a static price axis can be done mentally or with the aid of pen-and-paper. . . ." and specifically that "a static price axis is a well-known conventional feature in both paper and electronic displays for such data." *See* Reply at 8-9. These new arguments could have been included in Petitioner's original paper, but were not, and they raise claim construction and factual issues that the Patent Owner cannot now brief. Dr. Román's new conclusions and supporting statements

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.