

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,  
-----X

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

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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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