

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 CBM2014-00137  
Patent 7,685,055

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

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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. 1008), 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. 1009) 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. 1008 were his translation. For this additional reason, at least pages 101-140 of Ex. 1008 should be excluded.

TT also moves to exclude the Supp. Dec. of Kendyl A. Román (Ex. 1023, “Supp. Dec.”), because portions of Exhibit 1023 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 TT, since TT is unable to respond to them (FRE 403).

In addition, TT moves to exclude Exhibit 1029, page 28, line 14, to page 29, line 22, for going beyond the proper scope of cross-examination under FRE 611.

**I. The TSE Translation (Ex. 1008) Should Be Excluded**

**A. TT Timely Objected to the TSE Translation,<sup>1</sup> Which Was Relied Upon in TD's Petition and Its Reply**

TT objected to Exhibits 1007-1009 in objections served December 16, 2014. Ex. 2273. TD relies upon the TSE translation (Ex. 1008) for all instituted prior art grounds throughout its Petition and in its Reply. Pet., Paper 1 at 13-35; Reply, Paper 51 at 17-23; I.D., Paper 19 at 17-26.

**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 affidavit of Ms. Courtney O'Connell (Ex. 1009). 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

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<sup>1</sup> The Board determined that TT's original objection to Exs. 1007-1009 preserved its objections to the supplemental evidence (Exs. 1017-1021) and no further objections were necessary. Ex. 3003 at 16:4-12.

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. 1008 is a question of fact. Ms. O'Connell's affidavits (Exs. 1009 and 1021) 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 the accuracy of a Japanese translation; (2) does not know which pages were translated by any translator; and (3) did not perform a quality check on the translations. Ex. 2093 at 16:16-17, 38:8-39:1, 72:10-19. Ms. O'Connell merely managed the account relationship with TD, but she did not assign the translations, communicate with the translators, compile the translations, or even review the translations. Ex. 2093 at 73:17-74:3. In fact, Ms. O'Connell not only admitted that she cannot read Japanese, but also admitted that the project manager, Courtney Edmunds, also could not verify the accuracy of the translation because Ms.

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