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

_____

Case CBM2014-00137
Patent 7,685,055

_____

Patent Owner's Opposition to Petitioner's Motion to Exclude

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I. Preliminary Statement

In its motion to exclude, Petitioners TD Ameritrade et al. ("TD") repeatedly ask the Board to ignore the nature of the evidence submitted by Trading Technologies ("TT"), as well as the timing and circumstances of the evidence's submission.

TD criticizes TT's reliance on exhibits, not declarations, to support the Patent Owner's Preliminary Response ("POPR")—when, by rule, no declarations can be submitted at that phase of the proceeding. TD criticizes as hearsay exhibits not submitted for the truth of the matter asserted, twisting the exhibits' use to further TD's exclusionary goals. TD also argues that government websites and published articles are somehow inauthentic or unreliable.

As these examples demonstrate, are motivated not by a fair reading of the rules of evidence, but rather on a litigation-driven desire to exclude relevant, probative evidence. Accordingly, TT respectfully requests denial of TD's motion.

II. Standard

The Federal Rules of Evidence ("FRE") govern the admissibility of evidence in this proceeding. Trial Practice Guide, 77 Fed. Reg. 48,756, 48,758 (Aug. 14, 2012). As the party moving to exclude evidence, TD bears the burden of proof on inadmissibility. 37 C.F.R. § 42.20(c).

III.   Exhibit 2007, a Set of Demonstrative Exhibits, was Properly Cited in TT's Preliminary Response and is not Hearsay

TD criticizes TT for citing Exhibit 2007, a set of demonstrative slides submitted to a court in parallel litigation, in its Patent Owner's Preliminary Response. TT cited this exhibit as general background regarding TT's formation, company size, and success of its MD Trader product. Other than one mention of commercial success, TT did not repeat this reliance in its Patent Owner's Response ("POR"). TT's reliance on these demonstratives was proper under the Rules.

Under Rule 42.207(c) and the Board's Trial Practice Guide ("TPG"), a Patent Owner cannot submit new supporting declarations with its Preliminary Response and must rely on evidence from other proceedings. 37 C.F.R. § 42.207(c) ("The preliminary response shall not present new testimony evidence beyond that already of record . . . ."); TPG at 48,764 ("The preliminary response may present evidence *other than new testimonial evidence* to demonstrate that no review should be instituted.") (emphasis added). TD's criticism of TT's citation of Exhibit 2007, not repeated in the Patent Owner's Response, is misplaced.

Exhibit 2007 is demonstrative in nature and illustrates exemplary differences between TT's technology and the prior art. To narrow the issues before the Board, TT agrees to rely on Exhibit 2007 as a demonstrative only, not to establish the truth of the matters for which it is cited on pages 1 and 29 of the POPR. As such,

TD's hearsay objections are unfounded. TD's objections under FRE 602, 702, and 703 fail for the same reason.

TD's reliance on the best evidence rule (FRE 1002 *et seq*.) against Ex. 2007 is similarly misplaced. First, TT has not offered Ex. 2007 "in order to prove its content" or as a "summary . . . of voluminous writings." FRE 1002; FRE 1006. TT never alleged any passage or figure of these exhibits served as a "summary" of a prior litigation. Nor has TD pointed to any discrepancy between Ex. 2007 and any underlying document. The "contents" of Ex. 2007 are therefore not at issue, and these rules are inapplicable. Second, TD's arguments go to the sufficiency of the evidence, not its admissibility. TD's motion questions whether the passages of Ex. 2007 are "proper summaries" of the root proceedings. Motion at 5. This argument is improper in a motion to exclude. *See* TPG at 48,767 ("A motion to exclude . . . may not be used to challenge the sufficiency of the evidence to prove a particular fact.").

IV.   Exhibit 2202, a District Court Demonstrative, Was Not Offered for the Truth of the Matter Asserted

TD similarly asks the Board to exclude another demonstrative exhibit, Ex. 2202, on the basis of hearsay, lacking personal knowledge, and the rules governing expert testimony. Motion at 1-5. Due to the demonstrative nature of the exhibit, as well as its intended use, TD's arguments fail.

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