

Paper No. _____
Filed: February 10, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TRADESTATION GROUP, INC. AND
TRADESTATION SECURITIES, INC.

Petitioner

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.

Patent Owner

Case CBM2015-00161
U.S. Patent 6,766,304 B2

**Patent Owner's Objections to
Evidence Pursuant to 37 C.F.R. § 42.64**

Pursuant to 37 C.F.R. § 42.64(b)(1), Patent Owner objects to Petitioners' Exhibits 1013 (Declaration of Dr. John Phillips Mellor), 1016 ("Futures/ Option Purchasing System Trading Terminal Operation Guide", Tokyo Stock Exchange Operation System Division), 1017 (Translation of "Futures/ Option Purchasing System Trading Terminal Operation Guide", Tokyo Stock Exchange Operation System Division), 1018 (Certificate of Translation of "Futures/ Option Purchasing System Trading Terminal Operation Guide", Tokyo Stock Exchange Operation System Division), and 1019 (Gutterman, et al. US Patent No. 5,297,031) served with the Petition (Paper No. 2).

I. OBJECTION TO PETITIONERS' EXHIBIT 1013

Exhibit 1013 is inadmissible and should be excluded for the following reasons:

First, Petitioners' Exhibit 1013 is inadmissible hearsay under **FRE 801 and 802**, having been prepared for another party, CQG, in another proceeding, and not having been adopted by Mr. Mellor for these proceedings (*see, e.g.*, Ex. 1013 at 1-2, 60). Exhibit 1013 also contains additional hearsay statements by other declarants that appear at paragraphs 77, 79-81. No hearsay exception applies for Exhibit 1013, or the statements of others incorporated or contained therein.

Second, Exhibit 1013 is inadmissible as irrelevant under **FRE 401 and 402**. Because Petitioners rely on Exhibit 1013 only for their un-instituted § 112 grounds

(*see* Pet. 53, 55, 56, 57, 58, 59), and because the Board instituted trial as to the challenged claims only on § 101 grounds, and does not rely on Exhibit 1013 (*see* Paper No. 29), Exhibit 1013 is not relevant to this proceeding and does not have the tendency to make any fact at issue in this proceeding more or less probable.

Third, Exhibit 1013 does not include the Exhibits it refers to (Exs. 1-13). Exhibit 1013 and the Petition, therefore, are not compliant with: **37 C.F.R. §§ 42.6 (c); 42.63(a); and/or 42.205(a).**

II. OBJECTION TO PETITIONERS' EXHIBITS 1016, 1017, AND 1018

Exhibits 1016, 1017, and 1018 are inadmissible and should be excluded for the following reasons:

First, Petitioners appear to rely on Exhibit 1016 and its purported English translation, Exhibit 1017, for alleged truth(s) of the matter(s) asserted therein—e.g., that features of the TSE GUI were known during the relevant time. Pet. 36-37. Exhibit 1016 and 1017 are inadmissible hearsay for this purpose under **FRE 801 and 802**, and no exception applies.

Second, Exhibits 1016 and 1017 are irrelevant to the § 101 grounds, and therefore Exhibits 1016 and 1017 are further inadmissible under **FRE 401 and 402**.

Third, Petitioners have submitted no evidence to authenticate Exhibit 1016, and deficient evidence for Exhibit 1017 as set forth below, making both inadmissible under **FRE 901**.

Exhibits 1017 and 1018 are inadmissible and should also be excluded for the following additional reasons:

Petitioners fail to provide a credible translation of TSE and fail to conform with the Board's rules for submitting translations of foreign language documents. In particular, **37 C.F.R. § 42.63(b)** requires that “[w]hen a party relies on a document or is required to produce 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.” (Emphasis added.) The record lacks such an affidavit under Rule 42.63(b) attesting to the accuracy. When previously deposed regarding her affidavit (Ex. 1018), Ms. O’Connell, a manager at TransPerfect, was also unable to personally attest to the accuracy of the translation. She admitted that she cannot read or translate Japanese. *See* CBM2015-00131, Ex. 2093 [O’Connell Tr.] at 16:16-17; *see* **FRE 602** (requiring personal knowledge to testify to a matter); **FRE 603 and 604** (requiring truthful testimony and ability to make accurate translations); **FRE 104(b)** (requiring proof that a fact exists where the relevance of the evidence depends on the existence of a fact). This makes Exhibit 1018 inadmissible under 37 C.F.R. § 42.61(a).

Exhibit 1018 also fails to comply with the Board's rules for a proper affidavit and lacks the required statements for perjury. *See* **37 C.F.R. § 1.68** (stating that a declaration may be used in lieu of an oath "if, and only if, the declarant is on the same document, warned that willful false statements and the like are punishable by fine or imprisonment."); 37 C.F.R. § 42.2 (defining the term "affidavit" in a CBM proceeding as an "affidavit or declaration under § 1.68 of this chapter"); *see* 28 U.S.C. § 1746 (stating that unsworn declarations under penalty of perjury may be used where a matter is required or permitted to be supported by sworn declaration or affidavit); 37 C.F.R. § 42.2 (noting that "a declaration under 28 U.S.C. 1746 may be used as an affidavit" in a CBM proceeding). This non-compliant affidavit is inadmissible. **37 C.F.R. § 42.61(a)**.

The accuracy of Ex. 1017 is a question of fact. Ms. O'Connell cannot testify to that fact because she has no personal knowledge of Japanese-English translation or personal knowledge of the underlying source document's content. FRE 602-604, 104(b); *Zhongshan Broad Ocean Motor Co., Ltd. v. Nidec Motor Corp.*, IPR2014-01121, Paper 20 at 11-12 (January 21, 2015) (holding that because an affidavit was not filed with a translation, the Board would not consider the reference). Without proper evidence attesting to the accuracy of the translation, the translation is inadmissible. 37 C.F.R. § 42.61(a) ("Evidence that is not taken, sought, or filed in accordance with this subpart is not admissible."). Based on the failure to comply

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.