

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

IBG LLC, INTERACTIVE BROKERS LLC,
TRADSTATION GROUP, INC., TRADESTATION SECURITIES, INC.,
TRADESTATION TECHNOLOGIES, INC., and IBFX, INC.,
Petitioner,

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.,
Patent Owner.

CBM2015-00161 (Patent No. 6,766,304 B2)¹
CBM2015-00172 (Patent No. 7,783,556 B1)
CBM2015-00179 (Patent No. 7,533,056 B2)²
CBM2015-00181 (Patent No. 7,676,411 B2)
CBM2015-00182 (Patent No. 6,772,132 B1)

Before SALLY C. MEDLEY, MEREDITH C. PETRAVICK, and
JEREMY M. PLENZLER, *Administrative Patent Judges*.

Per Curiam.

ORDER
Conduct of the Proceeding
37 C.F.R. § 42.5

¹ Case CBM2016-00035 has been joined with this proceeding.

² Case CBM2016-00040 has been joined with this proceeding.

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CBM2015-00182 (Patent 6,772,132 B1)

On July 15, 2016, a conference call was held involving counsel for Petitioner, counsel for Patent Owner, and Judges Medley, Petravick, and Plenzler. The purpose of the call was for Patent Owner to seek authorization to file an Offer of Proof, pursuant to FRE 103(a)(2) & (b). For the reasons that follow, Patent Owner's request is denied.

The patents in these proceedings also are involved in the district court proceeding *TT v. BGC Partners, Inc.*, et al., No. 1:10-cv-00715 (N.D. Ill.). *See, e.g.*, Paper 9, 3.³ The district court proceeding was stayed, however, Patent Owner requested, and was granted a partial lift of the stay for limited discovery purposes. Ex. 2142, 29. As Patent Owner indicated (Paper 67, 2), that discovery period ended June 10, 2016. Due Dates for filing Patent Owner Responses were extended (Paper 63) to accommodate Patent Owner, in the event Patent Owner desired to use any of the district court evidence in these proceedings.

The evidence from the district court proceeding, which is the subject of this request, is in Patent Owner's possession, but is under a protective order in the district court proceeding. Ex. 2335, 21:15–21. According to Patent Owner, the district court protective order precludes the use of this evidence in Board proceedings. Ex. 2140, 5:19–22. The place to seek relief from such a protective order is in the district court. *See* Paper 74, 10. In other words, a district court can rule to lift its own protective order such that parties to a proceeding before the Board may then use such protected district court documents in a Board proceeding. When asked why Patent Owner

³ Citations are to CBM2015-00179.

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was asking the Board for the relief from the district court protective order during the call requesting authorization to file the motion for additional discovery, Patent Owner indicated that it “believe[d] there was a motion filed in the District Court action, but that hasn’t been acted on.” Ex. 2140, 5:19–24. Accordingly, we were led to believe that Patent Owner sought such relief from the district court. *See* Paper 74, 10. When asked during the call regarding the request to file an offer of proof, Patent Owner could not clearly articulate whether such a request had ever been made to the district court.⁴ *See* Ex. 2335, 14:14–15:11, 16:14–20, 17:2–12, 18:5–6. Based on the record before us, it appears that Patent Owner did not request relief from the district court protective order, but instead, made the litigation decision to file a motion for additional discovery in these proceedings. Ex. 2335, 15:5–11. Nevertheless, the motions for additional discovery were ultimately denied primarily for reasons divorced from whether Patent Owner requested relief from the district court protective order. Paper 74.

Notwithstanding the denial of the motion for additional discovery, Patent Owner was free to submit the same evidence it sought through means

⁴ During the call, Petitioner indicated that on June 13, 2016 Patent Owner filed, in the district court, a first motion to modify the protective order for the limited purpose of submitting some of the evidence with the motion for additional discovery. The first motion was withdrawn on June 14, 2016. According to Petitioner, a second motion was filed to modify the protective order for the limited purpose of an offer of proof. The district court granted the second motion on July 7, 2016 for the limited purpose of filing an offer of proof. Ex. 2335, 6:6–7:2. The record does not indicate whether Patent Owner requested general relief from the protective order in its first or second motion.

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of additional discovery provided the district court granted it relief from the district court protective order. But, as indicated above, Patent Owner does not appear to have timely made such a request. Rather, on June 26, 2016, Patent Owner filed its Patent Owner Responses without the protected district court proceeding evidence. Apparently, sometime after that, Patent Owner sought, and received, relief from the district court protective order for the limited purpose of filing an offer of proof, along with the evidence.

In essence, because Patent Owner now has evidence it seeks to file in these proceedings due to the limited relief from the district court protective order, Patent Owner argues that it is proper to present such evidence under the guise of an offer of proof under FRE 103(a)(2) & (b).

Analysis

Our rules provide that *generally*, the Federal Rules of Evidence apply to the types of proceedings before us here. 37 C.F.R. § 42.62(a). Patent Owner argues that to preserve the issue for appeal of whether we abused our discretion in denying it additional discovery, it must file an offer of proof under FRE 103(a)(2) & (b). Patent Owner argues that this is the proper mechanism in a district court proceeding to claim error of an evidentiary ruling for appeal purposes. However, Patent Owner did not provide a legal basis for doing the same in these proceedings. AIA proceedings are not the same as district court proceedings. *See, e.g., Cuozzo Speed Techs. LLC v. Lee*, No. 15–446, 2016 WL 3369425, at *2 (U.S. June 20, 2016) (explaining that an AIA proceeding is “less like a judicial proceeding and more like a specialized agency proceeding”). Moreover, even if a party can file an offer of proof in an AIA proceeding under 37 C.F.R. § 42.62(a), Patent Owner has not

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demonstrated sufficiently why such an offer of proof is appropriate based on the facts before us.

Federal Rule of Evidence 103 is directed to “Rulings on Evidence.” The text of FRE 103(a)(2) is directed to preserving a claim of error and indicates that “[a] party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and . . . (2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.” Federal Rule of Evidence 103(b) states that “[o]nce the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.” An offer of proof relates to rulings made by a court in admitting evidence or excluding evidence. Here, Patent Owner argues that we erred in excluding evidence when we denied its motion for discovery. Ex. 2335, 8:16–23. Patent Owner’s argument is misplaced as we did not exclude any evidence from the record of these proceedings. Rather, we denied Patent Owner’s motion seeking additional discovery, e.g., seeking to have Petitioner produce in these proceedings the same evidence Patent Owner obtained through discovery in the district court. We could not have excluded something that was never part of the record in the first place. Accordingly, Patent Owner’s argument is not persuasive.

We also note that with the proposed offer of proof, Patent Owner seeks to file new evidence in these proceedings, but acknowledges that those Exhibits would not affect this proceeding. Ex. 2335, 9:8–20. The proper mechanism for introducing new evidence into the record at this stage of the

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