UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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TRADESTATION GROUP INC.,
TRADESTATION SECURITIES, INC., IBG LLC, and INTERACTIVE BROKERS LLC.,
Petitioners,

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.,
Patent Owner.

_____

Case CBM2015-00161[1]
Patent No. 6,766,304

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**PETITIONERS' MOTION TO EXCLUDE**

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## I. INTRODUCTION

TT's Patent Owner Response ("TT's POR") dumps into the record and buries the Board with hundreds of pages of documents without regard to their admissibility. But this proceeding is governed by the Federal Rules of Evidence and those Rules set fair boundaries on the admissibility of evidence. TT's ignores those rules.

TT knows that its evidence suffers from significant admissibility problems. Indeed, it preemptively sought a blanket waiver from the Board so that TT could rely on a "large volume of documents produced in previous district court cases" without regard to the Board's Rules and Federal Rules of Evidence 802 and 901. Paper 38, 2–3. The Board denied TT's request. *See id.* Having been denied permission to do so, TT proceeded to file a tremendous number of documents from the district court cases without regard to the Board's order and the rules governing this proceeding. That evidence should be stricken.

A significant number of the documents submitted by TT violate the prohibition on hearsay. *See* FRE 802. Absent one of the well-established exceptions to hearsay, such as the unavailability of a declarant, hearsay is inadmissible. TT disregards this Rule entirely by introducing hearsay statements from dozens of individuals in an effort to defend the patentability of its claims.

A significant number of TT's documents also fail to meet the basic requirements of authenticity required by Federal Rule of Evidence 901. Despite Petitioners' timely objection, TT offered no competent evidence that cures this objection leaving the Board and Petitioners with no basis to gauge whether the documents are genuine.

TT's evidence also ignores the proper boundaries of expert witness testimony in contravention of Federal Rule of Evidence 702. Rule 702 permits an expert to offer opinions based on his specialized knowledge in the field. But significant portions of Mr. Thomas' declaration are not opinions of Mr. Thomas. Rather, Mr. Thomas purports to offer factual testimony that is not based on his own perception but is instead based upon his review of district court depositions and trial transcripts. That underlying evidence should not be admitted in this proceeding as TT may not use Mr. Thomas "simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony." *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013) (citation omitted). This testimony is improper and, therefore, should be excluded. *See, e.g.*, *United States v. Dukagjini*, 326 F.3d 45, 58 (2d Cir. 2003).

Moreover, the evidence is inadmissible under FRE 402 because is it not relevant to patent eligibility under 35 U.S.C. § 101, the sole remaining issue in this proceeding. Indeed, no court has ever considered evidence of secondary

considerations in a Section 101 analysis.

Accordingly, Petitioners file this motion pursuant to 37 C.F.R. § 42.64(c) and in accordance with the Board's May 12, 2016 Order modifying Due Date 4. (Paper 38 at 8.)

## II. ARGUMENT

### A. The *eSpeed/CQG* Transcripts: Exhibits 2029, 2211, 2220, 2222, 2224, 2225, 2228, 2232, 2247, 2251, 2274–2276, 2286–2288, and 2292–2296

The Board should exclude Exhibits 2211, 2220, 2222, 2224, 2225, 2228, 2232, 2247, 2251, 2274–2276, 2286–2288, 2292–2296 ("*eSpeed/CQG* Transcripts") because they are hearsay to which no valid exception applies. Most of these exhibits are cited in TT's POR. *See* Paper 67 at 13, 31–34, 38, 41–45, 47, 51, and 67; *see also* Paper 70 (providing limited citations to the record for TT exhibits). In addition, as discussed further in section II.E. *infra*, TT's technical expert Mr. Thomas relies upon these transcripts to support the assertions in his declaration (Ex. 2169) regarding, for example, the background of the claimed invention and alleged secondary considerations, including "commercial success," "initial skepticism followed by acceptance," "widespread copying," "failure of others," "praise and accolades," and "unexpected results." Petitioners timely objected to each of the *eSpeed/CQG* Transcripts on the basis of, among other things, hearsay. *See* Paper 22 at 16; Paper 69 at 14–16.

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