

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TRADESTATION GROUP, INC.
TRADESTATION SECURITIES, INC., IBG LLC, AND
INTERACTIVE BROKERS LLC,

Petitioners

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.
Patent Owner

Case CBM2015-00172¹
Patent No. 7,783,556

**PETITIONERS' OPPOSITION TO PATENT OWNER'S
MOTION TO EXCLUDE UNDER 37 C.F.R. 42.64(C)**

¹ Case CBM2016-00040 has been joined with this proceeding.

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I. INTRODUCTION

Patent Owner Trading Technologies International, Inc. (“TT”) urges the Board to exclude a portion of one deposition transcript involving TT’s declarant Dan Olsen (Ex. 1018, 57-58). TT’s argument can be summed up as seeking to exclude *unfavorable* testimony and otherwise using this Motion to Exclude as an unauthorized sur-reply to argue the merits of whether “the claimed inventions do not improve computers.” (Paper 65 at 2.)

II. FEDERAL RULES OF EVIDENCE 403

Fed. R. Evid. 403 provides that evidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusing the issues, misleading the fact-finder, undue delay, wasting time, and/or presenting needlessly cumulative evidence. Here, the material sought to be excluded consists of factually true admissions explaining how the claims are not directed to various technological improvements. These admissions are highly probative of patent eligibility. In turn, TT appears to rely on the “unfair prejudice,” “confusing” and “misleading” aspects of Fed. R. Evid. 403. But there is simply no danger of confusing or misleading *the Board*. The Board is perfectly capable of according these admissions appropriate weight in view of all the evidence. And TT has failed to demonstrate even a remote likelihood that the statements will be misinterpreted or misunderstood. TT may disagree with the legal conclusions to be drawn from these admissions;

however, that is not a cognizable basis for excluding evidence.

TT has exhausted its opportunities to brief the merits and rehabilitate its experts with explanations such as “[r]ather than admitting the claimed inventions do not improve computers, Mr. Olsen was simply stating what was not explicitly recited by the claims.” (Paper 65 at 3.) This argument has nothing to do with balancing probative value and unfair prejudice under Fed. R. Evid. 403; it is an improper attempt to explain away highly probative admissions.

And, as a general policy, it is not unfairly prejudicial to place the burden of seeking clarification on the testifying expert. In fact, this has long been the Board’s practice.² Here, counsel for Petitioner properly instructed the witness. (*See, e.g.*,

² *Cf.* U.S. PATENT & TRADEMARK OFFICE, Standing Order of Jan. 3, 2006 Governing Contested Cases Assigned to Trial Division, *Board of Patent Appeals and Interferences*, Cross Examination Guidelines, Appendix, p. 71 (Jan. 2006), available <https://www.uspto.gov/web/offices/dcom/bpai/Standing-Order.pdf> (“Guideline [1] At the beginning of a cross examination, the party conducting the cross examination must instruct the witness on the record to ask deposing counsel, rather than the witness’s own counsel, for clarifications, definitions or explanations of any words, questions or documents presented during the cross examination. The witness must

CBM2015-00179 Ex. 1059, Olsen Dep. Tr., 6:9-17.) Having been instructed, and free to seek clarification as needed, the answers provided are in accordance with the ground rules for cross-examination. TT's attempt to erase truthful, albeit unfavorable, responses given by its experts should be denied.

III. CONCLUSION

For the above reasons, Patent Owner's Motion to Exclude should be denied.

Respectfully submitted,

Dated: October 7, 2016

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follow these instructions.”) *See also Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993) (serving as the model for the Standing Order).

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