

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.
Patent Owner

Case CBM2015-00179
Patent No. 7,533,056

PETITIONERS' REQUEST FOR REHEARING

I. Statement of Relief Requested

Petitioners request rehearing of the Board’s April 15, 2016 Order (Paper 39) (“Order”) authorizing cross examination of Mr. Atsushi Kawashima. Prior authorization is not required to file this Request for Rehearing. 37 C.F.R. § 42.71(d). “The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.” *Id.*

II. Introduction

The Order sets out that “the parties disagree as to whether cross examination of Petitioner’s witness, Mr. Atsushi Kawashima, falls under the routine discovery rule or under the additional discovery rule.” (Order, at 1-2.) Then, without resolving this disagreement, and without hearing from Petitioners, the Order concludes that “Patent Owner is authorized to cross examine Mr. Atsushi Kawashima.” (Order, at 3.) This arbitrary and capricious conclusion should be reversed for at least two reasons.

First, to the extent that the basis for authorizing the cross-examination of Mr. Kawashima is “routine discovery,” the Order overlooks the Board’s consistent interpretation of the Rule for routine discovery. Numerous decisions from the Board stand for the proposition that routine discovery does not apply to preexisting evidence not prepared for the instant proceeding. Petitioners have no relationship

with or control over Mr. Kawashima. The only testimony of Mr. Kawashima relied upon by Petitioners is recorded testimony from a deposition taken on November 21, 2005, in a prior litigation involving Patent Owner involving events that occurred in 1998. Unlike Patent Owner, Petitioners were not involved in this prior litigation and did not participate in this deposition.

Second, to the extent that the basis for authorizing the cross-examination of Mr. Kawashima is “additional discovery,” the Order overlooks the requirements for granting additional discovery in CBM proceedings. Patent Owner must show “good cause” for the additional cross-examination of Mr. Kawashima under the modified *Garmin* factors outlined in *Bloomberg Inc. v. Markets-Alert Pty Ltd.*, CBM2013-00005, Paper 32 (May 29, 2013). No such showing has been made here, and the Order makes no reference to “good cause” or the *Garmin* factors.

III. Factual Background

On March 9, 2016, Patent Owner filed an objection to Petitioner’s Exhibit 1007 as hearsay. (Paper 30, at 1-2.)¹ Exhibit 1007 is a transcript of a deposition of

¹ Exhibit 1007 was used against Patent Owner in prior CBM proceedings and Patent Owner did not object to Exhibit 1007 on the basis of hearsay in any of those prior proceedings. *See Trading Technologies Int’l, Inc. v. TD Ameritrade*

Mr. Kawashima, taken on November 21, 2005, in a prior litigation involving Patent Owner. Petitioners were not parties to this prior litigation and did not participate in the deposition Mr. Kawashima. The deposition transcript is preexisting documentary evidence that was filed previously in another proceeding. The deposition transcript is referenced in the petition (Paper 9, at 21-22) and the institution decision (Paper 23, at 15-20). The deposition transcript is relevant to whether the TSE user manual was publicly available and thus prior art to the challenged patent. (*Id.*)²

During a March 23, 2016 Board call held in this matter, Petitioners explained that counsel for Patent Owner attended the deposition of Mr. Kawashima and had an opportunity to cross-examine Mr. Kawashima. (Ex. 1046, Transcript of March 23, 2016 Board Call, at 4:14-21; *see also* Paper 9, at 22, fn. 2.) Petitioners

Holding Corp., CBM2014-00131, 133, 135 and 137. Patent Owner also did not request a deposition of Mr. Kawashima in those prior proceedings.

² Exhibit 1007 is former testimony of an unavailable, third party witness given in a lawful deposition where Patent Owner had an opportunity to cross-examine. Exhibit 1007 fits within the hearsay exceptions of FRE Rules 804 and 807 and, as such, is admissible evidence that can be relied upon at trial in this proceeding.

also argued that they are under no obligation to make Mr. Kawashima available for cross-examination under routine discovery, as the deposition transcript was not prepared for this proceeding. (Ex. 1046, at 5:3-10.) Notwithstanding, as a courtesy, Petitioners indicated that they were in the process of locating Mr. Kawashima, a resident of Japan, to assess his current availability to provide testimony in this proceeding. (*Id.*, at 10:12-11:16.) Subsequent to this Board call, Petitioners informed Patent Owner that Mr. Kawashima, who remains an employee of the Tokyo Stock Exchange, was unwilling to come to the United States for a deposition in this proceeding. Mr. Kawashima also indicated he was unwilling to be deposed in Japan.³ Mr. Kawashima has no relationship with Petitioners and he is not under their control.

In response, Patent Owner twice approached the Board by email. First, on April 5, 2016, Patent Owner sought authorization to file a motion to dismiss

³ It is Petitioners' understanding that a voluntary deposition taken in Japan must be taken at the U.S. Embassy in Tokyo and can take many months to schedule.

Further, Japan is not a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1980). Thus, it is Petitioners' understanding that neither a U.S. Court, nor the Board, can compel testimony in Japan of a Japanese citizen because it will violate Japan's judicial sovereignty.

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