

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

Petitioners

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.

Patent Owner

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Case CBM2015–00179  
Patent 7,533,056

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**PETITIONERS' MOTION TO EXCLUDE**

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U.S. Patent and Trademark Office  
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Alexandria, VA 22313–1450

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## **I. Introduction**

Petitioners file this motion pursuant to 37 C.F.R. § 42.64(c) and in accordance with modified Due Date 4. (Paper 54.) The Board should exclude Patent Owner Trading Technologies International, Inc.'s ("TT") Exhibits 2327, 2030 and 2032 because these documents are either irrelevant and/or constitute hearsay to which no exception applies.

The first exhibit addressed in this motion is Exhibit 2327, which contains excerpts of a deposition of a third party Thomas Biddulph. The deposition occurred during one of TT's district court cases. Although TT does not cite Exhibit 2037 in its Patent Owner's Response, named inventors Mr. Richard Friesen and Mr. Peter Hart impermissibly use the Biddulph declaration to "corroborate" their alleged reduction to practice. Even if the 2011 deposition of Mr. Biddulph could corroborate a 1998 reduction to practice (which it cannot), there is no exception to the hearsay rule that applies.

The next two exhibits addressed are the jury verdict form and a related docket entry from a district court case, Exhibits 2030 and 2032, respectively. TT relies upon this evidence to support its contention that the TSE reference is not prior art. Apart from the fact that the outcome of a district court case has no bearing on the proceeding before the Board, both documents are also hearsay to which no exception applies.

The next exhibit is Exhibit 2301, which purports to be a design document of a certain electronic trading system. Petitioners challenged the authenticity of Exhibit 2301 in its Response (Paper 110 at 17–18), and timely objected to this exhibit on that basis and others. (Paper 80 at 7–9.) TT has made no attempt at curing the authentication defect and there is no way of knowing whether the exhibit is what it purports to be.

Lastly, Petitioners address Exhibits 2300, 2304–2316, 2318–2324, 2326, 2328–2329. These 22 third party emails are each lacking authenticity and are hearsay to which no exception applies.

TT knows that its evidence suffers from significant admissibility problems. Indeed, it preemptively sought a blanket waiver from the Board so that TT could ignore those requirements. (*See* Paper 8 in CBM2015-00182 at 1-2.) The Board denied TT’s request. (*Id.*) Having been denied permission to do so, TT proceeded to file its exhibits without regard to the Federal Rules. For the reasons set forth below, this evidence should be stricken.

## **II. Argument**

### **A. Deposition Transcript of Thomas Biddulph: Exhibit 2327**

The Board should exclude Exhibit 2327 (“Biddulph Transcript”) because it is hearsay to which no exception applies. The Biddulph Transcript purports to be a seven page *excerpt* from an earlier proceeding involving third parties accused of

infringement by TT. Petitioners timely objected to the Biddulph Transcript (Exhibit 2327) on the basis of, among other things, hearsay. (Paper 80 at 17–19.)

The Biddulph Transcript (Exhibit 2327) is not directly relied upon in TT’s Patent Owner Response. (*See* Paper 83 at 11.) Instead, TT uses this document in an extraordinary effort to corroborate the testimony of two inventors Mr. Richard Friesen and Mr. Peter Hart. *See* Ex. 2167 at 20–28, ¶¶ 34–36 (Friesen); Ex. 2181 at 18–25, ¶¶ 34–36 (Hart). Friesen and Hart cite to the Biddulph Transcript to support their otherwise uncorroborated assertions concerning actual reduction to practice. *See* Ex. 2167 at 20–28, ¶¶ 34–36 (Friesen); Ex. 2181 at 18–25, ¶¶ 34–36 (Hart). Although neither Friesen nor Hart attended the Biddulph deposition, both offer summaries of what transpired at that deposition based on their after-the-fact review of the deposition transcript. *See* Ex. 1054, Friesen Dep. Tr. at 57:3-5; Ex. 1055, Hart Dep. Tr. at 55:1-3. Although upon cross-examination, Mr. Friesen admitted he *never* even reviewed the Biddulph Transcript. *See* Ex. 1054, Friesen Dep. Tr. at 62:21-63:3; 68:18-69:4. And Mr. Hart admitted he only reviewed the “clips” of the deposition. Ex. 1055, Hart Dep. Tr. at 55:4-10, 56:4-7.

The Biddulph Transcript is categorical hearsay. *See* FRE 801. Mr. Biddulph’s statements were not made while testifying for the current proceeding and all are being offered for the truth of the matters asserted—i.e. that the software discussed therein is a commercial embodiment of the claims. None of these

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