

Paper No. _____
Filed: October 7, 2016

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.

Petitioners

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.

Patent Owner

Case CBM2015-00179
U.S. Patent 7,533,056

PATENT OWNER'S OPPOSITION TO MOTION TO EXCLUDE

Table of Contents

I. Preliminary Statement.....1

II. Standard.....2

III. TT’s Testimonial Evidence From District Court Is Admissible (Exhibit 2327).2

A. Nothing justifies treating TT’s testimonial evidence from district court differently from Petitioners’ testimonial evidence from district court (i.e., the 2005 Kawashima deposition transcript).....3

B. TT’s testimonial evidence from district court is admissible under Federal Rule of Evidence 807.....4

IV. TT’s Documentary Evidence From District Court Is Admissible (Exhibits 2300, 2301, 2304-2316, 2318-2324, 2326, and 2328-2329).....8

A. The exhibits are authentic (Exhibits 2300, 2301, 2304-2316, 2318-2324, 2326, and 2328-2329).....8

B. The exhibits are not hearsay (Exhibits 2300, 2304-2316, 2318-2324, 2326, and 2328-2329).....10

V. Court Documents Are Admissible (Exhibits 2030 and 2032).11

VI. Conclusion.....11

I. Preliminary Statement

37 C.F.R. § 42 governs these proceedings, and it “shall be construed to secure the just, speedy, and inexpensive resolution of every proceeding.” § 42.1(b). While Petitioners may prefer to focus on the “speedy” and “inexpensive” requirements, the “just” requirement cannot be ignored. In these proceedings, the “just” requirement mandates that the Board consider all of the evidence introduced by Patent Owner, Trading Technologies International, Inc. (“TT”).

Just like Petitioners’ Exhibit 1007, the transcript of a 2005 deposition of Atshushi Kawashima on which Petitioners rely to allege the prior art status of TSE (Exhibit 1003), some of TT’s evidence comes from district court. Petitioners provide no basis or justification for the Board to treat TT’s evidence from district court any differently from their own. Unlike Petitioners, TT took steps to ensure its evidence could come into the proceedings in a “just” way.

First, unlike Petitioners who ignored the Federal Rules of Evidence in introducing the 2005 Kawashima deposition transcript into these proceedings, TT sought to have certain Federal Rules of Evidence waived in the proceedings. Paper 54, Board’s Order, at 2. Petitioners opposed this request despite the fact that it would have cured the hearsay problem associated with the 2005 Kawashima deposition transcript, and the Board denied the request. *See id.* at 2-3.

Second, TT sought additional discovery in the form of subpoenas to

facilitate depositions that would reproduce here the evidence it (and Petitioners) already had from district court. *Id.* at 4. Petitioners again opposed, and the Board denied TT's request because it was "speculative." *Id.* at 5. Left with no other options, TT introduced its evidence from district court in the same way that Petitioners introduced their evidence from district court. There is no rule that prevented TT from doing so. Petitioners could have challenged TT's evidence by cross-examining its witness. They simply chose not to.

TT's evidence proves the validity of its patent. Petitioners cannot be allowed to bury their heads in the sand rather than face it. While the Board should consider all of TT's evidence directly, at a minimum, it was proper for TT's declarants to rely on the evidence, so it must remain in the record. Ignoring the evidence would be unjust and would deprive TT of due process.

II. Standard

As the movant, Petitioners bear the burden of proving that the challenged exhibits are inadmissible. CBM2012-00002, Paper 66 at 59 (January 23, 2014); 37 C.F.R. § 42.20(c). Petitioners failed to meet their burden, and the Board disfavors excluding evidence as a matter of policy; "it is better to have a complete record of the evidence submitted by the parties than to exclude particular pieces."

CBM2012-00002, Paper 66 at 60-61.

III. TT's Testimonial Evidence From District Court Is Admissible (Exhibit 2327).

Exhibit 2327 is a transcript of sworn deposition testimony from district court.

A. Nothing justifies treating TT’s testimonial evidence from district court differently from Petitioners’ testimonial evidence from district court (i.e., the 2005 Kawashima deposition transcript).

Everyone’s testimony from district court was sworn and subject to cross examination in these proceedings. Regardless of whether such cross examination would be classified as routine discovery or additional discovery, the Board recognized that cross examination is warranted when a party makes testimonial evidence a pivotal part of its case, even if that testimonial evidence is from a prior proceeding. Paper 39 at 3.

Before filing its PO responses, TT requested additional discovery in the form of subpoenas to proactively facilitate Petitioners’ cross examination of the witnesses behind TT’s testimonial evidence from district court. Paper 54, Board’s Order, at 4. Rather than seizing this opportunity, Petitioners opposed TT’s request. *Id.* And the Board denied TT’s request because “[t]he need for any subpoenas . . . was speculative.” *Id.* at 5. At the time, the Board pointed out that the request was premature because “[TT didn’t] know what evidence [it would] rely on, whether the petitioner [would] object to such evidence or have the need to cross examine [the] people.” Ex. 2107 at 44:16-45:3.

Ultimately, TT never needed to repeat its request for additional discovery in

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.