

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
Patent 7,533,056

**PETITIONER'S OPPOSITION TO PATENT OWNER'S
MOTION TO EXCLUDE**

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U.S. Patent and Trademark Office
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I. Introduction

TT raises two evidentiary objections in its Motion to Exclude. (Paper 114.) The first challenges the authenticity of the TSE manual. (Ex. 1003.) The second seeks to exclude cross-examination testimony from TT's own declarants that TT finds too prejudicial for the Board to hear. Both objections lack merit.

First, no legitimate challenge can be made to the authenticity of the TSE manual. There is unequivocal and reliable evidence to support the finding that Exhibit 1003 is what it purports to be: namely, a 1998 publication issued by the Tokyo Stock Exchange. (Ex. 1007, 9:19-10:9, 10:19-24, 11:1-3, 11:11-24; Ex. 2163, 45:7-46:3; Ex. 1061, Sokohl Decl. ¶ 1.) This 1998 publication has been twice authenticated by an employee of the Tokyo Stock exchange, Atushi Kawashima, who TT has twice deposed—once in this proceeding (Ex. 2163) and once in 2005 (Ex. 1007).

Given these circumstantial guarantees of trustworthiness, TT concedes that the 2005 deposition transcript is permissible hearsay. TT does not point to any evidence suggesting that Exhibit 1003 is not the 1998 TSE manual. And, in any event, Mr. Kawashima authenticated Exhibit 1003 *again* in his 2016 deposition.

Second, TT's efforts to exclude the cross-examination testimony of its *own* declarants should be rejected. TT's experts admitted that the claimed inventions do not improve computers. (*See, e.g.*, Ex. 1059, 57:18-58:13; Ex. 1060, 263:15-

269:13, 247:17-249:2.) That testimony is relevant to whether TT's patent claims are patent eligible or not. TT had a full and fair opportunity to try to rehabilitate its witnesses through redirect. It chose not to do so. Instead, TT uses this motion as a thinly-disguised attempt to argue the merits of whether "the claimed inventions do not improve computers." (Paper 114 at 9, 15.) But a motion to exclude is not the proper vehicle to argue the merits or belatedly attempt to rehabilitate declarants.

Accordingly, the Board should deny TT's Motion to Exclude.

II. Argument

A. The TSE manual has been properly authenticated.

1. TT concedes that the 2005 Kawashima deposition transcript is permissible hearsay; TT thus moots its own evidentiary objection.

TT does not seek to exclude the 2005 Kawashima deposition transcript (Exhibit 1007). Instead, TT asserts that Petitioners failed to authenticate the TSE manual (Exhibit 1003) because the 2005 Kawashima deposition transcript—which authenticates the TSE manual—is allegedly hearsay. Yet TT undermines all of its alleged "doubts" about the authenticity of the TSE manual by failing to object to the 2005 Kawashima deposition transcript itself and furthermore by conceding that it is admissible hearsay. (Paper 114 at 2-7, 3.) ("[T]he residual hearsay objection of FRE 807 applies to . . . the 2005 Kawashima deposition transcript.")

TT presumably takes this position hoping to receive favorable treatment of its own testimonial evidence from the related district court litigation. To this end,

TT asserts that “Patent Owner’s evidence from district court litigation and the 2005 Kawashima deposition transcript should *stand or fall together*.” (*Id.* at 6, emphasis added.) But TT’s bizarre attempt to horse trade on evidentiary issues in its motion is improper. The Office’s regulations place the burden of proof in any motion on the movant, including in motions to exclude. 37 C.F.R. § 42.20(c); *see, e.g., TRW Automotive U.S. LLC v. Magna Electronics Inc.*, IPR2014-01347, Paper 25 at 15 (P.T.A.B. Jan. 6, 2016). By conceding that Exhibit 1007 is permissible hearsay, TT quashes its own evidentiary objection. As such, its motion fails.

2. Admissible evidence shows that Exhibit 1003 is what Petitioner purports; TT’s arguments to the contrary are without merit.

Petitioners have produced unequivocal and unrebutted evidence showing that Exhibit 1003 is the TSE manual. That evidence meets the requirement for authentication under each of Fed. R. Evid. 901, 902(11), and 901(b)(4).

The certified English translation bears the name of the “Tokyo Stock Exchange Operation System Division” and the date “August, 1998.” (Ex. 1004 at 5.) The 2005 deposition of Mr. Kawashima provides further supporting evidence of authenticity. (Ex. 1007.) Mr. Kawashima’s testimony establishes that: (1) Exhibit 1003 is “the current futures options trading system -- trade manual” (*compare* Ex. 1003 at 1, marked “DX 179” with bates numbering “TSE 647-981”; *with* Ex. 1007, 9:19-10:9); (2) confirmed that the document was prepared and disseminated in 1998 by the Tokyo Stock Exchange (Ex. 1007, 10:19-24, 12:22-24); (3) that Mr.

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