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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CBM2015–00179
Patent 7,533,056

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PETITIONERS' REPLY TO PATENT OWNER'S OPPOSITION TO PETITIONERS' MOTION TO EXCLUDE

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The Board should exclude TT's inadmissible evidence identified in Petitioners' Motion to Exclude (Paper 116, "Mot."). TT's opposition (Paper 117, "Opp.") does nothing to cure its evidentiary shortcomings.

I. Exhibit 2327.

TT knows its testimonial evidence is inadmissible. (*See* Ex. 2107 at 14:18-19:22; 24:14-25; 27:16-25 (asking Board to waive the FRE 802 and 901, and for additional discovery "to get [ ] authentication" and "vitiate any hearsay concerns").) Its opposition asserts admissibility under FRE 807 and attempts to horse trade on evidentiary issues. Both arguments fail.

A. The Biddulph Transcript (Exhibit 2327).

The Biddulph Transcript—which is undisputed hearsay—is inadmissible under FRE 807.[1] TT asserts that the "residual exception" applies to this evidence because it has "the same circumstantial guarantees of trustworthiness" as the testimony at issue in *Apple v. VirnetX* and as the declarations created for these proceedings. (Opp. at 4-8 (citing IPR2015-00811, Paper 44).) Not true. This interpretation of Rule 807 eviscerates the rule against hearsay, which provides only limited exceptions for testimony in prior proceedings. *See* FRE 804(b)(1).

FRE 807 does not confer "a broad license" on judges "to admit hearsay statements that do not fall within one of the other exceptions." *Neste Oil OYJ v.*

[1] TT does not assert admissibility under Rules 803 or 804.

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REG Synthetic Fuels, LLC, IPR2013-00578, Paper 53, at 10 (P.T.A.B. Mar. 12, 2015) (citation omitted). It only applies in "exceptional cases." *Id.* This case is not exceptional, and TT has not shown otherwise. Thus, FRE 807 does not cure TT's hearsay evidence. Nor does TT cite precedential authority holding that testimony from a prior proceeding is always admissible before the Board. Indeed, it cannot. *See, e.g.*, *Captioncall, L.L.C. v. Ultratec, Inc.*, IPR2015-00637, Paper 98, at 16-17 (P.T.A.B. Sept. 7, 2016). TT's reliance on *Apple* here is misplaced. First, both the patent owner and petitioner in *Apple* were also parties to the underlying district court litigation. *See Apple*, Paper 44, at 68-70. Second, the Board in *Apple* determined that the residual exception applied where the proponent ***analyzed each factor*** of FRE 807 "***in detail***." *See id*. 69. Here, TT provides no actual analysis under FRE 807(a)(1). Third, the Board in *Apple* merely adopted the petitioner's analysis without explaining why that case was "exceptional." *See id*. at 68-70.

And TT's hearsay evidence is not "more probative than any other evidence that TT could obtain through reasonable efforts." (Opp. at 7.) TT has not shown that Mr. Biddulph is unavailable; it could have obtained a declaration. Indeed, TT represented that it had contact with at least some of its declarants. (Ex. 2107 at 25:17-26:20.) Instead, TT attempts to shift the burden to Petitioners to seek to compel their depositions. This is misguided. Petitioners' have no obligation to "cure" TT's hearsay evidence. And TT never offered their depositions in an effort

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to cure Petitioners' evidentiary objections.

Finally, TT's assertion that it will be "deprived of due process" if the Board excludes its evidence is meritless and does not satisfy FRE 807(a)(4). *See Captioncall*, Paper 98, at 17. Holding TT to the same set of evidentiary rules as every other party before the Board ***is not a*** denial of due process.

B. TT's attempt to horse trade on evidentiary issues is misguided.

TT blames Petitioners and the Board for its evidentiary shortcomings. (*See* Opp. at 1-4, 7-8.) It asserts that there is no justification for the Board to treat the Biddulph Transcript differently from Petitioners' Exhibit 1007 (2005 Kawashima deposition transcript). (Opp. at 3-4.) But TT waived any objection it had to the admissibility of Exhibit 1007 because it ***did not*** move to exclude that evidence. Rather, TT ***conceded its admissibility***. (*See* Paper 114 at 3-6.) The uncontested admissibility of Exhibit 1007 has no bearing here. Moreover, TT was present at the 2005 deposition of Kawashima.

II. Exhibits 2300, 2301, 2304-2316, 2318-2324, 2326, and 2328-2329.

In response to Petitioners' authenticity objections, TT asserts that the Third Party Emails were authenticated by Mr. Hart and Mr. Friesen. (Opp. at 8.) However, nowhere in their declarations do Messrs. Hart and Friesen attest to the nature of these exhibits as being true and correct copies of emails of which they have personal knowledge. It is TT's burden to produce evidence satisfying FRE

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901. TT simply fails in that regard. TT is aware of its shortcoming as it also argues that that the Third Party Emails are authenticated due to their "distinctive characteristics" under FRE 901(b)(4). (Opp. at 8-9.) This argument fails as the emails are not self-authenticating under FRE 902, and TT has offered no extrinsic evidence to show the existence of any such characteristics. *See, e.g.*, *Devbrow v. Gallegos*, 735 F.3d 584, 586-87 (7th Cir. 2013). TT's argument that Exhibit 2301 ("Trading Game Design Document") is authenticated likewise fails as TT does nothing to explain how the general categories of "information printed throughout the document" qualify as "distinctive characteristics." Moreover, it claims that these characteristics are "verifiable," yet offers no evidence verifying any of its claims.

In response to Petitioners' hearsay objections, TT fails to argue that any specific exception applies under FRE 803, 804, or 807. Instead, it argues that the Third Party Emails are not offered for their truth but rather "to show the conception and development of the invention." (Opp. at 10.) TT's argument is just wrong, as Messrs. Hart and Friesen both rely on these exhibits for their truth in an attempt to establish an actual reduction to practice of the alleged invention. TT's remaining arguments are likewise meritless. Contrary to TT's suggestion, Petitioners' arguments do not "relate to the appropriate weight to assign the evidence" because there is a threshold issue as to whether TT relies upon these out-

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