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

CBM2015–00181
Patent 7,676,411

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 111, "Mot."). TT's opposition (Paper 112, "Opp.") does nothing to cure its evidentiary shortcomings.

I. Exhibits 2033, 2211, 2216, 2218-2225, 2227-2229, 2232, 2239, 2247, 2251, 2273-2276, 2286-2288, and 2292-2296.

TT knows its testimonial evidence is inadmissible because it asked the Board to waive the Federal Rules for all of its evidence. (*See* Ex. 2107 at 14:18-19:22; 24:14-25; 27:16-25.) Having tried but failed to gain permission to ignore the Federal Rules, TT now seeks absolution for having ignored the Federal Rules.

A. The *eSpeed/CQG* Transcripts and the 32 Traders' Declarations.

The *eSpeed/CQG* Transcripts and the 32 Traders' Declarations—which are undisputed hearsay—are 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.*

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[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 8.) TT could have obtained declarations. Indeed, it 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 to cure Petitioners' evidentiary objections.

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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, 8.) It asserts that there is no justification for the Board to treat the *eSpeed*/*CQG* Transcripts and 32 Traders' Declarations differently from Petitioners' Exhibit 1010 (2005 Kawashima deposition transcript). (Opp. at 3-4.) But TT waived any objection it had to the admissibility of Exhibit 1010 because it ***did not*** move to exclude that evidence. Rather, TT ***conceded its admissibility***. (*See* Paper 109 at 3-6.) The uncontested admissibility of Exhibit 1010 has no bearing here. Moreover, TT was present at the 2005 deposition of Kawashima.

II. Exhibit 2169 (¶¶ 75, 83-86, 89-92, 94-97, 102-104, 106-111, 126-128, 131, 133, 134, 136-138, 140, 141, 151-153, 172).[2]

Large portions of Mr. Thomas' declaration should be excluded as improper expert testimony. (*See* Mot. at 12-16.) TT's provides no defense of ¶¶ 75, 97, 104, 106-111, 126-128, 131, 133, 134, 136-138, 140, 141, 151-153, 172. At a minimum, these paragraphs should be excluded outright.

As for the disputed paragraphs, TT argues that "Mr. Thomas's statements

[2] Petitioners timely objected to Exhibit 2169. (*See* Paper 78 at 15-17.)

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are not improper expert testimony because an expert is allowed leeway to use hearsay reasonably." (Opp. at 9.) But Mr. Thomas is not "interpreting" evidence, "explaining the basis of his expert opinion," or "articulat[ing] the effect the evidence would have [] on a person of ordinary skill in the art" as TT erroneously suggests. (Opp. at 10.) As explained in Petitioners' Motion, Mr. Thomas simply quotes, summarizes, and/or characterizes hearsay statements made by declarants outside of this proceeding; this is not the province of expert opinion. And contrary to TT's suggestion, Petitioners' arguments do not "relate to the appropriate weight to assign the evidence" because the threshold issue is whether it even qualifies as expert opinion. *See United States v. Dukagjini*, 326 F.3d 45, 58 (2d Cir. 2003).

III. Exhibits 2210, 2223 (pages 13-14), 2240-2246, 2250, 2252-2272, 2277, 2212, 2213, 2214.

Regarding Petitioners' authenticity objections, TT argues that "most" of the exhibits are authentic because they were produced in response to discovery requests or admitted without objection in a district court proceeding. (Opp. at 12.) This argument effectively nullifies the authentication requirements of FRE 901. Whether an unrelated party waived its objections to the admissibility of TT's evidence has no bearing here. TT also argues that the Third Party Emails are authenticated due to their "distinctive characteristics" under FRE 901(b)(4). (Opp. at 12-13.) 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

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