Paper No. ____
Filed: October 14, 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 CBM2015-00182
U.S. Patent 6,772,132

REPLY IN SUPPORT OF PATENT OWNER'S MOTION TO EXCLUDE UNDER 37 C.F.R. 42.64(C)

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I. TSE has not been authenticated under FRE 901.

A. TT does not concede that the 2005 Kawashima deposition transcript is admissible.

TT's evidence from district court litigation and the 2005 Kawashima deposition transcript should stand or fall together based on mutual hearsay objections. Indeed, as stated in TT's motion, "[t]o the extent the Board excludes any of Patent Owner's evidence from district court litigation, which it should not, the Board should likewise exclude the 2005 Kawashima transcript." Paper 100 at 6.

The Board must treat Patent Owner's district court evidence and the 2005 Kawashima transcript in the same way because they differ only in that Patent Owner exerted greater efforts to obtain better evidence than Petitioners. To the extent this difference impacts the admissibility of the evidence, it favors admitting Patent Owner's evidence, not the 2005 Kawashima transcript. Qualification for the residual exception to hearsay requires that evidence be more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts. FRE 807. While Patent Owner exerted significant efforts to obtain better evidence, Petitioners did not. Accordingly, based on this difference, to the extent the 2005 Kawashima transcript is treated differently from Patent Owner's evidence from district court, the 2005 Kawashima transcript, not

Patent Owner's evidence from district court, should be excluded.

Rather than identifying any other differences between the 2005 Kawashima transcript and Patent Owner's evidence from district court, Petitioners argue that Mr. Kawashima's cross-examination in this proceeding resolves any hearsay concern. This does not differentiate the Kawashima 2005 deposition transcript from Patent Owner's evidence from district court. Petitioners could have likewise deposed the witnesses on which Patent Owner relies in this proceeding but simply chose not to do so. The Board's recent Final Written Decision in *Apple Inc. v. VirnetX Inc.* is instructive. IPR2015-00811, Paper 44 at 68-70 (Sep. 8, 2016). In the *Apple* case, the Board pointed out that the party challenging the admissibility of evidence "chose not to seek the opportunity to cross examine the declaration testimony," which the Board had defined to include district court trial and deposition testimony, before explaining why the residual exception of Federal Rule of Evidence 807 nevertheless rendered everything admissible. *Id.* at 68-70. The Board thus recognized that whether or not a party actually cross-examines a witness in the proceeding is irrelevant to whether other testimony not from the proceeding is hearsay. *See id.*

Unable to articulate any difference between the 2005 Kawashima transcript and Patent Owner's evidence from district court, Petitioners avoid the issue by instead discussing burdens of proof. Paper 105 at 3. Given that there are no

differences between the 2005 Kawashima transcript and Patent Owner's evidence from district court that would favor admitting the 2005 Kawashima transcript but not Patent Owner's district court evidence, Petitioners cannot meet their burden to have Patent Owner's evidence from district court excluded without also demonstrating that the 2005 Kawashima transcript must be excluded. Accordingly, to the extent the Board excludes any of Patent Owner's evidence from district court litigation, which it should not, the Board should likewise exclude the 2005 Kawashima transcript.

B. Whether or not the 2005 Kawashima deposition transcript is excluded, Petitioners have not authenticated TSE.

Nothing in the record proves that Exhibit 1006 ("TSE") is the specific document that Petitioners assert was "published in August of 1998 by giving two copies to each of the about 200 participants in the Tokyo Stock Exchange" and not some other TSE document. *See* Paper 7 at 11.

i. The 2005 Kawashima deposition transcript does not authenticate TSE.

As explained in TT's motion, the 2005 Kawashima transcript raises more doubt that it resolves. Citing *Rosenberg v. Collins*, Petitioners argue that TT's criticism of the way Mr. Kawashima verified his identification of the TSE manual does not cut against authenticity in a way supported by law, but *Rosenberg* relates to the business record hearsay exception of FRE 803(6), not to whether the

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