

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

IBG LLC and INTERACTIVE BROKERS LLC,
Petitioners

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.,
Patent Owner

Case CBM2016–00009
Patent 7,685,055 B2

PETITIONERS’ MOTION TO EXCLUDE

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I. INTRODUCTION

Petitioners file this motion pursuant to 37 C.F.R. § 42.64(c) and in accordance with the Joint Stipulation to Move Due Dates 4 and 5. (Paper 46.) The Board should exclude Patent Owner Trading Technologies International, Inc.'s ("TT") Exhibits 2030, 2032, 2168, 2169 (¶¶ 127-128), 2292-2296, 2334 and 2339 because these documents are irrelevant and/or constitute hearsay to which no exception applies.

TT knows that its evidence suffers from significant admissibility problems. Indeed, TT preemptively sought a blanket waiver from the Board so that it could rely on a "large volume of documents produced in previous district court cases" without regard to the Board's Rules and Federal Rules of Evidence 802 and 901. (Paper 22 at 2–3.) The Board denied TT's request. (*See id.*) Having been denied permission to do so, TT proceeded to file numerous documents from the district court cases, including Exhibits 2030, 2032 and 2292-2296, without regard to the Board's order and the rules governing this proceeding. (*See* Paper 25 (Patent Owner's Updated Exhibit List).) That evidence should be stricken.

The '055 patent was not at issue in TT's prior litigations and has a different effective filing date than the patents that were at issue. TT has failed to show that Exhibits 2030, 2032 and 2292-2296, presented at *different* trials, before *different* tribunals, involving *different* parties, and involving *different* patents, have "any

tendency to make a fact [of consequence in determining this action] more or less probable than it would be without the evidence.” FRE 401.

In addition, Exhibits 2030, 2032, 2292-2296 violate the prohibition on hearsay. *See* FRE 802. Absent one of the well-established exceptions to hearsay, such as the unavailability of a declarant, hearsay is inadmissible.

TT's attempt to circumvent the admissibility rules regarding Exhibits 2292-2296 by summarizing, characterizing, and/or quoting from these documents in paragraphs 127-128 of the declaration of its expert, Mr. Thomas (Exhibit 2169), is also improper. Rule 702 permits an expert to offer opinions based on his specialized knowledge in the field. But these portions of Mr. Thomas' declaration are not opinions of Mr. Thomas. Rather, Mr. Thomas purports to offer factual testimony that is not based on his own perception but is instead based upon his review of the inadmissible deposition testimony recorded in Exhibits 2292-2296. TT may not use Mr. Thomas as a mere conduit for impermissible hearsay. The testimony contained in paragraphs 127-128 of Exhibit 2169 is improper and should be excluded.

TT has failed to show that Exhibit 2168, prepared for prior CBM proceedings involving *different* patents, is relevant to the matters at issue in this proceeding. The testimony therein is limited to the claims of U.S. Patent Nos. 6,766,304; 6,772,132; and 7,676,411, which are not at issue in this proceeding and

have a different effective filing date than the '055 patent.

TT has also failed to show that Exhibits 2334 and 2339 are relevant to the matters at issue in this proceeding. These declarations, from a translator who testified about how a Japanese reader (i.e., a layperson) would have understood certain portions of TSE (Exhibit 1007), are not relevant to the obviousness determination. Obviousness is determined from the perspective of a person of ordinary skill in the art at the time of the invention, not a layperson.

II. ARGUMENT

A. *eSpeed* Jury Verdict Form and Docket Entry: Exhibits 2030, 2032

The Board should exclude Exhibits 2030 and 2032, which purport to be a jury verdict form and docket entry, respectively, associated with *Trading Technologies Int'l, Inc. v. eSpeed, Inc.*, No. 1:04-cv-05312. TT offered Exhibit 2030 as evidence that TSE does not qualify as prior art. (See Paper 11 at 71; Paper 32 at 48 n.8.) It offers Exhibit 2032 for the same purpose. (See Paper 11 at 71.) Petitioners timely objected to Exhibits 2030 and 2032 on the basis of, among other things, lack of relevance and hearsay. (Paper 23 at 13-14.)

Neither the jury's findings nor the district court's decision are probative of any issue before the Board. Accordingly, this evidence is irrelevant and inadmissible. See FRE 401. The '055 patent was not at issue in the *eSpeed* litigation and it has a different effective filing date than the patents that were at

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