Paper No. _____
Filed: December 20, 2016

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

CBM2016-00009
Patent No. 7,685,055 B2

PATENT OWNER'S OPPOSITION TO PETITIONERS' MOTION TO EXCLUDE

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I. INTRODUCTION

37 C.F.R. § 42 governs these proceedings, and it "shall be construed to secure the just, speedy, and inexpensive resolution of every proceeding." § 42.1(b). The "just" requirement mandates that the Board consider all of the evidence introduced by Patent Owner Trading Technologies International, Inc. ("TT").

Much of TT's evidence comes from the same district court litigation as Petitioners' Exhibit 1011, the transcript of a 2005 deposition of Atsushi Kawashima on which Petitioners rely to allege the prior art status of TSE (Exhibit 1007). Petitioners provide no basis or justification for the Board to treat TT's evidence from district court any differently from their own. TT took steps to ensure its evidence could come into the proceedings in a "just" way.

First, unlike Petitioners, who ignored the Federal Rules of Evidence and 37 C.F.R. § 42.52(a), in introducing the 2005 Kawashima deposition transcript into these proceedings, TT previously sought to have certain Federal Rules of Evidence waived in the proceedings. Paper 22, Board's Order, at 2. Petitioners opposed this request despite the fact that it would have cured the hearsay problem associated with the 2005 Kawashima deposition transcript. The Board denied the request. *See id.* at 3-4.

Second, TT sought additional discovery in the form of subpoenas to facilitate depositions that would reproduce here the evidence it (and Petitioners)

already had from district court. *Id.* at 4. Petitioners again opposed, and the Board denied TT's request because it was "speculative." *Id.* at 5. Left with no other options, TT introduced its evidence from district court in the same way that Petitioners introduced their evidence from district court. There is no rule that prevented TT from doing so. Petitioners could have challenged TT's evidence by cross-examining its witnesses. They simply chose not to.

While the Board should consider all of TT's evidence directly, at a minimum, it was proper for TT's expert to rely on the evidence, so it must remain in the record. Ignoring the evidence would be unjust and would deprive TT of due process.

II. STANDARD

As the movant, Petitioners bear the burden of proving that the challenged exhibits are inadmissible. *Liberty Mutual Insurance Co. v. Progressive Casualty Insurance Co.*, CBM2012-00002, Paper 66 at 59 (January 23, 2014); 37 C.F.R. § 42.20(c). Petitioners failed to meet their burden, and the Board disfavors excluding evidence as a matter of policy; "it is better to have a complete record of the evidence submitted by the parties than to exclude particular pieces." CBM2012-00002, Paper 66 at 60-61.

III. TT'S TESTIMONIAL EVIDENCE FROM DISTRICT COURT IS ADMISSIBLE (EXHIBITS 2292-2296)

Exhibits 2292–2296 are transcripts of sworn deposition testimony. All are from district court, many from the same litigation as the 2005 Kawashima deposition transcript, *TT v. eSpeed, Inc*.

A. Nothing justifies treating TT's testimonial evidence from district court differently from Petitioners' testimonial evidence from district court (i.e., the 2005 Kawashima deposition transcript - Exhibit 1011)

Before filing its Patent Owner responses, TT requested additional discovery in the form of subpoenas to proactively facilitate Petitioners' cross examination of the witnesses behind TT's testimonial evidence from district court. Paper 2, Board's Order, at 4. Rather than seizing this opportunity, Petitioners opposed TT's request. *Id*. And the Board denied TT's request because "[t]he need for any subpoenas . . . was speculative." *Id*. at 5. At the time, the Board pointed out that the request was premature because "[TT didn't] know what evidence [it would] rely on, whether the petitioner [would] object to such evidence or have the need to cross examine [the] people." Ex. 2107 at 44:16-45:3.

Ultimately, TT never needed to repeat its request for additional discovery in the form of subpoenas, because Petitioners made a litigation choice to not even request cross examination to challenge any of TT's testimonial evidence from district court. Petitioners' litigation choice does not change the fact that TT's

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