

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

IBG LLC, INTERACTIVE BROKERS LLC,
TRADESTATION GROUP, INC., and
TRADESTATION SECURITIES, INC.
Petitioners

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.
Patent Owner

CBM2016-00032
Patent 7,212,999 B2

**PETITIONER'S OPPOSITION TO
PATENT OWNER'S MOTION TO EXCLUDE**

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Patent Trial and Appeal Board
U.S. Patent and Trademark Office
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I. Introduction

The Board should deny Patent Owner's Motion to Exclude (Paper 41).

Patent Owner seeks to exclude cross-examination testimony of its *own* expert that Patent Owner finds *unfavorable*. Patent Owner's expert, Mr. Thomas, admitted that the claimed inventions do not improve computers. (*See, e.g.*, Ex. 1047 at 248, 263-69.) His testimony is relevant to the issue of patent eligibility. Patent Owner had a full and fair opportunity to rehabilitate Mr. Thomas regarding the testimony at-issue through redirect. It chose not to do so.

Accordingly, the Board should deny Patent Owner's Motion to Exclude.

II. Argument

A. The testimony is highly probative and admissible.

Patent Owner urges the Board to exclude choice portions of Mr. Thomas' cross-examination testimony. (Paper 41 at 1-7 (citing Ex. 1047 at 248, 263-69).) Essentially, Patent Owner seeks to exclude *unfavorable* testimony; not irrelevant, prejudicial, confusing, or misleading testimony.

Fed. R. Evid. 403 provides that evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the fact-finder, undue delay, wasting time, and/or presenting needlessly cumulative evidence. Here, the material sought to be excluded consists of admissions explaining how the '999 claims are not directed to various

technological improvements. These admissions are highly probative of patent eligibility.

Patent Owner appears to rely on the “unfair prejudice ” or “confusing” aspects of Fed. R. Evid. 403. (Paper 41 at 8.) But there is no danger of confusing or misleading *the Board*. The Board is perfectly capable of according these admissions appropriate weight in view of all the evidence. And Patent Owner has failed to demonstrate even a remote likelihood that the statements will be misinterpreted or misunderstood. Patent Owner may disagree with the legal conclusions to be drawn from these admissions; but that is not a cognizable basis for excluding evidence.

And, as a general policy, it is not unfairly prejudicial to place the burden of seeking clarification on the testifying expert. In fact, this has long been the Board’s practice.¹ Here, counsel for Petitioner properly instructed the witness. (Ex. 1047 at

¹ Cf. U.S. PATENT & TRADEMARK OFFICE, Standing Order of January 3, 2006 Governing Contested Cases Assigned to Trial Division, *Board of Patent Appeals and Interferences*, Cross Examination Guidelines, Appendix, p. 72 (Jan. 2006), available <https://www.uspto.gov/web/offices/dcom/bpai/Standing-Order.pdf> (“Guideline [1] At the beginning of a cross examination, the party conducting the cross examination must instruct the witness on the record to ask deposing counsel,

5:21-6:4.) Having been instructed, and free to seek clarification as needed, the answers provided are in accordance with the ground rules for cross-examination.

Patent Owner's attempt to erase truthful, albeit unfavorable, responses given by its expert should be denied.

III. Conclusion

The Board should deny Patent Owner's Motion to Exclude.

Date: April 12, 2017

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Respectfully submitted,
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rather than the witness's own counsel, for clarifications, definitions or explanations of any words, questions or documents presented during the cross examination. The witness must follow these instructions"). *See also Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993) (serving as the model for the Standing Order).

CERTIFICATE OF SERVICE (37 C.F.R. § 42.6(e))

The undersigned hereby certifies that the foregoing **PETITIONER'S
OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE** was served
electronically via e-mail on April 12, 2017, in its entirety on Attorneys for Patent
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