

Paper No. _____
Filed: April 19, 2017

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
U.S. Patent 7,212,999

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

I. THE THOMAS TESTIMONY SHOULD BE EXCLUDED

Petitioners do not dispute that Mr. Thomas' testimony was given in response to vague and ambiguous questions. And Petitioners do not dispute that they are using this testimony in a confusing and misleading manner to argue that Mr. Thomas testified that the claimed inventions do not improve computers. *Opp.*, p. 1 (asserting that "Mr. Thomas, admitted that the claimed inventions do not improve computers. (*See, e.g.*, Ex. 1047 at 248, 263-69.)"). Instead, Petitioners defer to the Board's ability to accord the evidence "appropriate weight." *Id.* at 2. But the Board's ability to accord evidence "appropriate weight" does not entitle Petitioners to rely on testimony elicited by vague and ambiguous questions. Thus, even though the Board can appropriately disregard the evidence, it should also exclude the evidence.

Petitioners also claim that because Mr. Thomas answered the questions at all, the testimony should not be excluded. *Id.* ("Having been instructed, and free to seek clarification as needed, the answers provided are in accordance with the ground rules for cross-examination."). But the fact that the witness is entitled to seek clarification does not cure an objectionable question. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,772 (Aug. 14, 2012) ("An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the testimony, or any aspect of the

testimony—must be noted on the record, but the examination still proceeds; testimony is taken subject to any such objection.”). Patent Owner timely objected to objectionable questioning. Ex. 1047 at 248, 263-269. Mr. Thomas’ answers do not obviate these objections and do not moot Patent Owner’s motion to exclude.

Indeed, Mr. Thomas did not admit that the claimed inventions do not improve computers. Mr. Thomas simply stated what was not explicitly recited by the claims. The probative value of this testimony is substantially outweighed by a danger of unfair prejudice and confusing the issues as the result of vague questioning. Accordingly, it should be excluded under FRE 403.

II. CONCLUSION

The Board should grant Patent Owner’s Motion to Exclude

Date: April 19, 2017

Respectfully submitted,

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/Jennifer M. Kurcz/

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CERTIFICATION OF SERVICE

Pursuant to 37 CFR §§ 42.6(s)(4) and 42.205(b), the undersigned certified that on April 19, 2017, a complete and entire copy of this PATENT OWNER'S REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE was provided via email to the Petitioners by serving correspondence address of record as follows

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Dated: April 19, 2017

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