

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.  
Patent Owner

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CBM2016-00032  
Patent 7,212,999 B2

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**PETITIONERS' REPLY TO PATENT OWNER'S OPPOSITION  
TO PETITIONERS' MOTION TO EXCLUDE**

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Patent Trial and Appeal Board  
U.S. Patent and Trademark Office  
P.O. Box 1450  
Alexandria, VA 22313-1450

## **I. Introduction**

The Board should exclude Patent Owner's inadmissible evidence identified in Petitioners' Motion to Exclude (Paper 39). Patent Owner's Opposition (Paper 45) does nothing to cure its evidentiary shortcomings.

## **II. Argument**

### **A. *eSpeed* Jury Verdict Form (Exhibit 2030)**

The Board should exclude Exhibit 2030, which purports to be a jury verdict form associated with *Trading Technologies Int'l, Inc. v. eSpeed, Inc.*, No. 04-cv-05312. As explained in Petitioners' Motion to Exclude, Exhibit 2030 is not probative of any issue before the Board. (Paper 39, 1.) Patent Owner fails to refute this point. Patent Owner's Opposition does not explain why a Jury Verdict form from an unrelated district court proceeding is relevant to whether the '999 patent claims eligible subject matter under 35 U.S.C. § 101. (Paper 45, 1-2.) Because Patent Owner fails to explain the relevance of Exhibit 2030, the Board should exclude this exhibit as irrelevant. FRE 401.

### **B. Mr. Gould-Bear's Declaration and Attachments (Exhibits 2168 and 2192-2194) and Dr. Olsen's Declaration and Attachments (Exhibits 2174 and 2183-2189)**

The Board should exclude Mr. Gould-Bear's Declaration (including its attachments) and Dr. Olsen's Declaration (including its attachments) because they are irrelevant and impermissible hearsay. (Paper 39, 2-4.)

Mr. Gould-Bear and Dr. Olsen's testimony are not relevant to the instant CBM proceeding because neither declarant analyzed the patent-at-issue (i.e., the '999 patent). As explained in Petitioners' Motion to Exclude, Exhibit 2168 is Mr. Gould-Bear's Declaration from CBM2016-00051, which is a CBM of U.S. Patent No. 7,904,374. Exhibits 2192-2194 are attachments to Mr. Gould-Bear's Declaration. And, Exhibit 2174 is Dr. Olsen's Declaration from CBM2016-00051, which is a CBM of U.S. Patent No. 7,904,374. Exhibits 2183-2189 are attachments to Dr. Olsen's Declaration. (Paper 39, 2-4.) Compared to the '999 patent, the '374 is a different patent, with different claims, and from a different patent family.

Patent Owner does not dispute that neither Mr. Gould-Bear nor Dr. Olsen testified as to the '999 patent. (Paper 45, 2-3.) Instead, it asserts that their testimony is relevant because it is "directed to graphical user interfaces (GUIs)." (*Id.* at 2.) Patent Owner's argument falls flat because the instant CBM proceeding is not challenging whether all GUIs are patent eligible; it is challenging whether the specific claims of the '999 patent are patent eligible. Because Patent Owner's declarants (Mr. Gould-Bear and Dr. Olsen) failed to analyze the claims-at-issue, their testimony is irrelevant and should be excluded. (Paper 39, 2-4.)

Mr. Gould-Bear and Dr. Olsen's testimony (including all attachments) should also be excluded as impermissible hearsay. (*Id.*) Patent Owner asserts that the "residual exception" applies to this evidence because it has "the same

circumstantial guarantees of trustworthiness” as the testimony at issue in *Apple v. VirnetX* and as the declarations created for these proceedings. (Paper 45, 4-6 (citing IPR2015-00811, Paper 44).) That is not true. And, Patent Owner’s interpretation of Rule 807 eviscerates the rule against hearsay, which provides only limited exceptions for testimony in prior proceedings. *See* FRE 804(b)(1).

FRE 807 does not confer “a broad license” on judges “to admit hearsay statements that do not fall within one of the other exceptions.” *Neste Oil OYJ v. REG Synthetic Fuels, LLC*, IPR2013-00578, Paper 53, at 10 (P.T.A.B. Mar. 12, 2015) (citation omitted). It only applies in “exceptional cases.” *Id.* This case is not exceptional, and Patent Owner has not shown otherwise. Thus, FRE 807 does not cure Patent Owner’s hearsay evidence. Nor does Patent Owner cite precedential authority holding that testimony from another proceeding is always admissible before the Board. Indeed, it cannot. *See, e.g., Captioncall, L.L.C. v. Ultratec, Inc.*, IPR2015-00637, Paper 98, at 16-17 (P.T.A.B. Sept. 7, 2016).

Patent Owner’s reliance on *Apple* is misplaced. First, the Board in *Apple* determined that the residual exception applied where the proponent ***analyzed each factor*** of FRE 807 “***in detail.***” *See Apple Inc. v. Virnetx*, IPR2015-00811, Paper 44, at 69 (P.T.A.B. Sept. 8, 2016). Here, Patent Owner provides no substantive analysis under FRE 807(a)(3) or (4). Patent Owner’s assertion that it will be “deprived of due process” if the Board excludes its evidence (Paper 45, 6) is

meritless and does not satisfy FRE 807(a)(4), *see Captioncall*, Paper 98, at 17.

Holding Patent Owner to the same set of evidentiary rules as every other party before the Board *is not a* denial of due process.

Second, as outlined by the Board, the residual exception to the hearsay rule is to be reserved for “exceptional cases.” However, the Board in *Apple* merely adopted the petitioner’s analysis without explaining why that case was “exceptional.” *See id.* at 68-70. Here, Patent Owner has not explained why this case is exceptional. It is not exceptional.

Finally, the *Apple* Exhibits, which were from another proceeding, were submitted by a petitioner to establish that a document was prior art (the same purpose for which they were used in the other proceeding). And, the *Apple* Exhibits were specifically tailored to a factual issue. By contrast, Mr. Gould-Bear and Dr. Olsen’s testimony is directed to GUIs generally, and has absolutely no probative value in assessing the ’999 patent claims (which, again, neither declarant reviewed).

Thus, for this proceeding, the Board should not follow *Apple*’s lead. Instead, it should exclude Mr. Gould-Bear’s Declaration (including its attachments) and Dr. Olsen’s Declaration (including its attachments) because they are impermissible hearsay.

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