

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.

CBM2016-00051
U.S. Patent 7,904,374

**PATENT OWNER'S MOTION TO EXCLUDE
UNDER 37 C.F.R. § 42.64(c)**

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I. INTRODUCTION

Pursuant to 37 C.F.R. §§ 42.64(c) and 42.61(a) and the Federal Rules of Evidence, Patent Owner Trading Technologies International, Inc. (“TT”) respectfully moves to exclude TSE (Ex. 1003) because Petitioners have failed to meet the authentication requirements of FRE 901 and because the only purportedly authenticating evidence (Ex. 1009, the transcript of a 2005 deposition of Atshushi Kawashima) is hearsay under FRE 801. Moreover, this purportedly authenticating evidence was not cited by Petitioners in any paper and should be excluded for irrelevancy.

II. STANDARD

A Motion to Exclude must (a) identify where in the record the objection was made, (b) identify where in the record the evidence sought to be excluded was relied upon by an opponent, (c) address objections to exhibits in numerical order, and (d) explain the objection. Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012).

III. TSE SHOULD BE EXCLUDED

A. TT Timely Objected

TT timely objected to Exhibit 1003 in objections filed August 31, 2016.

Paper 14 at 4-7. Petitioners rely upon TSE (Ex. 1003) in their Petition and Reply to establish what were purportedly conventional and well-known techniques. Pet., Paper 3 at 14, 37; Reply, Paper 23 at 7.

B. TSE Has Not Been Authenticated under FRE 901

The Federal Rules of Evidence apply to the current proceedings. 37 C.F.R. § 42.62. Fed. R. Evid. 901 requires parties to authenticate documents. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. Fed. R. Evid. 901(a).

Petitioners have cited to no such evidence to support a finding that TSE is authentic. To the extent that Petitioners intend to rely on the transcript of a 2005 deposition of Atshushi Kawashima (Ex. 1009) as purportedly authenticating TSE, this transcript is insufficient in multiple respects.

1. The 2005 Kawashima deposition testimony is hearsay

The 2005 Kawashima deposition was conducted in a district court case, not any of the CBM proceedings. Ex. 1009 at 1. As a result, the 2005 Kawashima deposition is, by definition, hearsay.

FRE 801 defines hearsay as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” Since

testimony by Mr. Kawashima in the district court case was not made “while testifying at the current trial or hearing,” to the extent such testimony is used to prove the authenticity of TSE, it must be considered hearsay.

2. Even if the 2005 Kawashima deposition testimony was admissible, the deposition testimony raises more doubt than it resolves.

Rather than supporting a finding under FRE 901(a) that TSE is what Petitioners claim it is, the 2005 Kawashima deposition transcript ultimately raises additional doubts as to the authenticity of the document.

For example, in the deposition, Mr. Kawashima draws a conclusion about the authenticity of TSE, a document of hundreds of pages, based on the perceived absence of a mark in “looking briefly through” the document. Specifically, he testified:

Q Is this entire document, this document identified as Defendant’s Exhibit 179, from August 24 of 1998?

A Yes.

Q How do you know?

A Because when we replace sections there is a mark indicating a correction at the bottom of the page. And just looking briefly through this document, I didn’t see that mark and therefore I thought that was the original date.

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