

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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Case CBM2016-00051  
Patent No. 7,904,374

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**PETITIONERS' MOTION TO EXCLUDE**

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## I. INTRODUCTION

TT's Patent Owner Response ("TT's POR") dumps into the record and buries the Board with hundreds of pages of documents without regard to their admissibility. But this proceeding is governed by the Federal Rules of Evidence and those Rules set fair boundaries on the admissibility of evidence. TT ignores those rules.

A significant number of the documents submitted by TT violate the prohibition on hearsay. *See* FRE 802. Absent one of the well-established exceptions to hearsay, such as the unavailability of a declarant, hearsay is inadmissible. TT disregards this Rule entirely by introducing hearsay statements from dozens of individuals in an effort to defend the patentability of its claims.

A significant number of TT's documents also fail to meet the basic requirements of authenticity required by Federal Rule of Evidence 901. Despite Petitioners' timely objection, TT offered no competent evidence that cures this objection leaving the Board and Petitioners with no basis to gauge whether the documents are genuine.

TT's evidence also ignores the proper boundaries of expert witness testimony in contravention of Federal Rule of Evidence 702. Rule 702 permits an expert to offer opinions based on his specialized knowledge in the field. But significant portions of Mr. Thomas' declaration are not in fact expert opinions of

Mr. Thomas. Rather, Mr. Thomas purports to offer pure factual testimony that is not even based on his own analysis and expertise but is instead based upon his review of district court depositions and trial transcripts. That underlying evidence should not be admitted in this proceeding as TT may not use Mr. Thomas “simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony.” *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013) (citation omitted). This testimony is improper and, therefore, should be excluded. *See, e.g., United States v. Dukagjini*, 326 F.3d 45, 58 (2d Cir. 2003).

Accordingly, Petitioners file this motion pursuant to 37 C.F.R. § 42.64(c) and in accordance with the Board’s Scheduling Order. (Paper 12.)

## II. ARGUMENT

### **A. The *eSpeed/CQG* Transcripts: Exhibits 2211, 2220, 2222, 2287, and 2292–2296**

The Board should exclude Exhibits 2211, 2220, 2222, 2287, and 2292-2296 (“*eSpeed/CQG* Transcripts”) because they are hearsay to which no valid exception applies. Most of these exhibits are cited in TT’s POR. *See* Paper 18 at 25, 26, 28, and 35. Petitioners timely objected to each of the *eSpeed/CQG* Transcripts on the basis of, among other things, hearsay. *See* Paper 21 at 2-3.

The *eSpeed/CQG* Transcripts purport to be excerpts of a trial or deposition transcript from district court proceedings involving third parties. The *eSpeed/CQG*

*Transcripts* are hearsay as none of the statements therein were made by a person testifying for the current proceeding, and all are being offered for the truth of the matters asserted. FRE 801. None of these statements fall under any proper hearsay exception. For example, TT has not even attempted to show that the witnesses are unavailable. *See* FRE 804. Nor has TT shown that any specific exception under FRE 803. Likewise, the residual exception does not apply here as TT cannot credibly argue that the *eSpeed/CQG Transcripts* are somehow more probative evidence than any other evidence it could have obtained through reasonable efforts. *See* FRE 807.

Accordingly, the Board should exclude the *eSpeed/CQG Transcripts*.

#### **B. The 32 Electronic Trader Declarants: Exhibit 2223**

The Board should exclude Exhibit 2223 that purports to contain declarations from dozens of individuals in the electronic trading industry (Exhibit 2223<sup>1</sup>) (“Electronic Trader Declarants Exhibits”). The exhibits contain, for example, statements by individuals regarding their opinions concerning TT’s alleged commercial embodiments. *See* Ex. 2223. Petitioners objected to all of these

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<sup>1</sup> Exhibit 2223 includes Exhibits 2210, 2216, 2218, 2219, and 2221, which TT separately submitted. The Board should exclude these separately submitted declarations for the same reasons discussed above regarding Exhibit 2223.

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