

Paper No. \_\_\_\_\_  
Filed: April 12, 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.

---

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

---

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

TABLE OF CONTENTS

I. INTRODUCTION .....1

II. STANDARD.....1

III. eSPEED/CQG TRANSCRIPTS (EXHIBITS 2211, 2220, 2222, 2287, and 2292-2296).....1

IV. TRADER DECLARANTS (EXHIBIT 2223).....4

    A. Exhibit 2223 is authentic .....4

    B. Exhibit 2223 is not hearsay .....5

V. ANIMATION (EXHIBIT 2214) .....6

VI. THOMAS DECLARATION (EXHIBIT 2169, ¶¶ 71, 79-80, 83-86, 92-95, 100-102).....8

    A. The Board Is Equipped to Properly Assess Mr. Thomas’ Testimony .....8

    B. Mr. Thomas’ Testimony Is Used to Further Appropriate Objectives .....9

    C. The objected-to statements prove the evidence is not hearsay .....10

    D. Petitioner’s objections go to the weight of the evidence, not their admissibility .....11

    E. Papers submitted from other proceedings are proper.....11

VII. DOCUMENTS PRODUCED IN DISTRICT COURT CASES (EXHIBITS 2206-07, 2415-16, 2250, 2279-82) .....11

VIII. CONCLUSION.....13

## I. INTRODUCTION

37 C.F.R. § 42 governs these proceedings, and it “shall be construed to secure the just, speedy, and inexpensive resolution of every proceeding.” § 42.1(b). The “just” requirement mandates that the Board consider all of the evidence introduced by Patent Owner Trading Technologies International, Inc. (“TT”).

## II. STANDARD

As the movant, Petitioners bear the burden of proving that the challenged exhibits are inadmissible. *Liberty Mutual Insurance Co. v. Progressive Casualty Insurance Co.*, CBM2012-00002, Paper 66 at 59 (January 23, 2014); 37 C.F.R. § 42.20(c). Petitioners have failed to meet this burden. As a matter of policy, the Board disfavors excluding evidence; “it is better to have a complete record of the evidence submitted by the parties than to exclude particular pieces.” *Id.* at 60-61.

## III. *eSPEED/CQG* TRANSCRIPTS (EXHIBITS 2211, 2220, 2222, 2287, and 2292-2296)

Exhibits 2211, 2220, 2287, and 2292–2296 are admissible because they are sworn deposition testimony from district court cases.

Federal Rule of Evidence 807 provides a “residual exception” to the hearsay rule. To fall under the exception, a “statement must: (1) have equivalent circumstantial guarantees of trustworthiness; (2) be offered as evidence of a material fact; (3) be more probative on the point for which it is offered than any

other evidence that the proponent can obtain through reasonable efforts; and (4) be in the interests of justice to admit.” *Id.* at 69 (citing Fed. R. Evid. 807).

The Board’s recent Final Written Decision in *Apple Inc. v. VirnetX Inc.* is instructive on the rule’s applicability to TT’s testimonial evidence from district court. IPR2015-00811, Paper 44 at 68-70 (Sep. 8, 2016). In *Apple*, the Board addressed the admissibility of evidence just like TT’s: declarations that were prepared for other proceedings and district court trial and deposition testimony. *Id.* at 68. After recognizing that the party challenging the admissibility of the evidence “chose not to seek the opportunity to cross examine the declaration testimony,” which the Board had defined to include the district court trial and deposition testimony, the Board explained why the residual exception of Federal Rule of Evidence 807 rendered the evidence admissible. *Id.* at 68-70.

Although, in *Apple*, the Board, cautioned that the residual exception is to be reserved for “exceptional cases,” *Id.* at 69 (citing *Conoco Inc. v. Dep’t of Energy*, 99 F.3d 387, 392 (Fed. Cir. 1996), *as amended on rehearing in part* (Jan. 2, 1997)), tribunals are often “accorded wide discretion in applying the residual hearsay exception.” *Id.* (citing *Doe v. United States*, 976 F.2d 1071, 1076–77 (7th Cir. 1992), *cert. denied* 510 U.S. 812 (1993); *United States v. North*, 910 F.2d 843, 909 (D.C. Cir. 1990) *cert. denied* 500 U.S. 941 (1991)).

TT’s testimonial evidence from district court has the same circumstantial

guarantees of trustworthiness as the testimony at issue in *Apple*, as well as those declarations actually created for these proceedings. *See Apple*, IPR2015-00811, Paper 44 at 69-70. “The vast majority of testimony in *inter partes* reviews is admitted in paper form, as a declaration, instead of as live witness testimony. Thus, whether or not testimony is specifically created for a specific IPR or is created for another proceeding, if the declaration is sworn testimony and the witness is available for cross-examination, the testimony bears the same guarantees of trustworthiness.” *Id.* at 70. Here, like in *Apple*, TT’s testimonial evidence from district court is sworn testimony and the witnesses would have been available for cross-examination had Petitioners sought such cross examination. Thus, TT’s testimonial evidence from district court has the same circumstantial guarantees of trustworthiness as those declarations actually created for these proceedings.

As required by Federal Rule of Evidence 807, TT’s testimonial evidence from district court is also offered as evidence of a material fact, more probative on the point for which it is offered than any other evidence that TT could obtain through reasonable efforts. It is in the interests of justice to admit the evidence because TT will otherwise be deprived of due process.

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.