

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

I. TSE HAS NOT BEEN AUTHENTICATED UNDER FRE 901.

Petitioners argue that TT conceded that the Kawashima deposition transcript was admissible – and for this reason, TT’s motion fails. But TT did not concede that the 2005 Kawashima deposition transcript was admissible, and TT did not concede that the deposition transcript authenticates Exhibit 1003 (“TSE”). *E.g.*, CBM2016-00179, Paper 114. Rather, in other CBM proceedings, TT set forth an alternative argument that the deposition transcript and TT’s evidence from district court litigation should stand or fall together based on mutual hearsay objections. *Id.* at 6 (“[t]o the extent the Board excludes any of Patent Owner’s evidence from district court litigation, which it should not, the Board should likewise exclude the 2005 Kawashima transcript.”).

But even if the Kawashima deposition transcript is admitted, it does not authenticate TSE. Indeed, nothing in the record proves that TSE is the specific “prior art” document Petitioners assert it is. See Pet. at 14, 37.

As explained in TT’s motion, the 2005 Kawashima transcript raises more doubt that it resolves. Citing *Rosenberg v. Collins*, Petitioners argue that TT’s criticism of the way Mr. Kawashima verified his identification of the TSE manual does not cut against authenticity in a way supported by law, but *Rosenberg* relates to the business record hearsay exception of FRE 803(6), not to whether a document is a particular “prior art” document. See 624 F.2d 659, 665 (5th Cir.1980). Opp. at

4-5. Accordingly, it has no bearing on whether Mr. Kawashima ever authenticated any document as being the alleged “prior art” document cited by Petitioners.

Further, whether or not TSE is a business record or appears to be an authentic TSE document, nothing establishes that it is the “prior art” document Petitioners cite to. Specifically, Petitioners argue that the document is authenticated under FRE 901(b)(4) because it has a distinctive layout and has illustrations as well as Bates numbering. Opp. at 7. But such characteristics of the purported TSE document do nothing to establish that the document is the alleged “prior art” document Petitioners cite as support for features that were “well-known” and “conventional.” See Pet. at 14. Indeed, these characteristics do nothing to establish that the document was publically available such that it demonstrates what was well-known or conventional in the art at the time. Rather, these characteristics, at best, show that the purported “prior art” TSE document is the same (or similar) TSE document other defendants have used in other related litigations. As such, it is not self-authenticated in any way that can establish it is prior art, or evidence of what was “well-known” or “conventional” at the time, in this proceeding.

The 2016 deposition transcript does not include testimony putting to rest the deficiencies of the 2005 deposition. Instead, it once again suggests that Mr.

Kawashima could not have examined the document in a way that would have differentiated it from any other version. Ex. 1040 at 45-46.

As explained in TT's motion, the 2016 deposition transcript also proves Mr. Kawashima's bias. Paper 34 at 4-5. Petitioners argue that any doubts go to the weight of the testimony, not to its admissibility. Opp. at 7. TT agrees. Mr. Kawashima's bias goes to the weight that his testimony should be given. Mr. Kawashima's testimony should be given no weight, so it cannot authenticate TSE.

II. CONCLUSION

The Board should grant Patent Owner's Motion to Exclude

Date: April 19, 2017

Respectfully submitted,

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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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