

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

CBM2016-00054 (Patent 7,693,768 B1)
CBM2016-00090 (Patent 7,725,382 B2)

PETITIONERS' MOTION TO STRIKE

Mail Stop "PATENT BOARD"
Patent Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

TABLE OF CONTENTS

I. THE RELIEF REQUESTED (37 CFR § 42.22(a)(1)).....1

II. REASONS FOR THE RELIEF REQUESTED (37 CFR § 42.22(a)(2)).....1

A. The Board should strike '054 Exhibit 2233 and '090 Exhibit 2233 because they are impermissibly incorporated by reference in the '054 POR and the '090 POR, respectively.....4

B. The Board should strike the '054 POR's string citations on pages 38, 42-43, 51, 61, and 65 because each is an impermissible incorporation by reference.8

C. The Board should strike the '090 POR's string citations on pages 42, 46, 53, 62, and 65 because each is an impermissible incorporation by reference.10

D. In this case, striking both Exhibit 2233s and the PORs' string citations is the appropriate relief.11

III. CONCLUSION.....14

I. THE RELIEF REQUESTED (37 CFR § 42.22(a)(1))

As authorized by the Board's March 10, 2017 Order (CBM2016-00054, Paper 28) (CBM2016-0090, Paper 24), Petitioners move to strike Exhibit 2233 in CBM2016-00054 ("054 Exhibit 2233") because it is incorporated by reference in Patent Owner's Response (Paper 20) ("054 POR"), and Exhibit 2233 in CBM2016-00090 ("090 Exhibit 2233") because it is incorporated by reference in Patent Owner's Response (Paper 21) ("090 POR"). These incorporations violate 37 C.F.R. § 42.6(a)(3)'s prohibition on incorporation by reference and 37 C.F.R. § 42.24(b)(2)'s 18,700 word limit.

Petitioners further move to strike the string citations on pages 38, 42-43, 51, 55, 61, and 65 of the '054 POR, and the string citations on pages 42, 46, 53, 62, and 65 of the '090 POR because they also violate 37 C.F.R. §§ 42.6(a)(3) and 42.24(b)(2).

The Board authorized Petitioners to file the same motion in both CBM proceedings. ('090 Paper 24 at 2.)

II. REASONS FOR THE RELIEF REQUESTED (37 CFR § 42.22(a)(2))

The Office's Rules prohibit incorporation by reference: "Arguments must not be incorporated by reference from one document into another document." 37 C.F.R. § 42.6(a)(3). In the Rules of Practice for Trials Before The Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions;

Final Rule, the Office explained that this prohibition eliminates abuses (such as circumvention of word limits) and prevents waste of the tribunal's time:

The prohibition against incorporation by reference minimizes the chance that an argument would be overlooked and eliminates abuses that arise from incorporation and combination. In *DeSilva v. DiLeonardi*, 181 F.3d 865, 866–67 (7th Cir. 1999), the court rejected “*adoption by reference*” as a self-help increase in the length of the brief and noted that *incorporation is a pointless imposition on the court's time* as it requires the judges to play archeologist with the record. *The same rationale applies to Board proceedings.*

77 Fed. Reg. 48,612, 48,617 (Aug. 14, 2012) (emphasis added); *see also Cisco Sys., Inc. v. C-Cation Tech's, LLC*, IPR2014-00454, Paper 12 at 10 (P.T.A.B. Aug. 29, 2014) (informative) (“One purpose of the prohibition against incorporation by reference is to eliminate abuses that arise from incorporation.”).

Patent Owner continues to ignore this prohibition. In CBMs of related patents, this Panel censured counsel for Patent Owner for improperly incorporating unauthorized motions in its PORs, and *directed Patent Owner to the Office's Rule prohibiting incorporation by reference*. *See, e.g., IBG*, CBM2015-00182, Paper 65 at 2-3; *IBG*, CBM2015-00182, Paper 60 at 6-7. Yet, Patent Owner continues to impermissibly incorporate by reference in its PORs: the '054 POR incorporates '054 Exhibit 2233, which is an 890-page document including claim charts, annotated figures, and purported user manuals; and the '090 POR incorporates

'090 Exhibit 2233, which is an 896-page document that also includes claim charts, annotated figures, and purported user manuals. Patent Owner seeks to use these exhibits to establish the requisite nexus for Patent Owner's alleged objective evidence of nonobviousness (*see e.g.*, '054 POR at 37; 50; 56; '090 POR at 42; 52-53; 57), which is Patent Owner's burden to show, *In re Huang*, 100 F.3d 135, 139-40 (Fed. Cir. 1996). Additionally, both PORs rely on lengthy string citations to support its secondary consideration arguments, each of which is also an impermissible incorporation by reference.

The PORs' improper incorporations not only force Petitioners and the Board to "play archeologist with the record," 77 Fed. Reg. at 48,617, they add thousands of words to Patent Owner's briefing. For example, the '054 POR certifies that it "contains 18,649 words" ('054 POR at "Certificate of Compliance"), a mere 51 words below the 18,700 word limit imposed by 37 C.F.R. § 42.24(b)(2). '054 Exhibit 2233's claim charts add more than 4,600 words—a nearly 25% "self-help increase in the length of the brief." 77 Fed. Reg. at 48,617. '090 Exhibit 2233 is worse. It adds more than 5,300 words to Patent Owner's briefing.

The Board should not permit these abuses. In the above-mentioned CBMs of related patents, this Panel addressed the very same situation and found that Patent Owner's attempt to incorporate the same type of exhibit (as Exhibit 2233) and use of lengthy string citations were improper. *IBG LLC v. Trading Tech's Int'l, Inc.*,

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.