

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

PETITIONERS' MOTION TO EXCLUDE

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I. Introduction

TT has known for more than a year that much of the evidence submitted with its Patent Owner Response (“POR”) suffers from significant admissibility problems. (*See* Paper 38, 2-4 in CBM2015-00182 (Board denying TT’s request for a blanket waiver of FRE 802 and FRE 901 so that TT could rely on a “large volume of documents produced in previous district court cases”).) Despite this knowledge, TT elected not to address any of the deficiencies. Instead, TT dumps into the record of this proceeding hundreds of pages of the same documents (and more) from the district court cases without regard to their admissibility. But like the ’182 proceeding, this proceeding is governed by the Federal Rules of Evidence, which set fair boundaries on the admissibility of evidence. Because TT ignores those rules, its evidence should be stricken as explained below.

A significant number TT’s documents violate the prohibition on hearsay (FRE 802), and TT has done nothing to show that any of the well-established exceptions to hearsay apply to its evidence. Rather, 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 FRE 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 FRE 702. Significant portions of Thomas' declaration (Ex. 2169) are not his opinions. Rather, he improperly offers factual testimony based *not* upon his own perception, but upon his review of district court depositions and trial transcripts. That underlying evidence is inadmissible because TT may not use 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). Thus, Thomas' testimony is improper and 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 October 18, 2016 Order setting Due Date 4. (Paper 11 at 5, 8.)

II. Argument

A. Bear, Olsen, and Abilock Declarations: Exhibits 2168, 2174, 2178

The Board should exclude Exhibits 2168, 2174, and 2178 because they are not relevant. FRE 401. Each declarant testified that he did not consider the '768 patent from the perspective of a POSITA when forming his opinions. (Ex. 1085, 43:20-44:3; Ex. 1086, 31:17-32:16; Ex. 1069, 27:14-28:7.) Because a patent must

be analyzed from the perspective a POSITA, their testimony does not tend to make any facts in this proceeding more or less probable, and is therefore irrelevant.

Petitioners timely objected to these exhibits for lack of relevance. (Paper 25 at 7.)

B. District Court Transcripts: Exhibits 2211, 2220, 2222, 2224, 2225, 2228, 2232, 2247, 2251, 2273-2276, 2286, 2288, and 2292-2296

The Board should exclude Exhibits 2211, 2220, 2222, 2224, 2225, 2228, 2232, 2247, 2251, 2273-2276, 2286, 2288, and 2292-2296 (“Transcripts”) because they are hearsay to which no valid exception applies. TT cites most of these exhibits in its POR. (*See* Paper 21 at 39, 40, 42, 46-47, 50, 52-55, 57, 60, 63-67, 72, 76-77, 84.) As discussed further in section II.F *infra*, TT’s technical expert Thomas also relies upon these exhibits as alleged support for the assertions in his declaration (Ex. 2169) regarding, for example, the background of the claimed invention and alleged secondary considerations. Petitioners timely objected to these exhibits as hearsay. (Paper 25 at 9.)

The Transcripts purport to be *excerpts* of trial or deposition transcripts from district court proceedings involving third parties. The statements within are hearsay as none were made while testifying for the current proceeding and all are being offered for the truth of the matters asserted. FRE 801. No proper hearsay exception applies to the Transcripts. For example, TT has not shown that the witnesses are unavailable (FRE 804), nor has TT shown that any specific exception applies under FRE 803. Likewise, the residual exception does not apply here as this case is not

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