

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.

Case CBM2016-0054
U.S. Patent 7,693,768

**PATENT OWNER'S REPLY
IN SUPPORT OF ITS MOTION TO EXCLUDE**

I. TSE EXHIBITS 1016, 1017, AND 1019 SHOULD BE EXCLUDED AS UNAUTHENTICATED AND/OR INADMISSIBLE HEARSAY

Petitioners argue that TT conceded that the Kawashima deposition transcript was admissible. Opp. at 6. But TT did not concede that the 2005 Kawashima deposition transcript was admissible, and TT did not concede that the deposition transcript authenticates Exhibit 1016 (“TSE”). *E.g.*, CBM2016-00179, Paper 114. Rather, in other CBM proceedings, TT set forth an alternative argument that applied for that CBM proceeding: 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.”).

Here, the 2005 Kawashima testimony does not qualify under the residual hearsay exception because it is not more probative than any other evidence Petitioner could have obtained through reasonable efforts. FRE 807(a)(2). Petitioners make this argument. Opp. at 7. Yet in the very next paragraph they admit that *Kawashima made himself available for cross-examination in these CBM proceedings*. *Id.* Indeed, Petitioners examined Mr. Kawashima at this deposition. Ex. 2163, pp. 44-60. Further, Petitioners’ counsel even met with Mr. Kawashima prior to this deposition. *Id.* at 11:18 – 12:2, 13:23-25 (“Q: Now, yesterday, you

met with Ms. Gordon and Ms. Morgan for about how long? A: Three hours or so.”).

Thus, contrary to Petitioners’ argument, Petitioners had ample opportunity to obtain more probative evidence. Petitioners could have obtained a declaration from Kawashima during the time they privately met with him prior to his deposition. They also could have elicited testimony at his deposition addressing the deficiencies of the 2005 Kawashima testimony. They did not. As such, the 2005 Kawashima transcript is not more probative than other evidence they could have obtained through reasonable efforts. The 2005 Kawashima transcript thus does not qualify for the residual hearsay exception and should be excluded as hearsay.

Petitioners claim that “TT *does not* seek to exclude the 2005 Kawashima deposition transcript (Exhibit 1019)” Opp. at 6. Yet, TT’s motion to exclude demonstrates that the 2005 Kawashima transcript is inadmissible hearsay, which, among other reasons, renders it insufficient to authenticate TSE. Thus, the Board should not rely on the 2005 Kawashima transcript for any reason, and should thus exclude it.

Even if the Kawashima deposition transcript is admitted, it does not authenticate TSE. Indeed, this transcript is insufficient to establish that Exhibit 1016 is the same document allegedly distributed in 1998 by the Tokyo Stock

Exchange. As explained in TT's motion, the 2005 Kawashima transcript raises more doubt that it resolves. Mot. at 3-5. Petitioners argue (incorrectly) that TT does not point to any evidence suggesting that Exhibit 1016 is not the 1998 manual issued by the Tokyo Stock Exchange. Opp. at 1. But Petitioners' premise is flawed. The correct question is whether Exhibit 1016 is *the same* manual that Kawashima allegedly distributed *in 1998* to TSE participants. The 2005 Kawashima testimony (Ex. 1019) does not establish that it is.

Specifically, TT highlighted portions of Kawashima that demonstrate that Kawashima was unable to authenticate TSE *in a way that establishes that the TSE manual was the same document allegedly distributed in 1998 by the Tokyo Stock Exchange*. Mot. at 3-4 (citing Ex. 1019, pp. 97-98 (Q: Is this entire document, this document identified as Defendant's Exhibit 179, from August 24 of 1998? A: Yes. Q: How do you know? A: Because when we replace sections there is a mark indicating a correction at the bottom of the page. And just looking briefly through this document, I didn't see that mark and therefore I thought that was the original date); and citing Ex. 1019, p. 99 (Q: Is there any way to tell that the manual that was distributed is the same as Defendant's Exhibit 179? A: If you were to compare this with the distributed manual you would be able to tell.)).

Petitioners also 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 4. But such characteristics of the purported TSE document do nothing to establish that the document is the same manual allegedly distributed by the Tokyo Stock Exchange in 1998. And these characteristics do nothing to establish that the document was publicly accessible. Rather, these characteristics, at best, show that the purported 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 was the same manual allegedly distributed by the Tokyo Stock Exchange in 1998.

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. 1045 at 45-46. Further, as explained in TT's motion, the 2016 deposition transcript also proves Mr. Kawashima's bias. Mot. at 5. As such, the 2016 Kawashima testimony should be given no weight.

Finally, the TSE translation (Ex. 1017) should be excluded under FRE 106 and 403 because it is incomplete and misleading. Petitioner does not dispute that it copied TT's own translation of TSE's Chapter 7 for an inaccurate translation. Opp. at 11; *compare* Ex. 1017, 91-120 *with* Ex. 2178, pp. 15-44. Indeed, Petitioners' version omits two translator's notes from TT's original translation. Ex. 2178, 39-40. Given this, FRE 106 and 403 dictate that, at a minimum, pages

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