

Paper No. _____
Filed: July 5, 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

Case CBM2016-00087
U.S. Patent 7,412,416 B2

**PATENT OWNER'S MOTION TO EXCLUDE
UNDER 37 C.F.R. § 42.64(c)**

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I. INTRODUCTION

Pursuant to 37 C.F.R. §§ 42.64(c) and 42.61(a) and the Federal Rules of Evidence, Patent Owner Trading Technologies International, Inc. (“TT”) respectfully moves to exclude the TSE exhibits (Exhibits 1015, 1016) as not relevant and not authenticated; the 2005 Kawashima deposition transcript (Exhibit 1018) as inadmissible hearsay; and certain deposition testimony of Christopher Thomas (Ex. 1060) under FRE 403 because those portions’ probative value is substantially outweighed by a danger of unfair prejudice and confusing the issues as a result of vague questioning.

II. STANDARD

A Motion to Exclude must (a) identify where in the record the objection was made, (b) identify where in the record the evidence sought to be excluded was relied upon by an opponent, (c) address objections to exhibits in numerical order, and (d) explain the objection. Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012).

III. TSE (EXS. 1015, 1016) SHOULD BE EXCLUDED

A. TT Timely Objected

Petitioners relied on TSE in the Petition as a ground of invalidity. Pet. at 42-84. But the Board did not institute on any ground of invalidity involving TSE.

I.D. at 15-23. TT timely objected to TSE on December 15, 2016 as not relevant to any grounds instituted by the Board as well as not being authenticated. Paper 13.

B. TSE is not Relevant to any Ground Instituted by the Board

The Board did not institute on any invalidity grounds involving TSE. I.D. at 15-23. Thus, the TSE exhibits (Exs. 1015, 1016) are not probative on any issue remaining in this proceeding. They should therefore be excluded under FRE 401 and 402. *See Apple Inc. v. Smartflash LLC*, CBM2014-00106, Paper 52, p. 25 (PTAB Sep. 25, 2015) (excluding evidence not relied upon).

C. TSE Has Not Been Authenticated

The Federal Rules of Evidence apply to the current proceedings. 37 C.F.R. § 42.62. FRE 901 requires parties to authenticate documents. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. Fed. R. Evid. 901(a).

Petitioners can cite to no evidence sufficiently authenticating TSE. To the extent Petitioners may attempt to rely on a transcript of a 2005 deposition of Atshushi Kawashima (Ex. 1018), this transcript does not sufficiently authenticate TSE because it should be excluded as being inadmissible hearsay for the reasons set forth below in Section IV. But even if Kawashima is not excluded (which it should be), Kawashima remains deficient.

Indeed, rather than supporting a finding under FRE 901(a) that TSE is what Petitioners claim it is (i.e., that TSE is the same document allegedly distributed by the Tokyo Stock Exchange in 1998), the 2005 Kawashima deposition transcript ultimately raises doubts as to the authenticity of the document.

For example, in the deposition, Mr. Kawashima draws a conclusion about the authenticity of TSE, a document of hundreds of pages, based on the perceived absence of a mark in “looking briefly through” the document. Specifically, he testified:

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.

Ex. 1018, pp. 97-98.

Further, when asked how one would know if a distributed manual were the same as a particular copy, Mr. Kawashima merely makes the conclusory assertion that a comparison would reveal whether a distributed copy was the same, without

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