

Paper No. ____
Filed: September 23, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

IBG LLC; INTERACTIVE BROKERS LLC;
TRADESTATION GROUP, INC.; TRADESTATION SECURITIES, INC.;
TRADESTATION TECHNOLOGIES, INC.;
and IBFX, INC.

Petitioners

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.

Patent Owner

Case CBM2015-00181
U.S. Patent 7,676,411

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

IBG 1069

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C. The Probative Value of the Testimony at Pages 393-397 of the
Thomas Transcript is Outweighed by a Danger of Prejudice and
Confusing the Issues under FRE 40310

I. Preliminary Statement

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”), moves to exclude TSE (Ex. 1006), because Petitioners have failed to meet the authentication requirements of FRE 901 and because the only purportedly authenticating evidence (Ex. 1010, the transcript of a 2005 deposition of Atshushi Kawashima) is hearsay under FRE 801.

In addition, TT moves to exclude certain deposition testimony of TT’s experts Dan Olsen (Ex. 1051) and Christopher Thomas (Ex. 1052) under FRE 403 because its probative value is substantially outweighed by a danger of unfair prejudice and confusing the issues as the 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. Trial Practice Guide, 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012).

III. TSE (Ex. 1006) Should Be Excluded

A. TT Timely Objected to TSE, Which Was Relied Upon in Petitioners’ Petition

TT timely objected to Exhibit 1006 in objections filed March 21, 2016.

Paper 30 at 2-3. Petitioners rely upon TSE (Ex. 1006) in their Petition for their 35 U.S.C. § 101 grounds and all instituted prior art grounds. *E.g.*, Petition, Paper 7 at 21-22 and 60-80.

B. TSE Has Not Been Authenticated under FRE 901

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. FRE 901(a). Petitioners have produced no such evidence to support a finding that TSE is authentic, relying solely on Exhibit 1010, the transcript of a 2005 deposition of Atshushi Kawashima, which is insufficient in multiple respects.

i. The 2005 Kawashima Deposition Testimony is Hearsay

The only evidence that even attempts to authenticate TSE is Exhibit 1010, the transcript of the 2005 Kawashima deposition. *See* Ex. 1010, pp. 97-99. The 2005 Kawashima deposition was conducted in a district court case, not any of the CBM proceedings. Ex. 1010 at 1. As a result, the 2005 Kawashima deposition is, by definition, hearsay.

FRE 801 defines hearsay as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” Since

testimony by Mr. Kawashima in the district court case was not made “while testifying at the current trial or hearing,” to the extent such testimony is used to prove the authenticity of TSE, it must be considered hearsay.

ii. The residual hearsay exception of FRE 807 applies to both the 2005 Kawashima deposition and Patent Owner’s evidence from district court litigation

However, just like Patent Owner’s evidence from district court litigation (e.g., Ex. 2223 (trader declarations), etc.), the 2005 Kawashima deposition transcript should not be excluded as hearsay. “Hearsay is generally inadmissible because ‘the statement is inherently untrustworthy: the declarant may not have been under oath at the time of the statement, his or her credibility cannot be evaluated at trial, and he or she cannot be cross-examined.’” *United States v. Reilly*, 33 F.3d 1396, 1409 (3d Cir. 1994); *see also Queen v Hepburn*, 11 U.S. 290 (1813). These concerns are not present with respect to the 2005 Kawashima deposition transcript.

Although no exception under FRE 803 or FRE 804 applies, the residual hearsay exception of FRE 807 applies to both Patent Owner’s evidence from district court litigation and the 2005 Kawashima deposition transcript because the parties in this proceeding had the opportunity to cross examine the witnesses from the district court litigation.

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