

Paper No. ____
Filed: July 25, 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 REPLY IN SUPPORT OF ITS
MOTION TO EXCLUDE**

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I. TSE IS IRRELEVANT

TSE is not relevant to any issue remaining in these proceedings. Petitioners argue that TSE is relevant to “factual issues undergirding the § 101 analysis and the CBM-eligibility analysis.” Opp. at 2. But belying this is Petitioners’ failure to set forth any analysis of how TSE demonstrates any of these factual issues.

Indeed, Petitioners mention TSE just twice in the patent-eligibility section of their Petition: both times as mere “*see*” cites to one-sentence arguments regarding dependent claims 13, 23, and 24 with no further explanation of relevance. Pet. at 34-35. Petitioners fail to discuss (or cite) TSE in connection with a CBM-eligibility analysis. And Petitioners fail to even cite TSE in their Reply.

Two parenthetical cites with no explanation of relevance does not demonstrate that TSE is probative on any fact remaining in this proceeding. Thus, TSE should be excluded. *Apple Inc. v. Smartflash LLC*, CBM2014-00106, Paper 52, p. 25 (PTAB Sep. 25, 2015) (excluding evidence not relied upon). Allowing Petitioners to rely on TSE for these arguments, which are apparently being made for the first time in an opposition to a motion to exclude, violates the APA and Patent Owner’s Due Process rights because it prevents Patent Owner from meaningfully responding. *Dell Inc. v. Accelaron, LLC*, 818 F.3d 1293, 1301 (Fed. Cir. 2016).

II. KAWASHIMA IS HEARSAY

Petitioners argue that TT conceded that the Kawashima deposition transcript was admissible. But TT did not concede that the 2005 Kawashima deposition transcript was admissible, and TT did not concede that the deposition transcript authenticates Exhibit 1015 (“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.”).

Notably, Petitioners do not dispute that they could have obtained more probative evidence from Kawashima. As explained in TT’s motion, Petitioners could have obtained a declaration from Kawashima during the time they privately met with him prior to his 2016 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. *See* FRE 807(a)(2). The 2005 Kawashima transcript thus does not qualify for the residual hearsay exception and should be excluded as hearsay.

III. TSE HAS NOT BEEN AUTHENTICATED

Even if the Kawashima deposition transcript is admitted, it does not authenticate TSE. Indeed, this transcript is insufficient to establish that Exhibit 1015 is the same document allegedly distributed in 1998 by the Tokyo Stock Exchange. *See* Pet. at 18-19, 37. As explained in TT’s motion, the 2005 Kawashima transcript raises more doubt that it resolves. Mot. at 3-4. 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. Id.* (citing Ex. 1018, pp. 97-99).

Further, whether or not TSE is a business record or appears to be an authentic TSE document, nothing establishes that it is the “prior art” document to which Petitioners cite. Specifically, Petitioners 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 5-6. 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. *See* Pet. at 18-19. Indeed, these characteristics do nothing to establish that the document was publicly available such that it demonstrates what was well-known or conventional in the art at the time. Rather, these characteristics, at best, show that the purported

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