

Filed on behalf of Microsoft Corporation

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION
Petitioner

v.

PROXYCONN, INC.
Patent Owner

Case IPR2012-00026 (TLG)
Case IPR2013-00109 (TLG)
Patent 6,757,717 B1

**MICROSOFT CORPORATION'S *CORRECTED*
MOTION TO EXCLUDE EVIDENCE**

Pursuant to 37.C.F.R. § 42.64 and the Federal Rules of Evidence, petitioner Microsoft Corporation (“Microsoft”) moves to exclude patent owner Proxyconn, Inc.’s (“Proxyconn”) Exhibit Number 2002, the Declaration of Alon Konchitsky (“Konchitsky’s Declaration” or “Konchitsky Declaration”), submitted in support of Patent Owner’s Response (corrected version filed on June 20, 2013). Microsoft’s motion is based on the Federal Rules of Evidence (“FRE”), relevant case law, and the PTAB’s Rules.

I. MICROSOFT TIMELY OBJECTED TO DR. KONCHITSKY’S TESTIMONY

Microsoft timely objected to Exhibit 2002, the Declaration of Alon Konchitsky. Proxyconn presented this evidence with its Response on May 21, 2013. Microsoft timely objected on May 29, 2013, pursuant to 37 C.F.R. § 42.64(b)(1), identifying the grounds for the objection with sufficient particularity to allow correction in the form of supplemental evidence. (See Ex. 1027 (copy of Microsoft’s Objections to Exhibits)¹.) Specifically, Microsoft objected to the admissibility of Dr. Konchitsky’s Declaration because he “is not qualified as an expert on the matters on which he opines” and his testimony does not satisfy the requirements of FRE 702(b)-(d). (Ex. 1027 at 1-2.)

¹ Microsoft also objected to Proxyconn’s Exhibit 2004, in response to which Proxyconn submitted supplemental evidence (Exhibit 2005).

Microsoft again raised its objection in its Reply to Patent Owner's Corrected Response, filed on August 21, and submitted the 3rd Declaration of Professor Darrell D. E. Long, Exhibit 1025, which provided further support for Microsoft's objections.

II. PROXYCONN RELIED ON DR. KONCHITSKY'S TESTIMONY

In the Corrected Patent Owner's Response filed June 20, 2013, Proxyconn relies on the direct testimony presented in Dr. Konchitsky's Declaration (Ex. 2002) and cites to the Declaration throughout its argument (at pages 11-12 and 17-39).

Proxyconn uses the Konchitsky Declaration to support its arguments of what a person of skill in the art would know (see, e.g., Resp. at 12, 29-30), the teachings of the prior art and the patent (see, e.g., id. at 17-24, 27-31, 33-35, 37-40), and the technology generally (see, e.g., id. at 22, 25, 26, 32, 36-37, 39, 43). But, Dr. Konchitsky is not a person of skill in the art and is not sufficiently familiar with the technology and field of the art to opine on such matters.

III. DR. KONCHITSKY'S DIRECT TESTIMONY SHOULD BE EXCLUDED

Dr. Konchitsky's direct testimony (Ex. 2002) should be excluded as inadmissible under FRE 602, 701, and 702 because Dr. Konchitsky is not an expert in the field and does not have personal knowledge on which to base his testimony. Further, Dr. Konchitsky's testimony, even if he is found to be an expert, is

inadmissible because (1) it is not based on “facts or data,” (2) is not the “product of reliable principles and methods,” and (3) does not show a reliable application of “principles and methods to the facts of the case.” FRE 702(b)-(d).

A. Dr. Konchitsky Does Not Qualify As An Expert In This Field And Does Not Qualify As A Person Of Skill In The Art

Dr. Konchitsky’s CV submitted by Proxyconn explains that he has been an expert in the fields of “voice technologies, adaptive speech processing, voice coders, wireless voice communications, portable processing/architecture and operating systems.” (Ex. 2003 at 1.) His CV also identifies his work experience, which has been focused on voice communications and mobile and wireless technologies. In addition, he has done some coding. (Id. at 1-2.) The technology at issue in this IPR, however, involves generally the sending of data over communication networks, and more specifically distributed data storage systems and networking, and code theories and cryptographic hash functions. (See, e.g., ’717 patent at 1:10-15, 6:24-47.) Dr. Konchitsky is not an expert in this field and admitted in his deposition that he was unfamiliar with much of the relevant background and terminology in the field. (Ex. 1024 (Konchitsky Tr., July 2, 2013) at 145:23-155:2.) Such unfamiliarity with the relevant field is grounds for excluding his testimony. See Sundance, Inc. v. DeMonte Fabricating Ltd., 550 F.3d 1356, 1361 (Fed. Cir. 2006) (dismissing expert testimony where expert did

not possess “the relevant expertise in the pertinent art”).

Dr. Darrell Long, Microsoft’s expert witness, explains in his declaration (Ex. 1025) that Dr. Konchitsky is not an expert in the field relevant to the ’717 patent and the prior art in this IPR. Dr. Long’s assessment is based on Dr. Konchitsky’s testimony that he does not have the common knowledge about HTTP, caching, file systems, and other topics relevant to this IPR. Further, he has not written on matters in this field, is not a member of various organizations in this field, and has not worked in this field. (Id.) In fact, Dr. Konchitsky does not qualify as a person of skill in the art based on Dr. Long’s definition (Dr. Konchitsky does not provide a definition of a person of skill in the art). (Id. at 2.) A person of skill in the art would have had several years of practical experience working in operating systems, in particular the data storage subsystem (or the equivalent post-graduate academic work). There is nothing in Dr. Konchitsky’s CV that shows this requisite practical or educational experience. (Id. at 12.)

Proxyconn has the burden of establishing that Dr. Konchitsky’s testimony is admissible based on his “knowledge, skill, experience, training, or education.” FRE 702; see also Sundance, 550 F.3d at 1361 (placing burden on propounding party “to explain how [expert] possesses the relevant expertise in the pertinent art”). Courts determine whether expert testimony is reliable by assessing whether

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