

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION

Petitioner

v.

PROXYCONN, INC.

Patent Owner

Case IPR2012-00026

Case IPR2013-00109

Patent 6,757,717 B1

Before SALLY C. MEDLEY, THOMAS L. GIANNETTI, and MITCHELL G. WEATHERLY, *Administrative Patent Judges*.

GIANNETTI, *Administrative Patent Judge*.

ORDER

Decision on Motion to Exclude

37 C.F.R. § 42.64

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Petitioner, Microsoft Corporation, moves under 37 C.F.R. § 42.64(c) to exclude the direct testimony of Patent Owner's technical expert, Dr. Alon Konchitsky. Paper 56 ("Motion"). The declaration of Dr. Konchitsky (Ex. 2002) is proffered by Patent Owner, Proxyconn, Inc., under Fed. R. Evid. 702. Patent Owner opposes the motion. Paper 62 ("Opposition"). For the following reasons, Petitioner's motion is denied.

DISCUSSION

The gist of Petitioner's motion is that Dr. Konchitsky is not an expert in the pertinent technical field and that he lacks personal knowledge on which to base his testimony. Motion 2. Dr. Konchitsky's qualifications are summarized in his curriculum vitae. Ex. 2003. He holds a PhD in electrical engineering, has served as an expert witness and consultant in various patent matters, held technical and managerial positions with several communications companies, including Nokia Mobile Phone & Radio Frequency Co., is a member of many technical and professional organizations, including IEEE, and named as an inventor on a large number of U.S. patents.

Petitioner contends that Dr. Konchitsky is unqualified to provide expert testimony under Fed. R. Evid. 702 because his experience is concentrated in the field of communications technology (voice, mobile, and wireless). Motion 3.

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Petitioner contends that the '717 patent¹ at issue in this proceeding, in contrast, “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.” *Id.* Petitioner contends that Dr. Konchitsky is not an expert in this field.

Petitioner also contends that Dr. Konchitsky lacks sufficient personal knowledge of certain matters, including those described at pages 5–8 of its motion. These include the HTTP protocol’s “GET” request, the details of caching servers, the “Harvest” and “Squid” web caches, various network file systems, and utilities for computing differences between files. *Id.* at 5–8.

Patent Owner responds that Dr. Konchitsky’s training and experience qualify him to testify under Rule 702. Opposition 2. Patent Owner points to Dr. Konchitsky’s experience in the field of communications networks. *Id.* According to Patent Owner, this is relevant to the technology of the '717 patent, which describes the field of the invention as being addressed to “increasing the speed of data accessing in communication networks.” Opposition 3, quoting '717 patent, col. 1, lines 10–15.

¹ U.S. Patent 6,757,717.

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Patent Owner further responds that Dr. Konchitsky's supposed lack of knowledge of certain matters (e.g., the HTTP "GET" request) is no proper basis for excluding his testimony. Opposition 9–14. According to Patent Owner, Dr. Konchitsky adequately answered the questions posed to him by Petitioner at his deposition, testing his knowledge of certain specifics. *Id.* In any event, according to Patent Owner, the questions posed to Dr. Konchitsky at his deposition were not "tied to the '717 patent, or the field of invention, as defined by [Petitioner]." Opposition 9.

We agree with Patent Owner that Dr. Konchitsky's testimony should not be excluded. Dr. Konchitsky's qualifications and experience are sufficient to qualify him as an expert in the pertinent field under Rule 702. Petitioner's own general description of the relevant field (communication networks), as well as the description in the '717 patent, are broad enough to encompass Dr. Konchitsky's qualifications. In any case, there is no requirement of a perfect match between the expert's experience and the field of the patent. *See SEB S.A. v. Montgomery Ward & Co.*, 594 F.3d 1360, 1373 (Fed. Cir. 2010). We conclude, therefore, that Dr. Konchitsky's testimony is likely to assist the Board in determining the issues in this proceeding.

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Finally, we agree with Patent Owner that Petitioner's list of alleged insufficiencies in Dr. Konchitsky's personal knowledge are an insufficient basis to exclude his testimony. At best, these go to the weight of his testimony, and not its admissibility.

In view of the foregoing, it is hereby

ORDERED that Petitioner Microsoft Corporation's Corrected Motion to

Exclude Evidence (Paper 56) is denied.

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