

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner

v.

VIRNETX, INC. AND SCIENCE APPLICATION INTERNATIONAL
CORPORATION,
Patent Owner

Case IPR2014-00237
Patent 8,504,697

Before MICHAEL P. TIERNEY, KARL D. EASTHOM, and STEPHEN C. SIU,
Administrative Patent Judges.

Petitioner's Reply

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The Board correctly found that Beser anticipates and renders obvious claims 1-11, 14-25, and 28-30 of the '697 patent. Paper 15 (“Dec.”) at 33. In its Response (“Resp.”) (Paper 30), Patent Owner tries to divert attention from the largely undisputed evidence of record establishing this, choosing instead to accuse Mr. Fratto of bias and disputing his credentials. It then asks the Board to read new limitations into its claims. When it finally addresses the grounds, Patent Owner advances strained readings of the prior art its own expert largely abandoned at his deposition. The Board’s determination that the challenged claims are unpatentable thus is supported by more than substantial evidence and should be maintained.

I. Mr. Fratto’s Testimony is Competent and Unbiased

Patent Owner devotes more than 8 pages of its Response to an attack on Mr. Fratto’s supposed lack of expertise and bias. Far more telling is Patent Owner’s conduct – *Patent Owner did not ask Mr. Fratto a single substantive question about his declaration testimony at his deposition.* Patent Owner’s decision to *not test* any of Mr. Fratto’s technical opinions shows those opinions are accurate and well-founded. Moreover, Patent Owner did not identify a single inaccuracy in Mr. Fratto’s testimony linked to this supposed “bias” and lack of expertise.

Patent Owner’s challenge to Mr. Fratto’s credentials is baseless. Mr. Fratto has over 15 years of experience in studying, evaluating, testing, and describing networking, networking security and related technologies. Ex. 1003 ¶ 9. In the

early 1990s he was writing computer programs as part of an IT consulting business that provided remote office automation. Ex. 1081 (Fratto Dep. Tr.) at 13:4-14:7. He can write computer programs in several languages including “C, Pascal, Turbo Pascal, PERL, PHP, JAVA, Javascript, [and] a little bit of Python,” all of which were self-taught. Ex. 1081 at 13:11-14:19. These subject areas are directly relevant to understanding the state of the art as it relates to the ’697 patent, and more than qualify Mr. Fratto as an expert in these proceedings.

Patent Owner claims Mr. Fratto is nonetheless unqualified as he “does not have a master’s degree” – it argues that knowledge *cannot* be gained through work experience to qualify a witness as an expert. Resp. at 1-5. Patent Owner’s expert disagrees – Dr. Monroe testified that someone with substantial work experience in the “things that are really relevant to understanding [] the state of the art” could acquire the *same* level of expertise as someone with a master’s degree. Ex. 1083 (Monrose Dep. Tr.) at 48:8-49:9; *see id.* at 36:1-17, 37:6-11, 48:8-49:9. Patent Owner’s theory also ignores Fed. R. Evid. 702 (*i.e.*, a witness may qualify “as an expert by knowledge, skill, experience, training, *or* education.” (emphasis added)).

Patent Owner’s claim of “bias” rests on a handful of tweets by Mr. Fratto reflecting his belief that several of Patent Owner’s patents are invalid. Resp. at 5-8. This is hardly an indicia of bias –institution of this trial and other proceedings before the Office substantiates the merits of that belief. The tweets at issue do not

even mention VirnetX. At worst, those tweets are consistent with Mr. Fratto's declarations and little more than candid reflections of the fact that the patents at issue in this and related proceedings are invalid. It is also irrelevant that Mr. Fratto has never found a patent valid – under this metric, Dr. Monroe is also fatally biased because he has never found a patent *invalid*. *See* Ex. 1083 at 8:7-9. Both critiques are meaningless – each has *only* served as an expert in proceedings involving Patent Owner. *Id.*; Ex. 1081 at 46:18-22. Patent Owner's manufactured "bias" theory is simply an effort to distract the Panel from the merits and can be ignored – once again, Patent Owner identifies no error in Mr. Fratto's testimony linked to this supposed bias. Resp. at 6-8.

II. Claim Construction

A. Broadest Reasonable Interpretation

Patent Owner argues the broadest reasonable interpretation should "not apply" because its ability to amend the claims is "restricted." Resp. at 9-10. But Patent Owner made no attempt to amend its claims in this proceeding, and its hypothetical concerns over amending the claims is unmerited – the Board has provided ample guidance on motions to amend. *See, e.g., Toyota Motor Corp. v. American Vehicular Sciences, LLC*, IPR2013-00419, Paper 32 at 2-5. Patent Owner's real problem is its disclosure, which does not describe an invention having the intricate set of requirements it seeks to now read into its claims. Patent

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