

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION,

Petitioner,

v.

BRADIUM TECHNOLOGIES LLC,

Patent Owner.

Case IPR2015-01432
Patent No. 7,139,794 B2

PETITIONER'S MOTION TO EXCLUDE EVIDENCE

Paper No. 43

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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(c) and the Federal Rules of Evidence, Petitioners Microsoft Corporation (“Microsoft” or “Petitioner”) hereby submits its Motion to Exclude inadmissible evidence proffered by Patent Owner Bradium Technologies, LLC (“Bradium”) (Exhibits 2002-2005 and 2010) which Bradium attempted to introduce for the first time in a deposition of Dr. William Michalson on August 5, 2016. Microsoft filed timely objections to these new exhibits on August 12, 2016. (Paper 36.) Microsoft further objected to these exhibits, and to deposition testimony based on these exhibits, during the deposition itself. (Ex. 2011 at 13:15-17, 15:12, 16:12, 18:10, 22:10, 22:22, 23:9, 23:22, 24:3, 25:5.) Bradium’s new exhibits are improper because they are no more than an attempt to introduce evidence that Bradium failed to raise in its Patent Owner Response (Paper 24) by using Dr. Michalson’s deposition as a vehicle to circumvent the Board’s rules.

II. ARGUMENT

A. Bradium’s Exhibits 2002-2005 and 2010 Should be Excluded

Exhibit Nos. 2002-2005 and 2010 should be excluded because they are untimely under the Board’s rules. Bradium did not submit any of these exhibits in

support of its Patent Owner response (Paper 24). Bradium instead attempted to introduce these exhibits during the deposition of Dr. William Michalson.

However, 37 C.F.R. § 42.53(d)(5)(ii) specifically limits cross-examination to the scope of the direct examination. For cross-examination testimony of a reply
5 witness, the scope of the direct examination should be limited to the direct testimony submitted in support of the reply.

The Office Trial Practice Guide provides two discovery periods for a patent owner, the first occurring between the decision to institute and the filing of the patent owner response and the second occurring after the petitioner's reply to the
10 patent owner's response.¹ Office Trial Practice Guide, 77 Fed. Reg. 48757-8 (Aug. 14, 2012).

In the event that cross-examination occurs after a party has filed its last substantive paper on an issue, such cross-examination may result in testimony that should be called
15 to the Board's attention

The Board may authorize the filing of observations to identify such testimony and responses to observations . . .

Id. at 78767-8.

¹ No motion to amend has been filed in this case.

In this case, Bradium had the opportunity to depose Dr. Michalson prior to submitting its Patent Owner Response and to introduce new exhibits in its Patent Owner Response. However, Bradium chose not to take Dr. Michalson's deposition during this first discovery period. Bradium now attempts to move in new exhibits
5 through a post-reply deposition of Dr. Michalson and observations on cross-examination regarding that deposition. This is improper. Under similar circumstances in *Respironics, Inc. v. Zoll Medical Corp.*, IPR2013-00322, Paper 26 at 3-4 (PTAB May 7, 2014), the Board authorized the Patent Owner to file a motion for observations on cross-examination of Petitioner's reply witness, but
10 limited the observations to testimony concerning Petitioner's Reply to the Patent Owner Response.

In this case, Bradium attempted to introduce six new exhibits through the deposition of Dr. Michalson. None of these exhibits relate to issues raised in Dr. Michalson's reply testimony. In fact, Bradium's Motion for Observations on
15 Cross-Examination (Paper 40) does not even assert that any of Exhibits 2002-2005 is relevant to any issue raised in Dr. Michalson's reply declaration (Ex. 1015), nor does the motion for observations mention Ex. 2010 *at all*. Without such foundation, there is no other procedural basis for Bradium to introduce new evidence at this late stage of the proceedings, and Microsoft is prejudiced by this

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