

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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MICROSOFT CORPORATION,

Petitioner,

v.

BRADIUM TECHNOLOGIES LLC,

Patent Owner.

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Case IPR2015-01432

Patent No. 7,139,794 B2

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**PETITIONER'S REPLY TO PATENT OWNER'S OPPOSITION TO  
PETITIONER'S MOTION TO EXCLUDE**

**Paper No. 46**

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Patent Owner Bradium improperly uses its Opposition (Pap. 45) to  
Petitioner Microsoft's Motion to Exclude (Pap. 43) as a vehicle to offer even *more*  
new and untimely substantive arguments and evidence that it could have offered in  
its Patent Owner Response and accompanying expert declaration, but chose not to  
5 do so. Therefore, Bradium's Opposition should be given no weight.

Bradium's Opposition fails to address this Board's decision (joined by two  
members of this panel) regarding the limited scope of testimony and evidence in  
*Respironics v. Zoll Medical*, IPR2013-00322, Pap. 26 at 3-4 (May 7, 2014) limiting  
observations on cross-examination of a reply witness to testimony concerning the  
10 reply. Nor does Bradium's Opposition offer any contrary authority. Instead,  
Bradium makes new arguments attempting to link the challenged exhibits to Dr.  
Michalson's reply (Ex. 1015), but *no* such connections were articulated in  
Bradium's Motion for Observations on Cross-Examination (Pap. 40). Making the  
arguments in its Opposition for the *first* time is entirely inappropriate. Finally,  
15 Bradium's threadbare reliance on the very limited residual hearsay exception of  
Federal Rule of Evidence (FRE) 807, like its self-authentication arguments, is  
unsupported by both the facts and law and must fail.

**I. EXHIBITS 2002-2005 AND 2010 SHOULD BE EXCLUDED**

**1. Exhibits 2002-2003**

20 **a. Inadmissible as untimely and irrelevant**

Bradium provides new purported reasons for introducing Exhibits 2002-

2003, but Bradium does not dispute that none of its proposed observations actually argued that these exhibits were relevant to any issue raised in Dr. Michalson's reply declaration (Ex. 1015). Pap. 40, Observation Nos. 1-3. Just as the Motion for Observation on Cross-Examination is not a "do-over" for Bradium to introduce  
5 evidence and arguments that it failed to present earlier, Bradium's Opposition is not an opportunity for Bradium to introduce new arguments and exhibits that were absent not only from Bradium's substantive papers and supporting expert declarations, but even from its Motion for Observations. *See* Office Trial Practice Guide ("Guide"), 77 Fed. Reg. at 48,767 ("An observation (or response) is not an  
10 opportunity to raise new issues, re-argue issues, or pursue objections"). Simply put, no other substantive paper discussed these exhibits and therefore, they should not be considered by the Board.

Bradium's new arguments nevertheless fail to establish the relevance of Exs. 2002 and 2003 to Dr. Michalson's reply declaration (Ex. 1015). Those exhibits  
15 were not even mentioned either in the Patent Owner Response or in Dr. Bajaj's declaration (Ex. 2001). The cross-examination testimony from Dr. Michalson that consisted entirely of acknowledgement that counsel for Bradium had put these documents in front of him and that they appeared to contain certain passages (Ex. 2011 at 9:17-15:14), does not in any way "impeach Dr. Michalson's credibility as  
20 to his opinions regarding Dr. Bajaj." (Pap. 43 at 6). Finally, Bradium's argument

that these exhibits impeach Dr. Michalson's credibility because he "admitted that he had not located or reviewed either of these exhibits in rendering his opinion" is preposterous because Dr. Bajaj himself did not cite these exhibits in Ex. 2001.

**b. Inadmissible as unauthenticated and hearsay**

5           Bromium fails to provide reasons why Exs. 2002 and 2003 should not be excluded as hearsay. Bradium appears to suggest in a parenthetical on page 7 of its Opposition that these exhibits are "not intended as an assertion," yet on the same page, Bradium also argues that these exhibits are relevant because of "[t]he fact that *Dr. Bajaj treats GIS as integrated with other technical areas...*" and  
10 repeatedly quotes excerpts from both exhibits. *Id.*, pp. 6-7. Bradium's only purpose for quoting these portions of these exhibits is to argue the truth of the matter asserted, and Bradium does not seriously argue otherwise.

          Bromium also cites FRE 807, the "residual hearsay" rule. However, a hearsay statement may only be admitted under this rule when not otherwise covered by a  
15 hearsay exception if "(1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice." Bradium fails to even  
20 acknowledge these requirements, much less show how they are met. As to the third

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