

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION,

Petitioner,

v.

BRADIUM TECHNOLOGIES LLC,

Patent Owner.

CASE: IPR2016-00448

Patent No. 7,908,343 B2

PETITIONER'S OPPOSITION TO MOTION TO EXCLUDE EVIDENCE

Paper No. 49

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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(c) and the Federal Rules of Evidence, Petitioner Microsoft provides its Opposition to Patent Owner Bradium's Motion to Exclude Microsoft's evidence.

5 II. MR. LAVI'S TESTIMONY (EXHIBIT 1017) SHOULD NOT BE EXCLUDED

Given the unique circumstances present in this case, the Board should not exclude Mr. Lavi's testimony.

A. Summary of Facts

10 The '343 Patent names two inventors. The first, Isaac Levanon, owns 50% of Bradium through a family trust, while the other, Yonatan Lavi, is an Israeli citizen who has no relationship with either party or interest in the outcome of this proceeding. The allegedly inventive activity relating to the '343 Patent claims took place around 1999 and 2000 while Mr. Lavi worked at 3DVU, Inc., a small
15 company which Mr. Levanon admits that he closed "around 2010." Ex. 2004, ¶ 94. Delaware public records confirm that 3DVU's (formerly Flyover Technologies) corporate status has been "void" since 2011. Ex. 1033 (Flyover Technologies and 3DVU, Inc. Delaware Secretary of State records search results).

Even though he is the co-inventor on the challenged patent, Bradium did not
20 disclose Mr. Lavi as a person with knowledge of facts relevant to the case in its F.R.Civ.P. 26 initial disclosures. Bradium also informed District Judge Andrews

that neither it nor its counsel had any relationship with Mr. Lavi. Ex. 1034 (C.A. 15-31-RGA, Plaintiff Bradium's Feb. 25, 2016 Rule 16(a)(1) Initial Disclosures);

Ex. 1035 (C.A. 15-31-RGA, Feb. 3, 2016 hearing transcript) at 5:24-7:9. Upon learning that Bradium had no relationship with Mr. Lavi, and that Bradium's

5 counsel was not representing Mr. Lavi, Microsoft's counsel located him in Israel at its own expense. Mr. Lavi signed a declaration (Ex. 1017) after Microsoft's counsel informed Mr. Lavi about standard Board discovery procedures including depositions of declarants.

After Microsoft filed Mr. Lavi's declaration, Bradium threatened retaliation
10 against Mr. Lavi. Bradium accused Mr. Lavi of disclosing unspecified 3DVU confidential information, despite the fact that Mr. Lavi testified on the same topics Mr. Levanon did in his *public* declaration, and despite 3DVU having been out of business for about seven years, and nonexistent as a corporate entity for six. Ex. 1039 (C. Coulson Feb. 9, 2017 letter to C. Ng). Bradium insisted that Microsoft's
15 counsel send Bradium's threat letter to Mr. Lavi. *Id.*

Allegations of confidentiality breaches are serious, and Microsoft took them seriously from the beginning. Microsoft agreed to work with Bradium on the issue and asked Bradium to identify, with specificity, the confidential information they claimed Mr. Lavi had disclosed, and the basis for the alleged confidentiality. Ex.
20 1040 (E. Day Feb. 9, 2017 email to C. Coulson). To date, Bradium still has not

identified any allegedly confidential information that Mr. Lavi's declaration disclosed.¹

Microsoft also promptly communicated Bradium's deposition request to Mr. Lavi, who then indicated he did not want to travel to the United States to be
5 deposed because he was concerned about legal and other retaliation from Mr. Levanon. Microsoft informed Bradium about Mr. Levanon's unwillingness to testify and proposed that the parties jointly seek a Letter of Request to take Mr. Lavi's deposition in Israel, a process that normally takes 60-75 days, but can be accomplished in considerably less time using expedited procedures. Microsoft also
10 offered to reimburse Bradium for reasonable travel costs associated with its counsel's travel to take the deposition. Ex. 1041 (E. Day Feb. 27, 2017 email to C. Coulson). Bradium rejected this proposal.

When the parties sought Board guidance, the Board requested that the parties discuss an agreement to address Mr. Lavi's concerns about retaliation.
15 Bradium then sent Microsoft a proposal, which did the opposite. Bradium's proposal would have required Mr. Lavi to agree that Bradium, Levanon, and

¹ Bradium later raised an issue relating to a Denso license, but Mr. Lavi did not discuss the Denso license in his declaration, and has never seen this license. Mr. Lavi mentioned Denso in his declaration in no more detail or specificity than Mr. Levanon did in his public declaration. *Compare* Ex. 1017, ¶¶ 20-22 with Ex. 2004/2072, ¶¶ 43-47, 50-61. Bradium never responded to Microsoft's request to explain how Mr. Lavi's testimony concerning Denso could be confidential in light of Mr. Levanon's public declaration. Ex. 1044 (E. Day Feb. 14, 2017 letter to C. Coulson).

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