

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

INTEL CORP., CAVIUM, INC.,
WISTRON CORPORATION, and DELL INC.
Petitioners,

v.

ALACRITECH, INC.,
Patent Owner

Case IPR2017-01406¹
U.S. Patent No. 7,673,072

Patent Owner's Opposition to Petitioner's Motion to Exclude

¹ Cavium, Inc., which filed a Petition in Case IPR2017-01718, Wistron Corporation, which filed a Petition in Case IPR2018-00327, and Dell Inc., which filed a Petition in Case IPR2018-00371, have been joined as petitioners in this proceeding.

Petitioner's Motion to Exclude should be denied because 1) Petitioner misapplies 37 C.F.R. § 42.65(a), 2) Dr. Almeroth disclosed sufficient underlying facts and the bases for all of his opinions in his expert declaration, and 3) Petitioner has not been prejudiced by the allegedly "redundant" paragraphs in Dr. Almeroth's declaration or during Dr. Almeroth's deposition.

I. Petitioners' Motion Misapplies the Rules and Case Law

Petitioner, relying on 37 C.F.R. § 42.65(a), argues that "[t]o the extent Dr. Almeroth was merely repeating the statements in the POR or offering opinions without providing the underlying support, Dr. Almeroth's declaration is entitled to *little or no weight*." Petitioner's Motion to Exclude at 2 (emphasis added). However, as Judge Fishman ruled in *Amazon.com, Inc. v. ZitoVault, LLC*, "regarding the objections under FRE 702, [the Board] note that under 37 C.F.R. § 42.65(a), '[e]xpert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight.' Consequently, this objection more properly *goes to the weight* to be given [the expert's] testimony, and *not to its admissibility*." *Amazon.com, Inc. v. ZitoVault, LLC*, IPR2016-00021, Paper 40 at 28. Therefore, Petitioner's argument regarding weight is not a proper basis for a *motion to exclude*. See also *Fox Factory, Inc. v. SRAM, LLC*, IPR2017-00472, Paper 64 at 54 ("To begin with, we note that the portion of 37

C.F.R. § 42.65(a) relied on by Petitioner deals only with the weight that can be given evidence, not its admissibility. Thus, it is not a proper basis for a motion to exclude.”). Because Intel’s motion to exclude is directed to *the weight* to be given to Dr. Almeroth’s opinions (and not its admissibility) and the Board can make its own determination regarding that weight, Intel’s motion to exclude should be denied.

II. Dr. Almeroth Provides Sufficient Underlying Facts

Petitioner alleges that Dr. Almeroth “offer[s] opinions without providing the underlying support.” Petitioner’s Motion to Exclude at 2. Petitioner’s allegations are false and contradicted by Dr. Almeroth’s clear and well resonated opinions. Dr. Almeroth provides sufficient underlying facts in his declarations, including the analysis of the relevant portions of the prior art references and deposition testimony of Petitioner’s expert, *see* Ex. 2026 ¶¶ 89-123, as well as the underlying evidence of secondary considerations, including the license agreements and various publications and articles concerning the patented technology at issue. *See* Ex. 2026 ¶¶ 125-135. Patent Owner is entitled to reproduce and reference Dr. Almeroth’s opinions and analyses in its briefs, and Petitioner cites no statutory bases or case law prohibiting a party from referencing its own expert’s analyses of the underlying facts. The weight of Dr. Almeroth’s testimony should not be reduced merely because it is also faithfully reproduced in Patent Owner’s briefs.

Petitioner's case law relating to situations where an expert "parrots" or repeats attorney argument "word-for-word" are inapposite and do not support its motion to exclude. Petitioner's Motion to Exclude at 1-2. First, as discussed above, Petitioner's complaints go to the weight of Dr. Almeroth's opinions and not their admissibility. Second, Petitioner misreads (or misinterprets) Patent Owner's Response. Dr. Almeroth's opinions do not parrot any attorney argument; rather, as is clear from the liberal use of quotation marks and numerous citations to Dr. Almeroth's declaration, it is actually Patent Owner's Response that faithfully reproduces and cited to various portions of the opinions contained in Dr. Almeroth's declaration.

As one example, Patent Owner explains in its Response, "*as Patent Owner's expert Dr. Almeroth explains*, 'it is impossible to tell whether implementing TCP on the I/O adapter of Erickson would save time and accelerate protocol processing and, further, there are many variables in how it is implemented. Until a POST sees the detailed hardware design and algorithms used, the POST would not have a reasonable expectation of successfully accelerating the network protocol processing.' (*Ex. 2026, ¶ 120.*)" Paper 34, p. 54. Because of the express attribution to Dr. Almeroth, the liberal references to Dr. Almeroth's declaration, and the use of quotation marks, it is clear that: 1) Patent Owner's Response

actually reproduces and references opinions rendered by Dr. Almeroth in his expert declaration and 2) Dr. Almeroth is not simply “parroting” any attorney argument.

III. The Deposition Instruction Is Irrelevant

Petitioner further argues Dr. Almeroth’s declaration should “be excluded because Patent Owner’s improper instruction not to answer prevented Petitioner from determining the basis for Dr. Almeroth’s report.” Petitioner’s Motion to Exclude at 4. Petitioner does not cite any authority granting a motion to exclude based on deposition instructions. In addition, as admitted by the Petitioner, the question at issue related to “why portions of the Patent Owner’s oppositions were identical to the expert’s purported declaration.” *Id.* at 3. This question has nothing to do with the “*basis*” for Dr. Almeroth’s declaration, which counsel for Petitioner explored at length during the deposition. It is clearly directed to the exchange of drafts between counsel and the expert and is specifically formulated to elicit expert-attorney communications, which is privileged. *See* Fed. R. Civ. P. 26(b)(4)(C) (“Rules 26(b)(3)(A) and (B) protect communications between the party’s attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications.”); Office Patent Trial Practice Guide, Appendix D: Testimony Guidelines, 77 Fed. Reg. at 48, 772-73 (“Counsel may instruct a witness not to answer only *when necessary to preserve a privilege*, to enforce a limitation ordered by the Board, or to present a motion to

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