

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE PATENT TRIAL AND APPEAL BOARD**

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

v.

ALACRITECH, INC.,  
Patent Owner.

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Case IPR2017-01406<sup>1</sup>

U.S. Patent No. 7,673,072

Title: FAST-PATH APPARATUS FOR TRANSMITTING DATA  
CORRESPONDING TO A TCP CONNECTION

**PETITIONER'S REPLY IN SUPPORT OF MOTION TO EXCLUDE  
PATENT OWNER EXHIBIT 2026**

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Patent Trial and Appeal Board  
U.S. Patent and Trademark Office  
P.O. Box 1450  
Alexandria, VA 22313-1450

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<sup>1</sup> Cavium, Inc., which filed a Petition in Case IPR2017-01707, Wistron Corp., which filed a Petition in Case IPR2018-00329, and Dell Inc., which filed a Petition in Case IPR2018-00375, have been joined as petitioners in this proceeding.

Patent Owner's opposition misses the point. It is true that Patent Owner's expert declaration (Almeroth Declaration, Ex. 2026), on its face, is entitled to little or no weight. But Patent Owner and its expert's errors were compounded by Patent Owner's improper deposition instruction which prevented Petitioner *and the Board* from assessing the source and basis of Dr. Almeroth's purported opinions. As such, the appropriate remedy is exclusion of Ex. 2026.

Patent Owner claims that Dr. Almeroth's declaration reflects his "clear and well resonated [sic] opinions" which were "faithfully reproduced in Patent Owner's briefs." Opp. at 3. But Patent Owner's claim is belied by the record. Not only are many of Dr. Almeroth's alleged opinions *verbatim copies* of Patent Owner's attorneys' arguments, often without any attribution (*see, e.g.*, Paper 34 at 2-3 repeating paragraph 61 of Ex. 2026 verbatim without citation to Ex. 2026), Dr. Almeroth's alleged declaration in the 036 Patent IPR<sup>2</sup> twice includes the phrase "[a]s explained by Dr. Almeroth . . ." strongly suggesting that these portions were

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<sup>2</sup> Dr. Almeroth's declaration for the 036 Patent (Ex. 2026) was submitted simultaneously with his declaration for this IPR (Ex. 2026) and includes substantially identical paragraphs for both the background and secondary consideration sections.

copied and pasted from the Patent Owner Response. *See Intel v. Alacritech*, Case IPR 2017-01391 (Feb. 24, 2018), Ex. 2026 at ¶110, 114.

The multiple verbatim copies, particularly those without attribution, raise a serious question of the extent to which Dr. Almeroth actually participated in the drafting of his purported declaration and/or Patent Owner's Response that demands explanation. Patent Owner's representation to the Board that "Dr. Almeroth's opinions do not parrot any attorney argument" (Opp. at 4) is directly contradicted by the record.

Because Petitioner had well-founded doubts that Dr. Almeroth's declaration actually reflects his own work and opinions, Petitioner questioned Dr. Almeroth on this point. Patent Owner does not, and cannot, dispute that Petitioner is entitled to explore the source of and basis for Dr. Almeroth's opinions. *See* 37 C.F.R. § 42.51(b)(1)(i)-(ii) (routine discovery permitted of "any exhibit cited in a paper or in testimony" and "[c]ross examination of affidavit testimony").

Neither Dr. Almeroth's Declaration as filed nor the Patent Owner's Response are protected communications under Fed. R. Civ. P. 26(b)(4)(C). Instead, the duplicated portions *are* the opinions Patent Owner seeks to present as evidence.

By directing Dr. Almeroth not to answer questions concerning this verbatim copying, Patent Owner prevented Petitioner *and the Board* from learning the true

source of the alleged opinion evidence Patent Owner seeks to introduce into the record. Patent Owner tries to brush off this error by claiming that its counsel “permitted Dr. Almeroth to answer a substantially similar question.” Opp. at 6 (citing Almeroth Depo.<sup>3</sup> at 181:20-182:23). However, Patent Owner’s counsel cautioned the witness on the basis of privilege, and Dr. Almeroth did not actually answer the question. See Ex. 1224 at 182:2:183:6. Patent Owner then gave its unjustified instruction not to answer in response to Petitioner’s attempt to follow up. Ex. 1224 at 185:7-23. Although Patent Owner suggests that Petitioner could have “rephrase[d] the question,” this is disingenuous. *Id.* As the direction not to answer made clear, Patent Owner would simply have directed Dr. Almeroth not to answer questions concerning the verbatim copying, however phrased. There is no requirement that Petitioner ask a third time, only to have the instruction not to answer repeated.

At bottom, Patent Owner’s expert offered alleged opinions that are in many cases word-for-word identical to Patent Owner’s attorney arguments in its Patent Owner Response, and Patent Owner improperly prevented the Petitioner and the

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<sup>3</sup> Patent Owner’s motion erroneously cites Ex. 2018, however Patent Owner is referring to the Almeroth deposition transcript, Ex. 1224, in which the cited question actually appears.

Board from learning the source and basis of these identical and nearly identical arguments. Because the source and basis of these alleged opinions has been effectively concealed from Petitioner and the Board, these passages should not be permitted into the evidence of record.

Therefore, Petitioner requests that the identical and nearly-identical portions of Dr. Almeroth's declaration be excluded from evidence because of Patent Owner's improper instruction not to answer.

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