UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION
Petitioner

v.

DAEDALUS BLUE, LLC
Patent Owner

Case IPR2021-00831

U.S. Patent No. 8,671,132
Title: SYSTEM, METHOD, AND APPARATUS FOR POLICY-BASED DATA MANAGEMENT
Filing Date: 03/14/2003
Issue Date: 03/11/2014

DAEDALUS BLUE, LLC'S REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE

Mail Stop Patent Board
Patent Trial and Appeal Board
U.S. Patent and Trademark Office
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All emphases in quotations are added unless otherwise noted.

All citations to specific pages of exhibits follow the pagination added to those exhibits per 37 C.F.R. § 42.63(d)(2)(i).

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I. Introduction

Microsoft's opposition did not show that the challenged evidence about *Tivoli*'s purported public accessibility is admissible. To start, Microsoft's opposition stretches FED. R. EVID. 807's residual exception beyond its breaking point. That exception "is to be reserved for 'exceptional cases,' and is not 'a broad license on trial judges to admit hearsay statements that do not fall within one of the other exceptions.'" *Google Inc. v. Intellectual Ventures II LLC*, Case IPR2014-00787, Paper 91, at 22 (PTAB July 24, 2020) (quoting *Conoco Inc. v. Dep't of Energy*, 99 F.3d 387, 392 (Fed. Cir. 1996), *as amended on reh'g in part* (Jan. 2, 1997)).

Microsoft did not even try to show that this case is exceptional enough to trigger the residual exception. Nor did it show that its hearsay evidence is "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." FED. R. EVID. 807(a)(2). Its opposition is silent as to what reasonable efforts (if any) Microsoft purportedly undertook. But Microsoft could have both (1) gathered whatever evidence it wanted before filing the petition; and (2) subpoenaed IBM after filing the petition. 35 U.S.C. § 24. That Microsoft did not make the most of its earlier opportunities is no reason to bail it out now with the residual exception. And all of that aside, if inadmissible hearsay is the most probative evidence that Microsoft could come up with via reasonable efforts, that casts serious doubt on *Tivoli*'s supposed public accessibility.

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As shown below, the other arguments in Microsoft's opposition fare no better. Thus, the Board should exclude (1) *Tivoli*'s purported created, updated, and copyright dates; (2) Ex. 1010 in its entirety; and (3) Ex. 1029 in its entirety.

II. The Board should exclude Microsoft's inadmissible evidence.

Ex. 1006 (*Tivoli*): Despite Microsoft's protests, its petition confirms that it offered the challenged statements about the dates *Tivoli* was purportedly created, updated, or copyrighted for their supposed truth: "Tivoli was published and publicly accessible at least by June 15, 2001 and no later than November 28, 2001. Tivoli was 'created or updated on June 15, 2001' with a 2000 copyright date. Tivoli, 2." (Petition at 16; *see also* Paper 42 ("Motion to Exclude") at 1-3; Paper 43 ("Opposition") at 1-2.) So does Microsoft's opposition, which says that "the dates are being offered as evidence to support the material fact that Tivoli pre-dates the 2002 critical date of the '132 Patent." (Opposition at 4.)

Even Microsoft's new theory that those dates are "circumstantial evidence of publication prior to the 2002 critical date for the '132 Patent" still requires offering *Tivoli*'s stated dates for their supposed truth. (Opposition at 2.) Otherwise, those stated dates would not be circumstantial evidence of any relevant date. Because Microsoft offered *Tivoli*'s stated dates for their supposed truth, the putative "PTAB doctrine" Microsoft raised—which consists of routine, non-binding decisions by different panels on different facts—is inapplicable here. (*Id.* at 1-2.) Whether as

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