

Filed on behalf of Veeam Software Corporation

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL  
AND APPEAL BOARD

Case IPR2013-00150  
Patent 7,093,086

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**VEEAM'S OBSERVATIONS ON CROSS EXAMINATION OF  
SYMANTEC'S REPLY WITNESS DR. GREEN**

Petitioner Veeam Software Corporation hereby submits observations on the cross-examination of Dr. Matthew Green, whose Supplemental Declaration (Symantec 2019) was submitted by Patent Owner with the Reply to the Opposition to the Motion to Amend, filed March 17, 2014, (Paper No. 35) and whose cross-examination was conducted by deposition on March 28, 2014. Exhibit Veeam 1032 is a transcript of that deposition, and is used as the basis for the observations below. Petitioner notes that the Board expunged Symantec 2019 and provided the Patent Owner with an opportunity to revise the Declaration and resubmit. Because the date to resubmit is concurrent with the due date of this motion, Petitioner's observations refer to the originally filed Symantec 2019. Petitioner plans to seek authorization to update the declaration citations if Patent Owner submits a replacement declaration.

1. In Exhibit 1032, on page 36, lines 11 to page 37, line 10, the witness testified that paragraph 54 of his Declaration in Support of Patent Owner's Motions to Amend ("First Motion to Amend Declaration"), specifically the cites to 4:53-61 and 6:40-61 of the '086 patent, provides written description support for the subject matter of claim 31. Exhibit 1032 on page 37, line 11 to page 40, line 1 confirms that this portion of the '086 Patent describes capturing state while the virtual machine is suspended. This testimony is relevant because it contradicts the witness's testimony in his Supplemental Declaration that because Lim "requires

that the virtual machine execution be interrupted prior to capturing the state, and only when the state has been captured does the virtual machine resume,” Lim does not render claim 31 unpatentable. (Ex. 2019, ¶28.) In addition, the testimony is relevant because it further contradicts the witness’s testimony in his Supplemental Declaration that claim 31 is limited to the embodiment of Figure 6 of the patent. (Ex. 2019, ¶ 29-30.) If claim 31 must capture state while the virtual machine is executing as argued by the witness, claim 31 cannot be supported by subject matter recited in 4:53-61 and 6:40-61 of the ‘086 patent describing capturing state while the virtual machine is suspended.

2. In Exhibit 1032, on page 41, lines 2-21, the witness testified that programs that permitted backups of certain portions of the virtual machine’s state existed prior to the March 28, 2002 filing date. This testimony is relevant because the witness has testified that he has “not identified any art that anticipates or renders obvious claim 31<sup>1</sup>.” (Ex. 2019, ¶31.) However, nowhere does Patent Owner or the witness explain why substitute claim 31 would not have been obvious to a person of ordinary skill in the art given the teachings of known backup programs alone or combined with other references known to the Patent Owner.

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<sup>1</sup> Substitute claim 31 amends the preamble of claim 1 by adding a “backup program” that “interfaces with a separately executing virtual machine kernel.”

3. In Exhibit 1032, at page 83, line 4 to page 84, line 4, the witness testified that creating an interface to a virtual machine (VM) kernel would also have been well-known to those having ordinary skill in the art. This testimony is relevant because the witness also testified that he had “not identified any art that anticipates or renders obvious claim 31” and which recites “a backup program” that “*interfaces* with a separately executing virtual machine kernel.” (Ex. 2019, ¶31.) However, nowhere does Patent Owner or the witness explain why substitute claim 31 would not have been obvious to a person of ordinary skill in the art given the witness’s testimony that creating an interface for use with the VM kernel and backup programs for virtual machines were well-known to those having ordinary skill in the art.

4. In Exhibit 1032, on page 52, line 22 to page 53, line 6 and page 54, line 15 to page 55, line 6, the witness testified that he could not identify any explicit support for capturing “configuration settings” in the ’086 patent. This testimony is relevant because it contradicts the witness’s testimony in his First Motion to Amend Declaration, which states that “copying the machine state” must include “transferring configuration files.” (Ex. 2015, ¶¶ 149-150.) Further, this testimony is relevant because each of the substitute claims include a step of “copying at least a portion of the state,” but Dr. Green could not identify any explicit description

within the '086 patent that described copying “configuration files” or “configuration settings.”

5. In Exhibit 1032, on page 70, lines 3-12, the witness testified that Lim’s GUI comprises a series of instructions that initiates checkpoints. Further, in Exhibit 1032, on page 85, lines 9-22 and on page 90, lines 6-21, the witness testified that Lim can be interpreted such that in one embodiment when a checkpoint is initiated, the state vectors are transmitted to a second virtual machine. This testimony is relevant because it contradicts the witness’s testimony in his Supplemental Declaration, which states that Lim does not describe “that the GUI is used to transfer the state vector to a remote virtual machine.” (Ex. 2019, ¶ 27.) The witness now testifies that under at least one interpretation, Lim describes transferring state as part of the checkpointing process, which can be initiated by the GUI.

6. In Exhibit 1032, on page 112, line 1 to page 113, line 18, the witness testified that his interpretation of substitute claim 33 does not include claim 21’s requirement that the virtual machine is suspended during the capturing step. This testimony is relevant because it contradicts the witness’s testimony in his Supplemental Declaration, which states that the substitute claims require that “the state of the virtual machine can be captured . . . without suspending the virtual

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