UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VEEAM SOFTWARE CORPORATION
Petitioner

v.

SYMANTEC CORPORATION
Patent Owner

Case IPR2013-00150
U.S. Patent No. 7,093,086

**VEEAM SOFTWARE CORPORATION'S MOTION TO COMPEL
THE DEPOSITION OF VMWARE
ON THE PUBLIC AVAILABILITY OF EXHIBIT 1005**

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Patent Trial and Appeal Board
U.S. Patent and Trademark Office
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I. Introduction

Pursuant to 37 C.F.R. § 42.52, Veeam respectfully seeks authorization to compel third party Dan Scales, Principal Engineer at VMware, Inc., and member of the team that created VMware ESX Server, to testify by deposition regarding the public availability of VMware's ESX Server User's Manual Version 1.0 ("ESX Manual," submitted as Ex. 1005), which VMware distributed with its ESX Server Version 1.0.1 in mid-2001, before the March 28, 2002 filing date of the '086 patent.[1]

Veeam expects VMware's testimony to corroborate the 2001 copyright shown on the face of electronic and physical copies of the ESX Manual, the date printed on the CD-ROM containing the ESX Server product and the ESX Manual, and the dates on the various archived web pages showing the availability of the ESX Server product v1.0.1 and its documentation.

Taken together, the ESX Manual and Veeam's supporting evidence show that the ESX Manual was publicly available, and Symantec has presented no evidence to the contrary. Nevertheless, Symantec maintains its objections regarding the public availability of this reference.

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[1] Subject to VMware proffering a more knowledgeable witness.

Veeam has exhausted other sources of evidence. VMware should be able to

testify that it made its ESX Manual available to the public in 2001, as shown by all of

the evidence already of record. Testifying on this limited topic should not be unduly

burdensome because the deposition will be very brief and the ESX Manual is a

non-cumulative reference that anticipates all four challenged claims of the '086

patent.

II. Background Facts

The Board instituted this IPR on August 7, 2013, finding that Veeam had

demonstrated a reasonable likelihood of prevailing on the grounds that claims 1, 11,

12 and 22 were anticipated by the ESX Manual, as well as the Getting Started Guide

for another VMware Product, VMware 2.0 for Linux, and the Lim patent. (Decision

to Institute, Paper 10 (August 7, 2013) ("Decision")). The Board also found that

Veeam had demonstrated a reasonable likelihood of prevailing under § 103 over two

other references. *Id.*

A. Symantec's objections to the ESX Manual

On August 21, 2013, Symantec objected on various grounds to all of the

applied references. (Symantec's Obj. to Evid. (Ex. 1014)). Symantec specifically

contended that the ESX Manual is not authentic, is inadmissible hearsay, and is not

prior art. *Id.* at 2. Symantec also objected on the grounds of authenticity, hearsay, and

relevance to Exhibit 1012, a VMware web page with a link to buy the ESX Server

product that was captured by the Internet Archive on June 23, 2001. *Id*. at 2-3.

To address Symantec's objections, Veeam served supplemental evidence on

Symantec on September 5, 2013. (Email and Cert. of Serv. (Ex.1015)). Veeam

included a declaration from Daniel Block, an attorney at SKGF who visited

VMware[2] and took photographs of VMware's copies of its software and user

manuals, and declarations from Christopher Butler, an Internet Archive employee

who authenticated Exhibit 1012 and other archived VMware web pages. *Id*.

On September 12, 2013, Symantec objected to Veeam's supplemental

evidence on various grounds. (Symantec's Obj. to Suppl. Evid. (Ex. 1016)). After a

meet and confer, Veeam served a replacement Block declaration on October 4, 2013

to address many of Symantec's concerns. (Email and Repl. Block Decl. (Ex. 1017)).

Eventually, the parties resolved all of Symantec's objections to the applied

references except for the ESX Manual. During the October 28, 2013 conference call,

Symantec explained to the Board that it believes the proffered evidence does not

show that the ESX software or documentation was actually available in 2001, and

that it intends to file a motion to exclude the ESX Manual reference. Veeam believes

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[2] VMware was unwilling to provide a declaration.

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