

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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Palo Alto Networks, Inc.,  
Fortinet, Inc. and  
WatchGuard Technologies, Inc.  
Petitioners,

v.

Selective Signals, LLC  
Patent Owner.

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Case IPR2018-00594

U.S. Patent No. 8,111,629

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**PETITIONERS' NOTICE OF IMPROPER ARGUMENT AND EVIDENCE**

***Mail Stop "PATENT BOARD"***  
Patent Trial and Appeal Board  
U.S. Patent and Trademark Office  
P.O. Box 1450  
Alexandria, VA 22313-1450

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**Petitioners' Exhibit List**

<b><i>Exhibit #</i></b>	<b><i>Description</i></b>
<b>1001</b>	U.S. Patent No. 8,111,629 (“the ’629 Patent”)
<b>1002</b>	Select portions of prosecution history of the ’629 Patent (“File History”)
<b>1003</b>	Declaration of Petitioners’ Expert Dr. Samuel H. Russ (“Russ”)
<b>1004</b>	U.S. Pat. No. 8,085,775 (“Pappu”)
<b>1005</b>	U.S. Pat. No. 7,660,248 (“Duffield”)
<b>1006</b>	U.S. Pat. Publication No. 20060262789 (“Peleg”)
<b>1007</b>	U.S. Pat. Publication No. 20070076606 (“Olesinski”)
<b>1008</b>	“Toward the Accurate Identification of Network Applications” (“Moore”)
<b>1009</b>	“Automated Traffic Classification and Application Identification Using Machine Learning” (“Zander”)
<b>1010</b>	“Evaluating Machine Learning Methods for Online Game Traffic Identification” (“Williams”)
<b>1011</b>	Supplemental Declaration of Petitioners’ Expert Dr. Samuel H. Russ

## **I. Introduction**

Pursuant to the Board’s March 21, 2019 Order (Paper No. 32), Petitioners submit this Notice of Improper Argument and Evidence in response to Patent Owner’s Sur-reply to Petitioners’ Reply (Paper 29; “PO Sur-reply”) and Patent Owner’s Reply to Petitioners’ Opposition to Patent Owner’s Motion to Amend (Paper 30; “Reply to MTA”). As specified below, the Patent Owner submitted arguments and evidence in both the PO Sur-reply and the Reply to MTA that are untimely and should have been submitted with the Patent Owner Response (Paper 20; “POR”) and Patent Owner’s Motion to Amend (Paper 19; “MTA”), respectively.

The 2018 Update to the Trial Practice Guide (“TPG”) states that “[w]hile replies and sur-replies can help crystalize issues for decision, a reply or sur-reply that raises a new issue or belatedly presents evidence may not be considered.” TPG 15. The Board should disregard the new arguments and evidence submitted by the Patent Owner for the first time in the PO Sur-reply and Reply to MTA in its failed efforts to address its shortcomings in its POR and MTA.<sup>1</sup>

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<sup>1</sup> Concurrently with this filing, Petitioners are filing motions to exclude some of these exhibits under the Trial Practice Guide and the Federal Rules of Evidence.

## **II. The Board Should Disregard the New Arguments and Evidence in The PO Sur-reply**

In support of its POR, the Patent Owner submitted a single exhibit—the transcript of the deposition of Petitioners’ expert (Exhibit 2005). But in the PO Sur-reply, the Patent Owner submitted twelve new exhibits. Of the twelve new exhibits, eight of them are submitted in support of arguments that should have been made previously in the POR. The eight exhibits can be grouped as follows:

(a) Exhibits 2007, 2010, 2011, 2016 and 2017, all directed to discussions of OSI Layers.

(b) Exhibits 2009 and 2012, 2014 are submitted in support of the declaration of Patent Owner’s expert originally submitted with the Patent Owner Preliminary Response (Paper 9; “POPR”).

The PO Sur-reply also includes new arguments directed to Claim 19 which were not included in the POR.

Each of these new arguments and exhibits are untimely as further addressed below.

### **A. New OSI Layer Arguments (Exhibits 2007,2010, 2011, 2016 and 2017)**

In the POPR, the Patent Owner argued that a “session” is not the same as a “flow” and tried to distinguish between the ’629 Patent and Pappu by arguing that they operated on different OSI layers:

*Pappu* also does not teach session management, and thus *Pappu* does not disclose the claimed “session types,” “session characteristics,” and “presumed session” limitations. Instead, *Pappu* teaches IP traffic *flow* management. *Pappu*’s “flow” is a set of packets uniquely identified by their “five tuple” (i.e., layer-3 and layer-4 packet header information). EX2001, ¶ 67. A session is a set of packets that relates to an application-level (i.e., layer-7), bidirectional communication. *Id.* at ¶ 87. A session’s packets may belong to multiple flows. *Id.* A flow may include packets from multiple sessions. *Id.* As Petitioner concedes, flow management (at layers 3 and 4) is therefore insufficient to disclose session management (at layer 7). Further, the combination of *Pappu* and *Peleg* does not remedy this deficiency because neither *Pappu* nor *Peleg* teach or suggest managing sessions, including differentiating between user application types. *Id.* at 159–64.

POPR 5-6; 16.

All citations in support of Patent Owner’s argument are to its expert’s declaration (EX. 2001), which itself does not cite to any source documents regarding the OSI layers. EX. 2001.

In the POR, the Patent Owner raised the identical arguments but still submitted no evidence in support, and instead relied on its same unsupported expert declaration. POR 6, 21.

In the PO Sur-reply, and in response to the Board’s recognition of packet management at “‘higher layers’ of the OSI network model,” the Patent Owner

submitted new arguments and new evidence in support of the Patent Owner's arguments regarding the difference between a session and a flow. *See* PO Sur-reply at 4-6 (discussing new exhibits 2011 and 2017); 14-16 (discussing new exhibits 2007, 2010, 2016).

Exhibits 2007, 2010, 2011, 2016 and 2017, and the arguments directed to them, are untimely because these arguments should have been included in the POR in order to afford Petitioners the opportunity to address them substantively.

Petitioners request that the Board disregard these new arguments and evidence.

**B. New Arguments and Support for Expert Declaration (Exhibits 2009 and 2012, 2014)**

The PO Sur-reply includes new arguments and new evidence to support the opinion offered by Patent Owner's expert (Ex. 2001) regarding the differences between a session and a flow. PO Sur-reply 12 (discussing new Exhibits 2009, 2012 and 2014.) However, these arguments and exhibits are untimely and should have been submitted with Patent Owner's expert's declaration (Exhibit 2001) filed with the POPR, or at the latest with the POR to afford Petitioners' expert sufficient time to evaluate the arguments and evidence. Moreover, the Patent Owner's expert has offered no testimony regarding these exhibits and thus it is improper for the Patent Owner to speculate that its expert would agree that these exhibits support his testimony. Petitioners requests that the Board disregard these new arguments and evidence.

### **C. New Arguments Directed to Claim 19**

The PO Sur-reply includes new arguments regarding the patentability of Claim 19. The Scheduling Order entered in this case stated “[t]he patent owner is cautioned that any arguments for patentability not raised and fully briefed in the response will be deemed waived.” Scheduling Order 8/29/18, Paper 4. While the POPR did include arguments regarding the patentability of Claim 19 (POPR 26-27), the POR does not include any arguments for the patentability of Claim 19 or even address the Board’s analysis of Claim 19. By not raising arguments for the patentability of Claim 19 until the PO Sur-reply, the Patent Owner has deprived Petitioners of the opportunity to substantively address its arguments. Thus, the Board should disregard Patent Owner’s arguments because, under the Scheduling Order, the Patent Owner has waived its ability to argue for the patentability of Claim 19.

### **III. The Board Should Disregard the New Arguments and Evidence in the Reply to MTA**

In its Reply to MTA, the Patent Owner attached an appendix including a chart that claims to identify written support in the ’510 Application for independent Claim 25. The Board should disregard this appendix because it is untimely and improper.

A motion to amend must include the “support in the original disclosure of the patent for each claim that is added or amended.” 37 C.F.R. § 42.121(b)(1).



Patent Owner failed to include such support with its Motion to Amend and it is untimely to submit this required support with its Reply to MTA. For this reason alone, the Board should disregard the appendix.

Separately, this appendix is improper because the written description support must be set forth in the motion to amend itself, not in a claim listing included in an appendix. *Lectrosonics, Inc. v. Zaxcom, Inc.*, IPR2018-01129 (PTAB Feb. 25, 2019) (Paper 15)(Precedential). Additionally, a reply to a motion to amend may not exceed 12 pages. 37 C.F.R. § 42.24(c)(3). The single-spaced appendix that Patent Owner attached to its Reply to MTA is improper as it would cause the Reply to MTA to exceed its 12 page limit if the analysis were properly double-spaced as part of the body of the Reply to MTA and not part of an appendix.

Thus, the Board should disregard the appendix as untimely and improper under 37 C.F.R. § 42.121(b)(1) and 37 C.F.R. § 42.24(c)(3).

#### **IV. Conclusion**

For the reasons set forth above, Petitioners request that the Board disregard and not consider Exhibits 2007, 2009, 2010, 2011, 2012, 2014, 2016 and 2017, the arguments related to these exhibits in the PO Sur-reply, and the appendix to the Reply to the MTA.

Respectfully submitted,

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Dated: April 1, 2019

**CERTIFICATION OF SERVICE**

Pursuant to 37 C.F.R. §§ 42.6(e), 42.8(b)(4) and 42.105, the undersigned certifies that on the 1 April 2019, a complete and entire copy of Petitioners' Notice of Improper Argument and Evidence were served electronically through the PTAB's E2E system on Patent Owner's counsel at:

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