

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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PALO ALTO NETWORKS., 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 B2

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**PETITIONERS' MOTION TO EXCLUDE PATENT OWNER'S  
EVIDENCE UNDER 37 § 42.64**

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

**I. INTRODUCTION**

Pursuant to 37 C.F.R. § 42.64(c), Palo Alto Networks, Inc., Fortinet, Inc., and Watchguard Technologies (“Petitioners”) move to exclude the Carnegie Mellon Handbook (Exhibit 2006), Cisco Voice over IP (VOIP) (Exhibit 2007),; Intra-and Inter-Session Network Coding in Wireless Networks (IEEE Article) (Exhibit 2009), IETF SIP Standard, Parts 1 and 4 (Exhibit 2010), Intro to OSI (Exhibit 2011), Palo Alto Networks Firewall Session Overview (Exhibit 2012), U.S. Patent No. 9,077,702 (Exhibit 2014), How SIP Works in VoIP (SIP) (Exhibit 2016), and Cisco VOIP Per Call Bandwidth Consumption (Exhibit 2017), which were relied on by Patent Owner Selective Signals, LLP (“Patent Owner”) in support of its PO Sur-reply to Petitioners’ Reply filed March 11, 2019 (“PO Sur-reply”) (Paper 29). Petitioners timely objected to these exhibits on March 18, 2019 (Paper No. 31).

The Federal Rules of Evidence apply to this proceeding. *See* 37 C.F.R. § 42.62. Exercising its discretion, the Board may “exclude the ... evidence in their entirety, or alternatively, decline to consider the ... related evidence.” *CBS Interactive Inc. v. Helferich Patent Licensing, LLC*, IPR2013-00033, Paper 79, at 3 (PTAB Aug. 9, 2013).

Exhibit 2006, which purports to be a Carnegie Mellon Handbook, is irrelevant, unfairly prejudicial, misleading, and of no probative value (Fed. R. Evid. 401, 402 and 403); inadmissible because it contains hearsay (Fed. R. Evid. 801 and 802); and despite receiving the Petitioners' objection, Patent Owner has still failed to properly authenticate it (Fed. R. Evid. 901). Accordingly, Petitioners request that all of this exhibit be excluded from the trial of this matter.

Exhibit 2007, which purports to be a guide to configuring Cisco Voice Over IP, is irrelevant, unfairly prejudicial, misleading, and of no probative value (Fed. R. Evid. 401, 402 and 403); inadmissible because it contains hearsay (Fed. R. Evid. 801 and 802); and despite receiving the Petitioners' objection, Patent Owner has still failed to properly authenticate it (Fed. R. Evid. 901). Accordingly, Petitioners request that all of this exhibit be excluded from the trial of this matter.

Exhibit 2009, which purports to be an article regarding Intra-and Inter-Session Network Coding in Wireless Networks (IEEE Article), is irrelevant, unfairly prejudicial, misleading, and of no probative value (Fed. R. Evid. 401, 402 and 403); inadmissible because it contains hearsay (Fed. R. Evid. 801 and 802); and despite receiving the Petitioners' objection, Patent Owner has still failed to properly authenticate it (Fed. R. Evid. 901). Accordingly, Petitioners request that all of this exhibit be excluded from the trial of this matter.

Exhibit 2010, which purports to be a document discussing IETF SIP Standard, Parts 1 and 4, is unfairly prejudicial and of little to no probative value (Fed. R. Evid. 403); inadmissible because it contains hearsay (Fed. R. Evid. 801 and 802); and despite receiving the Petitioners' objection, Patent Owner has still failed to properly authenticate it (Fed. R. Evid. 901). Accordingly, Petitioners request that all of this exhibit be excluded from the trial of this matter.

Exhibit 2011, which purports to be a blog post containing an introduction to OSI, is irrelevant, unfairly prejudicial, misleading, and of no probative value (Fed. R. Evid. 401, 402 and 403); inadmissible because it contains hearsay (Fed. R. Evid. 801 and 802); and despite receiving the Petitioners' objection, Patent Owner has still failed to properly authenticate it (Fed. R. Evid. 901). Accordingly, Petitioners request that all of this exhibit be excluded from the trial of this matter.

Exhibit 2012, which purports to be a customer support article containing a Palo Alto Networks Firewall Session Overview, is irrelevant, unfairly prejudicial, misleading, and of no probative value (Fed. R. Evid. 401, 402 and 403); inadmissible because it contains hearsay (Fed. R. Evid. 801 and 802); and despite receiving the Petitioners' objection, Patent Owner has still failed to properly authenticate it (Fed. R. Evid. 901). Accordingly, Petitioners request that all of this exhibit be excluded from the trial of this matter.

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Exhibit 2016, which purports to be a blog post entitled “How SIP Works in VoIP,” is irrelevant, unfairly prejudicial, misleading, and of no probative value (Fed. R. Evid. 401, 402 and 403); and inadmissible because it contains hearsay (Fed. R. Evid. 801 and 802; and despite receiving the Petitioners’ objection, Patent Owner has still failed to properly authenticate it (Fed. R. Evid. 901). Accordingly, Petitioners request that all of this exhibit be excluded from the trial of this matter.

Exhibit 2017, which purports to set forth Cisco VOIP Per Call Bandwidth Consumption, is irrelevant, unfairly prejudicial, misleading, and of no probative value (Fed. R. Evid. 401, 402 and 403); and despite receiving the Petitioners’ objection, Patent Owner has still failed to properly authenticate it (Fed. R. Evid. 901) and inadmissible because it contains hearsay (Fed. R. Evid. 801 and 802).

Accordingly, Petitioners request that Exhibits 2006, 2007, 2009, 2010, 2011, 2012, 2014, 2016 and 2017 (the “Challenged Exhibits”) be excluded from the trial of this matter]

## **II. ARGUMENT**

“A party may move to exclude evidence, whether as improper under the response-only regulation, under the Trial Practice Guide’s advice, or on other grounds.” *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1081 (Fed. Cir. 2015). Other bases for excluding exhibits exist in the Federal Rules of Evidence. *See* 37 C.F.R. § 42.62 (“[T]he Federal Rules of Evidence shall apply to a proceeding.”).

For the reasons set forth below, the Challenged Exhibits are all inadmissible under the Trial Practice Guide and the Federal Rules of Evidence.<sup>1</sup>

**A. The Challenged Exhibits are Inadmissible as Irrelevant Because Patent Owner Did Not Comply with 37 C.F.R §§ 42.22, 23**

With the PO Sur-reply, the Patent Owner submitted the Challenged Exhibits to provide support to the subject matter discussed by the Patent Owner's expert testimony in his declaration. Ex. 2001. However, the Challenged Exhibits were not relied upon by the expert, nor was there any evidence submitted that Patent Owner's expert agrees with the Patent Owner's counsel's arguments in the PO Sur-reply regarding the Challenged Exhibits. In fact, Exhibit 2006 is not even discussed in the PO Sur-reply.

37 CFR 42.22, 23 require that a petition and any response thereto include "a detailed explanation of the significance of the evidence." To the extent that the Challenged Exhibits are submitted to show what a POSA understood, or support the testimony of the Patent Owner's expert, the Challenged Exhibits should have

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<sup>1</sup> Pursuant to the Board's March 21, 2019 Order (Paper 32), Petitioners are concurrently filing Petitioners' Notice of Improper Argument and Evidence directed to exhibits. 2007, 2009-2012, 2014, 2016 and 2017 as untimely because Patent Owner should have introduced these exhibits with its Patent Owner Response.

been submitted with the declaration of a POSA explaining the significance of the evidence. Patent Owner's counsel is not a competent witness to testify as to these exhibits and thus the Challenged Exhibits should be excluded as irrelevant under Fed. R. Evid. 402.

**B. Exhibits Created After the '629 Patent's Priority Date are Irrelevant**

A document that post-dates the priority date of a patent is irrelevant as a matter of law to show the state of the art on the priority date. *See Endo Pharmaceuticals Inc. v. Mylan Pharmaceuticals Inc.*, No. 11-CV-00717, 2014 WL 334178, at \*31 n.72 (D. Del. Jan. 28, 2014) (holding that an exhibit was “a post-priority date document that is irrelevant to the state of the art as of the priority date” and declining to “rely upon it for that purpose.”); *see also* Fed. R. Evid. 401 (defining relevant evidence).

Exhibits 2006, 2007, 2009, 2011, 2012, 2014, 2016, and 2017 all post-date the priority date of the '629 Patent. Although Patent Owner fails to include “a detailed explanation of the significance” of any of its evidence, as it is required to do under 37 C.F.R. §§ 42.22 and 42.23, it is clear in the PO Sur-reply that Patent Owner impermissibly relies on these exhibits in an attempt to establish what the state of the art was on the '629 Patent's priority date. Because documents which post-date the priority date are generally irrelevant to establish the state of the art as

of the priority date, *see Endo*, Exhibits 2006, 2007, 2009, 2011, 2012, 2014, 2016, and 2017 are irrelevant and inadmissible under Fed. R. Evid. 402.

**C. Patent Owner’s Cited Articles, Blogs, and Guides are Comprised of Inadmissible Hearsay**

The Challenged Exhibits are not admissible because they are hearsay.

“Hearsay” includes a written assertion that “the declarant does not make while testifying at the current trial or hearing” and that “a party offers in evidence to prove the truth of the matter asserted in the statement.” Fed. R. Evid. 801.

Hearsay that does not fall within an exception is inadmissible. *See* Fed. R. Evid. 802.

All of the Challenged Exhibits are hearsay, and none of them meet any hearsay exception. Throughout its PO Sur-reply, Patent Owner relies on these exhibits to establish the truth of the matter asserted in the exhibits.<sup>2</sup> *See, e.g.*, PO Sur-reply at 12 (relying on Exhibits 2009, 2012, and 2014 to argue that there is a “substantive difference[ ] between a session and a flow”); PO Sur-reply at 14-15 (copying a table verbatim from Exhibit 2007 to argue the same).

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<sup>2</sup> Patent Owner does not try to use an assertion in Exhibit 2006 to prove the truth of any matter asserted therein because Patent Owner *never cites to Exhibit 2006 at all*.



“Reliability is key to the hearsay rule . . . .” *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1056 n.6 (6th Cir. 1983); *see also* Fed. R. Evid. 807(a)(1) (requiring “circumstantial guarantees of trustworthiness” for admissibility under the residual exception). However, Patent Owner has resorted to unverifiable blog posts and customer support articles in support of attorney arguments in its PO Sur-reply. Patent Owner cannot vouch for the knowledge, expertise, bias (or lack thereof), or in some cases even the *identity* of the declarants who composed these writings. Using these documents as substantive proof is anything but “reliable.” Patent Owner is required to present sworn testimony, based on an adequate foundation, and from a competent witness, in order to prove these matters; it cannot use these exhibits as a shortcut. The Challenged Exhibits should be excluded as unreliable hearsay.

**C. Patent Owner Has Failed to Authenticate Exhibits 2006, 2007, 2009, 2010, 2011, 2012, 2016, and 2017**

Under Fed. R. Evid. 901, “the proponent [of documents] must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Exhibits 2006, 2007, 2009, 2010, 2011, 2012, 2016, and 2017 are print-outs from websites. The Patent Owner has made no attempt to offer evidence that the exhibit accurately reflects the computer image of the web page as of the date it was first publically available, or offer the testimony of a witness with firsthand knowledge of its content or authorship. Despite having notice of Petitioners’

objections to the authenticity of Exhibits 2006, 2007, 2009, 2010, 2011, 2012, 2016, and 2017, Patent Owner has failed to make *any* showing that *any* of these exhibits are authentic. Patent Owner offers no proof as to the authorship of any of the documents or integrity of the reproductions. Accordingly, Exhibits 2006, 2007, 2009, 2010, 2011, 2012, 2016, and 2017 should be excluded under Fed. R. Evid. 901.

### III. CONCLUSION

For the foregoing reasons, Petitioners request exclusion of the Challenged Exhibits.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

The undersigned certifies, in accordance with 37 C.F.R. § 42.6(e), that service was made of the Petitioner's Motion to Exclude Evidence on the Attorneys for Patent Owner as detailed below, dated April 1, 2019, via The PTAB's E2E filing and system and Electronic Mail:

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