

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

Selective Technologies, LLC
Patent Owner

IPR2018-00594
PATENT 8,111,629

**PATENT OWNER'S OPPOSITION TO PETITIONERS' MOTION TO
EXCLUDE PATENT OWNER'S EVIDENCE**

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I. Introduction

37 C.F.R. § 42.64 requires Petitioners to “identify the objections [to evidence] in order and *must explain the objections.*” (Emphasis added).

Petitioners’ long list of general objections, Motion to Exclude at 3–5, fails at least because Petitioners fail to meet this burden. As detailed below, Petitioners’ specific challenges fail at least because Petitioners fail to support their arguments, ignore Patent Owner’s Sur-Reply, mischaracterize the evidence, and ignore Patent Owner’s supplementary evidence.

Petitioners challenge eight exhibits Patent Owner submitted in accompaniment with Patent Owner’s Sur-Reply to the Petition: Exhibits 2006, 2007, 2009, 2010, 2011, 2012, 2016, and 2017 (collectively, the “Challenged Exhibits”). Petitioners argue the Challenged Exhibits are irrelevant, constitute inadmissible hearsay, and have not been authenticated. Petitioners’ arguments are flawed at least because: (1) Patent Owner included a detailed explanation of the significance of the Challenged Exhibits in Patent Owner’s Sur-Reply, (2) the Challenged Exhibits are relevant regardless of priority date, (3) the Challenged Exhibits are admissible at least under Fed. R. Evid. 807, and (4) Patent Owner has properly authenticated the Challenged Exhibits.

As noted above, Petitioners make additional blanket objections to the Challenged Exhibits with no specific argument whatsoever. For example,

Petitioners object to all of the Challenged Exhibits under Fed. R. Evid. 403.

Motion to Exclude at 3–5. However, Petitioners provide no analysis whatsoever of how Petitioners believe the Board should apply Rule 403 to the Challenged Exhibits. For completeness, Patent Owner has addressed these objections in Section VI below. However, the Board should reject these objections as Petitioners have failed to meet their burden of showing how the cited challenges apply to the Challenged Exhibits.

II. Patent Owner Included a Detailed Explanation of the Significance of the Challenged Exhibits in Patent Owner’s Sur-Reply

Petitioners argue that Patent Owner “submitted the Challenged Exhibits to provide support to the subject matter discussed by the Patent Owner’s expert testimony.” Motion to Exclude at 6. Yet Petitioners do not cite a single page or statement from Patent Owner’s Sur-Reply in support of this statement. *Id.* at 6–7. Contrary to Petitioners’ assertions, Patent Owner has provided a “detailed explanation of the significant of the evidence,” in compliance with 37 C.F.R. §§ 42.22, 42.23.

For example, Patent Owner describes the significance of Exhibits 2007, 2009, 2010, 2012, 2014, and 2016 throughout the section of Patent Owner’s Sur-Reply entitled “Petitioners’ Argument That There Is No Substantive Difference Between a Session and a Flow Is Technically Flawed.” Sur-Reply at 11–16. Patent Owner also described the significance of Exhibits 2011 and 2017 in explaining

Petitioners’ misunderstanding of Patent Owner’s claim construction. *Id.* at 3–6.

Patent Owner acknowledges that Exhibit 2006 was not cited in the Sur-Reply.

Petitioners also argue that “the Challenged Exhibits should have been submitted with the declaration of a [person of ordinary skill in the art] explaining the significance of the evidence. Patent Owner’s counsel is not a competent witness to testify as to these exhibits” Motion to Exclude at 6–7. Contrary to Petitioners’ position, expert testimony is not necessary to establish the state of the art. *See Union Carbide Corp. v. American Can Co.*, 724 F.2d 1567, 1573 (Fed. Cir. 1984) (stating that “the references and appellant’s invention are easily understandable without the need for expert explanatory testimony”); *see also K-TEC, Inc. v. Vita-Mix Corp.*, 696 F.3d 1364, 1374 (Fed. Cir. 2012).

III. The Challenged Exhibits are Relevant Regardless of Priority Date

Petitioners argue that, because Exhibits 2006, 2007, 2009, 2011, 2012, 2014, 2016, and 2017 are irrelevant because they “post-date the priority date of the ’629 Patent.” Motion to Exclude at 7. Petitioners arguments should be rejected.

In the Sur-Reply, Patent Owner uses Exhibits 2007, 2011, 2016, and 2017 expressly to demonstrate a general understanding of VOIP and the OSI Layer Model. Sur-Reply at 5–6, 14–15. Petitioners have provided no evidence that this general understanding has changed in any way since the publication dates of Exhibits 2007 and 2016. *See Lake Cherokee Hard Drive Techs., LLC v. Bass*

Computers, Inc., 2012 WL 3230973, at *17 (E.D. Tex. Aug. 6, 2012) (“Defendants challenged the dates of publication of Plaintiff’s dictionaries as being too long after the priority date of the patents-in-suit, but Defendants have not submitted evidence of any relevant change in definition.”).

Further, Patent Owner uses Exhibits 2009, 2012, and 2014 to directly rebut Petitioners’ argument that “there is no substantive difference between a session and a flow.” *See* Reply at 11–14; Sur-Reply at 11–12. Specifically, Patent Owner provided several examples of technical literature that recognized substantive differences between sessions and flows. Sur-Reply at 11–12. Petitioners do not argue that these substantive differences only arose after the priority date of the ’629 Patent. *See Lake Cherokee Hard Drive Techs., LLC*, 2012 WL 3230973, at *17.

While exhibits before the priority date of the ’629 Patent would potentially be more relevant to the issues raised by Patent Owner, the dates of the Challenged Exhibits go to the relative weight of the evidence, not its admissibility.

IV. The Challenged Exhibits are Admissible At Least Under Fed. R. Evid. 807

With one exception, Patent Owner acknowledges that the Challenged Exhibits constitute hearsay under Fed. R. Evid. 801. The one exception is Exhibit 2014, which the Federal Rules of Evidence define as “not hearsay” under Rule 801(d)(2)(B–D). Exhibit 2014 is a U.S. Patent filed by two individuals that

presumably worked for Palo Alto Networks, Inc. (a party to this IPR) as the unpublished patent application was assigned to Palo Alto Networks, Inc. while it was still pending at the U.S. Patent & Trademark Office. *See* Reel/frame no. 030944/0858. Thus, the statements made in Exhibit 2014 are attributable to opposing party Palo Alto Networks under one or more of the conditions set forth in Fed. R. Evid. 801(d)(2)(B–D). The remaining Challenged Exhibits are hearsay, but remain allowable under Fed. R. Evid. 807.

As Petitioners note, “[r]eliability is the key to the hearsay rule.” Motion to Exclude at 9. Yet Petitioners provide no reason to doubt the reliability of the Challenged Exhibits. Patent Owner has provided to Petitioners the source of each of the Challenged Exhibits. *See* Exhibit 2018. Yet Petitioners still dismiss these sources as “unverifiable blog posts and customer support articles.” Motion to Exclude at 9. While Patent Owner admits that it is unable to vouch for the identity of, for example, the Internet Engineering Task Force RFC, Petitioners have provided no reason to even suspect that this organization’s standards should be dismissed as unreliable. *See* EX2010. Similarly, Exhibits 2007 and 2017 are articles published by Cisco to support their customers in understanding how to use Cisco products. Exhibit 2009 is a paper presented at an IEEE conference. Exhibits 2011 and 2016 are blog posts designed to—as Patent Owner used them in the Sur-Reply—educate its audience on the background of the OSI Layer Model and

VOIP, respectively. Petitioners have given no reason why the “equivalent circumstantial guarantees of trustworthiness” implicit in these sources is insufficient to qualify these exhibits as admissible under Fed. R. Evid. 807.

V. Patent Owner Has Properly Authenticated the Challenged Exhibits

Petitioners argue that, despite “having notice of Petitioners’ objections to the authenticity of [the Challenged Exhibits], Patent Owner has failed to make *any* showing that *any* of these exhibits are authentic.” Motion to Exclude at 9–10.

Patent Owner respectfully submits that Exhibit 2018—which shows that all of the Challenged Exhibits are true and correct copies of what they claim to be—was served on Petitioners within the time allotted by the Board for supplemental evidence under 37 C.F.R. § 42.64.

VI. Petitioners’ Laundry List of Objections Should Be Rejected

As noted above, Petitioners’ specific objections to Patent Owner’s evidence are without merit. In addition to these specific objections, Petitioners include a long list of objections to Patent Owner’s evidence without any explanation. *See* Motion to Exclude at 3–5. The Board should reject these objections at least because Petitioners failed to “explain the objections” as required by 37 C.F.R. § 42.64(c). For completeness, Patent Owner addresses those objections that Patent Owner has not already specifically addressed above.

- Exhibit 2006 is relevant at least to the general state of the art of the '629 Patent; admissible at least under Fed. R. Evid. 807 as stated in Section V above; and properly authenticated as evidenced by EX2018.
- Exhibit 2007 is relevant at least to the general state of the art of the '629 Patent; admissible at least under Fed. R. Evid. 807 as stated in Section V above; and properly authenticated as evidenced by EX2018. Further, Petitioners have provided no reason whatsoever why Exhibit 2007 should be deemed “unfairly prejudicial” or “misleading.”
- Exhibit 2009 is relevant at least to the general state of the art of the '629 Patent; admissible at least under Fed. R. Evid. 807 as stated in Section V above; and properly authenticated as evidenced by EX2018. Further, Petitioners have provided no reason whatsoever why Exhibit 2009 should be deemed “unfairly prejudicial” or “misleading.”
- Exhibit 2010 is relevant at least to the general state of the art of the '629 Patent; admissible at least under Fed. R. Evid. 807 as stated in Section V above; and properly authenticated as evidenced by EX2018. Further, Petitioners have provided no reason whatsoever why Exhibit 2010 should be deemed “unfairly prejudicial” or “misleading.”
- Exhibit 2011 is relevant at least to the general state of the art of the '629 Patent; admissible at least under Fed. R. Evid. 807 as stated in

Section V above; and properly authenticated as evidenced by EX2018.

Further, Petitioners have provided no reason whatsoever why Exhibit 2011 should be deemed “unfairly prejudicial” or “misleading.”

- Exhibit 2012 is relevant at least to the general state of the art of the '629 Patent; admissible at least under Fed. R. Evid. 807 as stated in Section V above; and properly authenticated as evidenced by EX2018. Further, Petitioners have provided no reason whatsoever why Exhibit 2012 should be deemed “unfairly prejudicial” or “misleading.”
- Exhibit 2016 is relevant at least to the general state of the art of the '629 Patent; admissible at least under Fed. R. Evid. 807 as stated in Section V above; and properly authenticated as evidenced by EX2018. Further, Petitioners have provided no reason whatsoever why Exhibit 2016 should be deemed “unfairly prejudicial” or “misleading.”
- Exhibit 2017 is relevant at least to the general state of the art of the '629 Patent; admissible at least under Fed. R. Evid. 807 as stated in Section V above; and properly authenticated as evidenced by EX2018. Further, Petitioners have provided no reason whatsoever why Exhibit 2017 should be deemed “unfairly prejudicial” or “misleading.”

VII. CONCLUSION

Petitioners provide a laundry list of objections to Patent Owner's evidence. Motion to Exclude at 3–5. This list fails to meet Petitioners' burden under 37 C.F.R. § 42.64(c) to "explain the objections." The specific objections that Petitioners do make are unsupported. Further, the specific objections fail at least because Patent Owner included a detailed explanation of the significance of the Challenged Exhibits in Patent Owner's Sur-Reply, the Challenged Exhibits are relevant regardless of priority date, the Challenged Exhibits are admissible under multiple hearsay exceptions, and Patent Owner has properly authenticated the Challenged Exhibits. At the most, Petitioners' arguments go to the weight, rather than the admissibility of Patent Owner's evidence. Thus, all of Patent Owner's arguments and evidence should be entered and given due consideration.

Date: April 15, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 37 C.F.R. § 42.24(d), we certify that this Opposition to Petitioners' Motion to Exclude Evidence complies with the page limits set forth in 37 C.F.R. § 42.24(b)(3) because it contains fewer than ten pages, as determined by the word-processing program used to prepare the brief, excluding the parts of the brief exempted by 37 C.F.R. § 42.24(a)(1).

Date: April 15, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing PATENT OWNER'S OPPOSITION TO PETITIONERS' MOTION TO EXCLUDE EVIDENCE was served on the Petitioners' counselors of record by electronic notification, as consented to by the petitioners:

Dated: April 15, 2019

Respectfully submitted,

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