

IN THE 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 Signals, LLC
Patent Owner.

Case IPR2018-00594

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

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

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

TABLE OF CONTENTS

	Page
I. Introduction.....	1
II. Patent Owner Has Not Met Its Burden of Showing How The Challenged Exhibits Are Relevant	1
III. The Lay Testimony of Patent Owner’s Attorney Cannot Supplant the Testimony of Patent Owner’s Expert	3
IV. Patent Owner Has Failed to Satisfy F.R.E. 807	4
V. Exhibit 2018 Does Not Authenticate the Challenged Exhibits	5
VI. Conclusion	5

Petitioners' Exhibit List

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

I. Introduction

Patent Owner's Opposition to Petitioners' Motion to Exclude Patent Owner's Evidence ("PO Opp. to MTE") fails to address how each of the Challenged Exhibits are admissible under the Federal Rules of Evidence. Instead, Patent Owner deflects and asserts that (1) Petitioners bear the burden of showing that the Challenged Exhibits are not relevant, (2) the subject matter of the '629 Patent is easily understandable and thus no expert testimony regarding the Challenged Exhibits is required, (3) the Challenged Exhibits are inherently trustworthy, and (4) Ex. 2018 authenticates the Challenged Exhibits.

II. Patent Owner Has Not Met Its Burden of Showing How the Challenged Exhibits Are Relevant

As the proponents of the exhibits, Patent Owner bears the burden of proving that the Challenged Exhibits are admissible. *U.S. v. Williams*, 561 Fed. App'x 604, 604 (9th Cir. 2014) ("As the proponent of this evidence, [defendant] bore the burden of establishing that the evidence was admissible."); *see also Radiance Found., Inc. v. N.A.A.C.P.*, 27 F. Supp. 3d 671, 673-74 (E.D. Va. 2013) (citing *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001)); *Avocados Plus, Inc. v. Johanns*, No. 02-1798, 2007 WL 172305, at *4 (D.D.C. Jan. 23, 2007) (citing *Bourjaily v. United States*, 483 U.S. 171 (1987)) ("It is of course the proponent's "burden [to] establish[] that the pertinent admissibility requirements are met by a preponderance of the evidence."); *Allstates Air Cargo, Inc. v. United*

States, 42 Fed. Cl. 118, 122 (1998) (“The proponent of the survey evidence bears the burden of establishing the elements of admissibility.”). A critical issue for any invalidity challenge is the knowledge of a person of skill in the art (“POSA”) at the priority date. Each of the Challenged Exhibits were belatedly submitted by Patent Owner to support the previous testimony of its experts regarding the knowledge of a POSA. Yet, Patent Owner does not even attempt to justify how the Challenged Exhibits accessed in 2019, and the lay testimony of its attorney regarding the Challenged Exhibits, are relevant to the knowledge of a POSA in 2006.

Patent Owner asserts that Exhibits 2007, 2011, 2016 and 2017 “demonstrate a general understanding of VOIP and the OSI Layer Model.” PO Opp. to MTE 3. Further, Patent Owner asserts that Exhibits 2009, 2012, and 2014 directly rebut Petitioner’s argument that “there is no substantive difference between a session and a flow.” *Id.* 4. Exhibits 2006, 2007, 2009, 2011, 2012, 2014, 2016, and 2017 all post-date the November 2006 priority date of the ’629 Patent by between four and thirteen years. Patent Owner has made no attempt to explain how these documents, which were not even in existence in November 2006, are relevant as to what a POSA understood regarding the state of the art in 2006.

Instead of addressing this glaring deficiency, Patent Owner turns the law on its head and asserts that Petitioners have the burden to show that the Challenged Exhibits do not accurately reflect the knowledge of a POSA in 2006. PO Opp. to

MTE 3. While Petitioners have the burden of proving invalidity, Patent Owner as the proponent offering an exhibit as evidence, has the burden of showing that the Challenged Exhibits are admissible under the Federal Rules of Evidence, including relevance. *See Williams*, 561 Fed. App'x at 604; *Radiance Found.*, 27 F. Supp. 3d 673-74; *Avocados Plus*, 2007 WL 172305, at *4; *Allstates Air Cargo*, 42 Fed. Cl. at 122. Patent Owner has failed to set forth an explanation for how the Challenged Exhibits dated after the priority date would be relevant to show what a POSA knew in 2006, and has accordingly not met its burden.

III. The Lay Testimony of Patent Owner's Attorney Cannot Supplant the Testimony of Patent Owner's Expert

Patent Owner asserts that where the subject matter of the relevant technology is “easily understandable”, expert testimony is not necessary. PO Opp. To MTE 3. This is not one of those cases as demonstrated by the fact that both Petitioners and Patent Owner submitted the testimony of expert witnesses in this proceeding as POSAs regarding the disclosure of the '629 Patent, the cited references, and the state of the art. Thus, it is improper for Patent Owner to submit the lay testimony of its attorney regarding the Challenged Exhibits in its attempt to buttress the unsupported testimony of its expert, *e.g.*, “Dr. Nakibly’s position –that one of ordinary skill in the art would recognize important, substantive differences between a session and a flow (*e.g.*, EX2001 ¶¶ 85-6)—is supported by literature from a variety of technical sources.” PO Sur-reply 12 (Paper 29). By failing to

submit the Challenged Exhibits with a declaration of its expert, Patent Owner provided no evidence that its expert was even aware of the Challenged Exhibits, reviewed the Challenged Exhibits, or agreed with the testimony of Patent Owner's attorney regarding a POSA's understanding of the Challenged Exhibits.

IV. Patent Owner Has Failed to Satisfy F.R.E. 807

Patent Owner argues that the Challenged Exhibits are admissible under Rule 807 of the Federal Rules of Evidence. Rule 807 could allow hearsay evidence to be admitted if the evidence (1) has equivalent circumstantial guarantees of trustworthiness; (2) is offered as evidence of a material fact; (3) is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of the Federal Rules of Evidence and the interests of justice. *See Fed. R. Evid.* 807.

However, Patent Owner makes no attempt to explain how the Challenged Exhibits satisfy the requirements of Rule 807. Instead, Patent Owner asserts that "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." PO Opp. to MTE 6. Therefore, Patent Owner has failed to satisfy the requirements of Rule 807 and the Challenged Exhibits remain inadmissible.

V. Exhibit 2018 Does Not Authenticate the Challenged Exhibits

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. 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 publicly available, or offer the testimony of a witness with firsthand knowledge of its content or authorship. Exhibit 2018 is the testimony of Patent Owner’s attorney regarding accessing the Challenged Exhibits online in 2019. Exhibit 2018 does not provide any testimony of a person with first-hand knowledge as to when these documents were first made publicly available online, the original contents when they were placed online, or the source of the content. 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.

VI. Conclusion

For the reasons set forth above, Petitioners request that the Board exclude the Challenged Exhibits, and disregard the arguments related to them.

Respectfully submitted,

DUANE MORRIS LLP

BY: Patrick D. McPherson/

Patrick D. McPherson

USPTO Reg. No. 46,255

Duane Morris LLP

505 9th Street NW, Suite 1000

Washington, D.C. 20004

Lead Counsel

Dated: April 22, 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 22 April 2019, a complete and entire copy of Petitioners' Reply To Patent Owner's Opposition To Petitioners' Motion To Exclude Patent Owner's Evidence was served electronically through the PTAB's E2E system on Patent Owner's counsel at:

Benjamin R. Johnson
TOLER LAW GROUP, PC
bjohnson@tlgiplaw.com

Timothy Devlin
DEVLIN LAW FIRM LLC
tdevlin@devlinlawfirm.com

/Patrick D. McPherson/
Patrick D. McPherson, Reg. No. 46,255
505 9th Street, N.W., Suite 1000
Washington, D.C. 20004
P: (202) 776-7800
F: (202) 776-7801
PDMcPherson@duanemorris.com