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 RESPONSE TO PETITIONERS' NOTICE OF IMPROPER ARGUMENTS AND EVIDENCE

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I. INTRODUCTION

Petitioners argue that Patent Owner's Sur-Reply, Paper 29, and Reply to Motion to Amend, Paper 30, include improper arguments and evidence because they are untimely. Petitioners' Notice of Improper Arguments and Evidence, Paper 34 ("Arguments and Evidence") at 1–2. As detailed in the sections below, Petitioners improperly conflate specific rebuttal arguments that are responsive to issues raised in Petitioners' briefing with "untimely" arguments that Petitioners did not have a chance to respond to. Patent Owner's "new" arguments are not new; they are ***directly responsive*** to arguments Petitioners raised in Petitioners' responsive briefing. Further, Petitioners did not request additional briefing as an alternative remedy regarding Patent Owner's alleged "new" arguments in Patent Owner's Sur-Reply.[1] Thus, all of Patent Owner's arguments and evidence should be entered and given due consideration.

II. PATENT OWNER'S SUR-REPLY ARGUMENTS

Petitioners characterized Patent Owner's Exhibits 2007, 2010, 2011, 2016, and 2017 as "New OSI Layer Arguments." Arguments and Evidence at 2. As detailed below, Petitioners' characterization of Patent Owner's arguments and evidence as "new" rather than directly responsive to Petitioners' arguments made

[1] Patent Owner also notes that, of the fifteen pages Petitioners originally requested for their two Motions to Strike, Petitioners used six.

in Reply is improper and Patent Owner's arguments and evidence should be considered.

Petitioners' first basis for dismissing Patent Owner's "new" arguments is that the argument is "untimely because these arguments should have been included in the POR in order to afford Petitioners the opportunity to address them substantively." Arguments and Evidence at 4. This argument fails. Patent Owner's OSI Layer Arguments are directly responsive to arguments made in Petitioners' Reply. *See, e.g.*, Reply at 11. Petitioners specifically argued that Patent Owner's argument "that '[a] session is a set of packets that relates to an application-level (i.e., layer-y), bidirectional communication" is incorrect. *Id.* Patent Owner then specifically rebutted that argument by providing responsive arguments and additional evidence. *E.g.*, Sur-Reply, Paper 29 ("Sur-Reply") at 3–7.

Petitioners' second basis for dismissing Patent Owner's "new" arguments and evidence is that Petitioners' expert should have been given more time to evaluate Petitioners' own argument. This argument is without merit. Patent Owner has consistently and repeatedly argued the substantive differences between sessions and flows. *E.g.*, Sur-Reply at 11–12. Petitioners first made the baseless statement in their Reply, that "there is no substantive difference between a session and a flow." Reply, Paper 29 ("Reply") at 11. Patent Owner included evidence to

specifically ***rebut this statement*** for the first time in the sur-reply because Petitioners made their argument for the first time in Reply.

Petitioners argue further that "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." Arguments and Evidence at 4. Patent Owner has made no such claim. Patent Owner merely provided evidence to specifically rebut Petitioners' characterization of the state of the art. Evidence of the state of the art does not need to be specifically supported by expert testimony in order to be relevant. *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).

Finally, Petitioners repeat the argument made in their Reply, that Patent Owner is somehow estopped from arguing the validity of Claim 19 because the Board's Scheduling Order states: "The patent owner is cautioned that any arguments for patentability not raised and fully briefed in the response will be deemed waived." Arguments and Evidence at 5 (citing Aug. 29, 208 Scheduling Order, Paper 4). In support, Petitioners again argue they have been

"deprived . . . of the opportunity to substantively address its arguments." Arguments and Evidence at 5.

Petitioners' position fails at least because: (1) prior to Petitioners' Reply, there was nothing for Patent Owner to respond to because the Board had previously rejected Petitioners' arguments regarding Claim 19, and (2) Patent Owner's arguments in the sur-reply were directly responsive to Petitioners' arguments in the Reply. Patent Owner's arguments in the sur-reply regarding Claim 19 specifically addressed arguments Petitioners made in the Reply. There was no "new argument;" there was no "new evidence."

Patent Owner directly responded to: (1) Petitioners' argument that "'the inter-packet time gap between the two most recently arrived packets' can be used to derive an instantaneous flow rate," Reply at 24, which Petitioners raised for the first time in Reply; (2) Petitioners' argument "that the 'session characteristic' recited in Claim 15 corresponded to the behavioral characteristics of the flow, including the individual packet characteristic of an inter-packet gap," Reply at 24, which Petitioners raised for the first time in Reply; and (3) Petitioners' misconstruction of "said characteristics," which, again, Petitioners raised for the first time in Reply.

Because Petitioners raised each of these arguments for the first time in Reply (the first time Petitioners were allowed to do so), Patent Owner is entitled to rebut those arguments in sur-reply (the first time Patent Owner would have been allowed

to do so). Petitioners' argument that specific, rebuttal arguments raised in a sur-reply are somehow untimely because Petitioners have not had the "opportunity to substantively address its arguments" mischaracterizes the nature of responsive briefing. Petitioners could have asked for an opportunity for further briefing and will have the opportunity to address these arguments before the Board. Any other remedy would deny Patent Owner's ability to respond to arguments Petitioners raised for the first time in Reply.

III. PATENT OWNER'S REPLY TO MOTION TO AMEND ARGUMENTS

Petitioners repeat arguments made in Opposition to Patent Owner's Motion to Amend. See Arguments and Evidence at 5–6; Opposition to Motion to Amend, Paper 26 at 3–7. Specifically, Petitioners argue that the support for amended claims Patent Owner provided in its Reply to Motion Amend is "untimely and improper" because (1) Patent Owner should have submitted this information in the original Motion to Amend, and (2) Patent Owner exceeded the page limits allowed for Reply. Arguments and Evidence at 5–6.

First, Patent Owner's supplemental support was not improper. As Patent Owner stated in its Reply, to "the extent any amended claim includes subject matter recited in an originally-filed application, that subject matter provides its own written description support." Further, Petitioners have the burden to show that Patent Owner's amended claims lack written description support. *See In re*

Magnum oil Tools Int'l, Ltd., 829 F.3d 1364, 1375 (Fed. Cir. 2016) (holding the burden of unpatentability lies with Petitioners). Petitioners have not pointed to the specific limitations of the challenged claims that Petitioners believe lack written description. To the extent 37 C.F.R. § 42.121(b)(1) places this burden on Patent Owner, that burden is improper. *Id.*

Finally, Petitioners argue that Patent Owner's supplemental support should be dismissed because Patent Owner labeled this support as an "Appendix." Arguments and Evidence at 6. Patent Owner respectfully submits that the supplemental support was included in the Reply, within the page limits, and should be considered part of the substantive briefing. With regard to the page limit, Petitioners argue that Patent Owner's supplemental support "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." Arguments and Evidence at 6. Patent Owner respectfully notes that 37 C.F.R. § 42.6(a)(2)(iii) allows that double spacing "must be used except in claim charts."

Patent Owner also respectfully submits that Patent Owner presented the information in the "Appendix—Additional Claim Support" in a manner that Patent Owner believed would be most useful to the Board and to Petitioners, and that the same information could have been readily (if less easily readable) included in a double-spaced format to fit in the same physical space with Patent Owner's Reply

to Motion to Amend. As evidence, Patent Owner has included a version of the supplemental support that contains exactly the same content as the "Appendix—Additional Claim Support" on the following page. Patent Owner submits that Patent Owner's Reply, had it included this new version, would still be less than twelve pages.

Patent Owner's Support for Claim 25's Original Elements

25. [A] A method of identifying session type, comprising

[B] obtaining passing packets of respectively unknown sessions and unknown session types;

[C] obtaining traffic packet characteristics of said passing packets of respectively unknown session types;

[D] comparing said obtained packets with each other using respectively obtained traffic packet characteristics;

[E] grouping together those packets having similar values of said traffic packet characteristics into a presumed session; and

[F] analyzing said grouped packets of said presumed session for session characteristic;

[G] using said session characteristics to identify a session type of said presumed session,

[H] wherein said identifying a session type is followed by at least one of the group comprising: providing provisioning and providing control actions to the session.

Support[2] for the above elements may be found at: [A] 1:6–10, 4:9–23, 8:29–9:6; [B] 4:27–29, 9:23–30, 10:13–18, 18:1–5; [C] 4:10–24, 5:1–7, 5:21–24, 7:1–2, 7:5–11, 9:3–5, 9:22–30; [D] 12:23–25, 7:5–11, 9:22–30, 11:22–28; [E] 11:29–33, 16:3–7; [F] 16:8–17, 7:1–11, 9:13–21, 10:13–18; [G] 10:13–18; and [H] 2:12–17, 5:15–16, 5:27–6:27, 8:29–9:6, 9:22–30, 10:25–26, 11:16–28.

[2] Citations are to the originally-filed '510 Application as Page Number:Line Number.

IV. CONCLUSION

Petitioners repeatedly describe specific rebuttal arguments that are responsive to issues raised in Petitioners' briefing as "untimely" arguments that Petitioners did not have a chance to respond to. Patent Owner's allegedly "new" arguments are not new, however. They are directly responsive to arguments Petitioners raised in Petitioners' responsive briefing. Further, Petitioners did not request additional briefing as an alternative remedy regarding Patent Owner's alleged "new" arguments in Patent Owner's Sur-Reply, and Petitioners did not even file a sur-reply to Patent Owner's Motion to Amend, which Petitioners requested and the Board approved. Thus, all of Patent Owner's arguments and evidence should be entered and given due consideration.

Date: April 30, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 37 C.F.R. § 42.24(d), we certify that this Response to Petitioners Notice of Improper Arguments and Evidence complies with the page limits set forth in the Board's Order, Paper 32 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 30, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing PATENT OWNER'S RESPONSE TO PETITIONERS' NOTICE OF IMPROPER ARGUMENTS AND EVIDENCE was served on the Petitioners' counselors of record by electronic notification, as consented to by the petitioners:

Dated: April 30, 2019

Respectfully submitted,

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