

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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CISCO SYSTEMS, INC.,  
Petitioner,

v.

CENTRIPETAL NETWORKS, INC.,  
Patent Owner.

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Case No. IPR2018-01512  
Patent No. 9,565,213

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**PATENT OWNER'S MOTION TO EXCLUDE PETITIONER'S EVIDENCE**

## **I. INTRODUCTION**

Pursuant to 37 C.F.R. § 42.64, Patent Owner Centripetal Networks, Inc., (“Centripetal”) hereby moves to exclude Exhibits 1004, 1008, 1010-1012, 1015, 1017, 1020-1023, and 1025-1030. On April 3, 2019, Centripetal timely filed its objections to the evidence in Petitioner’s Petition, including Exhibits 1004, 1008, 1010-1012, 1015, and 1017. Paper No. 10. On October 14, 2019, Centripetal timely filed its objections to evidence in Petitioner’s Reply, including Exhibits 1020-1023, and 1025-1030. Paper No. 19. The Board should grant Patent Owner’s Motion to Exclude for the reasons set forth below.

## **II. ARGUMENT**

### **A. The Board Should Exclude the Exhibits 1010-1011, 1022-1023, 1025, 1028-1030**

Petitioner did not authenticate Exhibits 1010-1011, 1022-1023, 1025, 1028-1030, and Patent Owner timely objected to those exhibits on that basis. *See* Paper Nos. 10 & 19. Petitioner did not serve supplemental evidence in response to Patent Owner’s objections. Because Petitioner has failed to produce any evidence to support a finding that Exhibits 1010-1011, 1022-1023, 1025, and 1028-1030 are in fact what Petitioner claims they are, those exhibits should be excluded under Federal Rule of Evidence (“FRE”) 901 as unauthenticated.

**B. The Board Should Exclude Exhibit 1027**

Petitioner untimely filed the Supplemental Declaration of Eli Fuchs with its Reply as Exhibit 1027. However, Petitioner improperly introduces this new evidence and arguments for the first time with its Petitioner's Reply. *See* Paper 17. This evidence and arguments are inadmissible under 37 C.F.R. § 42.61, and are properly subject to exclusion because Petitioner is not permitted to introduce new evidence and arguments with its Reply in order to resolve the deficient arguments and evidentiary shortcomings of its Petition. *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1081 (Fed. Cir. 2015) (“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.”). Exhibit 1027 should therefore be excluded as untimely supplemental evidence.

**C. The Board Should Exclude Exhibit 1008**

Petitioner failed to establish public accessibility of Exhibit 1008, and Patent Owner timely objected to this exhibit on that basis. *See* Paper No. 10 at 2. Petitioner purports to establish the public accessibility of Ex. 1008 through the Declaration of Eli Fuchs (Ex. 1012) and Supplemental Declaration of Eli Fuchs (Ex. 1027). Mr. Fuchs, however, provided no evidence in his opening declaration that ACNS Guide was available to the public prior to the filing date of the ‘213 Patent. *See generally* Ex. 1012; Ex. 2021 (Fuchs Tr.) at 40:12-15 (Q. So the

evidence -- the only evidence you provide in your declaration would be [Ex. 1008 – ACNS Guide]; is that correct? And your testimony? A. Yes.). Petitioner then filed the untimely Supplemental Declaration of Eli Fuchs to introduce new evidence in the Reply to establish the public accessibility of Exhibit 1008. As discussed above, the Supplemental Declaration of Eli Fuchs is untimely and its purported evidence should be given no weight. Exhibit 1008 should be excluded because Petitioner failed to establish the public accessibility of Exhibit 1008.

**D. The Board Should Exclude Exhibit 1020**

Petitioner filed a declaration from Kevin Jeffay with its Reply as Exhibit 1020. But Exhibit 1020 purports to authenticate references filed with the Petition and should have been served as supplemental evidence in response to Patent Owner's objections. Exhibit 1020 should therefore be excluded as untimely supplemental evidence. This exhibit, and the arguments therein, are inadmissible under 37 C.F.R. § 42.61, and are properly subject to exclusion because Petitioner is not permitted to introduce new evidence and arguments in its Reply in order to make the *prima facie* case that it should have made in its Petition. *Belden Inc.*, 805 F.3d at 1081 (“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.”). Indeed, Petitioner may not use its Reply as a vehicle to add in new evidence that could have been included in its Petition, and all such evidence should

be excluded. *See, e.g., Toshiba Corp. v. Optical Devices, LLC*, IPR2014-01447, Paper 34 at 44–47 (P.T.A.B. Mar. 9, 2016) (“[Section 42.23(b)], however, does not authorize or otherwise provide a means for supplementing the evidence of record.”); *Toyota Motor Corp. v. Am. Vehicular Scis. LLC*, IPR2013-00424, Paper 50 at 21 (P.T.A.B. Jan. 12, 2015) (“[Petitioner] cannot rely belatedly on this evidence in its Reply and Reply Declaration of [its expert] to make up for the deficiencies in its Petition.”); *The Scotts Co. v. Encap, LLC*, IPR 2013-00110, Paper 79 at 5–6 (P.T.A.B. June 24, 2014) (declining to consider untimely evidence and arguments because the patent owner “was denied the opportunity to file responsive evidence.”). Accordingly, Exhibit 1020 should therefore be excluded as untimely supplemental evidence.

#### **E. CONCLUSION**

For the foregoing reasons, Patent Owner's Motion to Exclude should be granted.

Patent Owner's Motion to Exclude  
IPR2018-01512 (U.S. Patent No. 9,565,213)

Respectfully submitted,

Dated: November 27, 2019

/James Hannah/

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*Attorneys for Patent Owner*

**CERTIFICATE OF SERVICE**

The undersigned certifies, in accordance with 37 C.F.R. § 42.6(e), that service was made on the Petitioner as detailed below.

*Date of service*      November 27, 2019

*Manner of service*    Electronic Mail (dmcdonald@merchantgould.com;  
jblake@merchantgould.com; kott@merchantgould.com;  
mwagner@merchantgould.com;  
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*Documents served*    PATENT OWNER'S MOTION TO EXCLUDE

*Persons Served*      Daniel W. McDonald  
Jeffrey D. Blake  
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/James Hannah/  
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