

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CISCO SYSTEMS, INC.,

Petitioner,

- vs. -

CENTRIPETAL NETWORKS, INC.,

Patent Owner

Case No.: IPR2018-01512

U.S. Patent No. 9,565,213

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

TABLE OF CONTENTS

I.	Introduction.....	1
II.	Argument	2
A.	Legal Standard.....	2
B.	Exhibits 1010-1011, 1022-1023, 1025 and 1028-1030 Should Not Be Excluded.....	3
C.	Exhibit 1027 Should Not Be Excluded.	8
D.	Exhibit 1008 Should Not Be Excluded.	12
E.	Exhibit 1020 Should Not Be Excluded.	13
III.	Conclusion	15

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Arista Networks, Inc. v. Cisco Sys., Inc.</i> , IPR2016-00303 (P.T.A.B. May 25, 2017)	12
<i>Belden Inc. v. Berk-Tek LLC</i> 805 F.3d 1064 (Fed. Cir. 2015)	15
<i>Brose N.A., Inc., et al. v. UUSI, Inc.</i> , IPR2014-00417 (P.T.A.B. July 20, 2015)	11, 15
<i>Flir Sys, Inc. v. Leak Surveys, Inc.</i> , IPR2014-00411 (P.T.A.B. Sept. 3, 2015).....	2, 10, 11, 12, 15
<i>Honeywell Int’l Inc. v. Int’l Controls & Measurements Corp.</i> , IPR2014-00219 (P.T.A.B. Jan. 5, 2015).....	11
<i>Nichia Corp. v. Emcore Corp.</i> , IPR2012-00005 (P.T.A.B. Feb. 11, 2014)	2
 Rules/Other	
37 C.F.R. § 42.20	2
37 C.F.R. § 42.23	11, 13, 14

I. INTRODUCTION

Petitioner Cisco Systems, Inc. (“Cisco”) opposes Patent Owner Centripetal Networks, Inc.’s (“Centripetal”) motion to exclude because Centripetal’s arguments are both factually unsupported and improperly raised in this type of motion. First, Centripetal seeks to exclude eight exhibits on authenticity grounds. However, Centripetal fails to even mention the substantial evidence of authenticity put forth by Cisco that well exceeds the standard of Federal Rule of Evidence (“FRE”) 901. These eight references were authenticated.

Second, Centripetal asserts that two declarations (EX1020 and EX1027) introduce “new evidence and arguments for the first time” in support of Cisco’s Reply (Paper 17). Centripetal ignores that both declarations properly respond to the arguments in the Patent Owner Response (Paper 15) and supporting declaration of Centripetal’s expert (EX2004). Moreover, the Board has been clear that it is improper to raise assertions about “new evidence and arguments” in a motion to exclude – which is intended to focus on evidentiary issues about admissibility.

Third, Centripetal argues that the primary prior art reference (Cisco’s ACNS Guide, EX1008) should be excluded because Cisco has not established its “public accessibility.” Again, Centripetal overlooks both the evidence of record demonstrating public accessibility and the Board’s prior rulings that this is a substantive issue that is improperly raised in a motion to exclude.

II. ARGUMENT

A. Legal Standard

The moving party has the burden of proof in a motion to exclude. *See* 37 C.F.R. § 42.20(c); *Flir Sys, Inc. v. Leak Surveys, Inc.*, IPR2014-00411, Paper 113, pp. 3, 5, 8 (P.T.A.B. Sept. 3, 2015). Exhibits filed in an IPR are considered to be “in evidence.” *Flir*, IPR2014-00411, Paper 113 at 5, 8, 13. Thus, in considering any motion to exclude, the Board has explained that “[t]here is a strong public policy for making all information filed in a non-jury, quasi-judicial administrative proceeding available to the public, especially in an *inter partes* review which determines the patentability of claims in an issued patent.” *Nichia Corp. v. Emcore Corp.*, IPR2012-00005, Paper 68, p. 59 (P.T.A.B. Feb. 11, 2014). “It is better to have a complete record of the evidence submitted by the parties than to exclude particular pieces.” *Id.*

“A motion to exclude must explain why the evidence is not admissible (e.g., relevance or hearsay) but may not be used to challenge the sufficiency of the evidence to prove a particular fact.” *Flir*, IPR2014-00411, Paper 113 at 4 (citing Office Trial Practice Guide, 77 Fed. Reg. at 49765, 49767 (Aug. 14, 2012)). Further, a motion to exclude must “[i]dentify where in the record the evidence sought to be excluded was relied upon by the opponent.” *Id.* Moreover, the motion must

“[a]ddress objections to exhibits in numerical order.” *Id.* Centripetal does not meet any of these requirements.

B. Exhibits 1010-1011, 1022-1023, 1025 and 1028-1030 Should Not Be Excluded.

Centripetal incorrectly argues that Exhibits 1010-1011, 1022-1023, 1025 and 1028-1030 should be excluded because these exhibits were not authenticated under FRE 901. Paper 24, p. 2. The pertinent question of authenticity is whether the proffered evidence “is what the proponent claims it is.” FRE 901(a). A document may be authenticated by “the testimony of a witness with knowledge ... that an item is what it is claimed to be.” FRE 901(b)(1). Further, a document may be authenticated by its “distinctive characteristics,” including “appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all of the circumstances.” FRE 901(b)(4).

Cisco submitted evidence that authenticated each of the exhibits identified by Centripetal. For example, Cisco provided evidence to authenticate Exhibit 1010 in paragraphs 137-143 of the initial declaration of Cisco’s expert Dr. Kevin Jeffay (EX1004). Dr. Jeffay explained that Exhibit 1010 is “[t]he HTTP 1.1 Specification[, which] is a written publication, titled ‘Hypertext Transfer Protocol – HTTP 1.1,’ and [it] lists its copyright date as June, 1999 and publication date to the public in June, 1999.” EX1004, ¶137. Dr. Jeffay explained that Exhibit 1010 is an industry-standard specification for HTTP 1.1, that he has personal knowledge about it, and

how copies of Exhibit 1010 could be obtained by himself and others. *Id.*, ¶¶138-143, 190, 212; *see also* Paper 1 at 54. His testimony therefore authenticates Exhibit 1010 under FRE 901(b)(1). Further, Exhibit 1010 corroborates the testimony of Dr. Jeffay because (as shown in the annotated excerpt below) Exhibit 1010 has distinctive characteristics that authenticate it, including notations that it is a “Request for Comments” (“RFC”) from the “Network Working Group” that “specifies an Internet standards track protocol for the Internet community.” EX1010 at 1. Further, the title, copyright date and substantive content of Exhibit 1010 support Dr. Jeffay’s testimony. *Id.* As such, Exhibit 1010 is also authenticated under FRE 901(b)(4).

Network Working Group
Request for Comments: 2616
Obsoletes: 2068
Category: Standards Track

R. Fielding
UC Irvine
J. Gettys
Compaq/W3C
J. C. Mogul
Compaq
H. Frystyk
W3C/MIT
L. Masinter
Xerox
P. Leach
Microsoft
T. Berners-Lee
W3C/MIT
June, 1999

Hypertext Transfer Protocol -- HTTP/1.1

Status of this Memo

This document specifies an Internet standards track protocol for the Internet community, and requests discussion and suggestions for improvements. Please refer to the current edition of the “Internet Official Protocol Standards” (STD 1) for the standardization state and status of this protocol. Distribution of this memo is unlimited.

Copyright Notice

Copyright (C) The Internet Society (1999). All Rights Reserved.

EXHIBIT 1010, p. 1 (annotated)

In addition, Exhibit 1010 can be authenticated under FRE 901(b)(8) because it qualifies as an ancient document that “is in a condition that creates no suspicion about its authenticity,” “was in a place where, if authentic, it would likely be (i.e., the IETF website according to Dr. Jeffay (*see* EX1004, ¶137)), and has a copyright date showing it to be “at least twenty years old” (*see* EX1010 at 1).

Cisco also provided evidence to authenticate Exhibit 1011 (the DiffServ Specification) in paragraphs 129-136 of Dr. Jeffay’s initial declaration. EX1004. Dr. Jeffay noted the title of the DiffServ Specification, that it has a copyright date, that he has personal knowledge about it, and how copies of Exhibit 1011 could be obtained by himself and others. *Id.* His testimony therefore authenticates Exhibit 1011 under FRE 901(b)(1). Further, Exhibit 1011 corroborates the testimony of Dr. Jeffay, and can be authenticated under FRE 901(b)(4), because it has distinctive characteristics that authenticate it, including notations that it is a RFC from the Network Working Group that “provides information for the Internet community,” as well as the title and copyright date. EX1011 at 1. In addition, Exhibit 1011 can be authenticated under FRE 901(b)(8) because it qualifies as an ancient document that “is in a condition that creates no suspicion about its authenticity,” “was in a place where, if authentic, it would likely be (i.e., the IETF website according to Dr. Jeffay (*see* EX1004, ¶129)), and has a copyright date showing it to be “at least twenty years old” (*see* EX1011 at 1).

Exhibit 1022 is a Broad Agency Announcement (“BAA”) document relating to Computer Network Defense from the Office of Naval Research of the Department of the Navy. Exhibit 1022 is authenticated under FRE 901(b)(4) because it has distinctive characteristics that authenticate it, including the emblem of the Office of Naval Research and a first sentence that explains that “[t]his publication constitutes a Broad Agency Announcement (BAA) as contemplated in Federal Acquisition Regulation (FAR) 6.102(d)(2).” EX1022, p. 1. Exhibit 1022 also list a number of “Point(s) of Contact” for the Office of Naval Research that support that the document is what it purports to be.” *Id.* at 5-6. The above information also demonstrates that Exhibit 1022 is authenticated as a public record under FRE 901(b)(7).

Exhibit 1023 is a “List of HTTP header fields” from the Wikipedia webpage. Exhibit 1023 is authenticated under FRE 901(b)(4) because it has distinctive characteristics that authenticate it, including the above-described title, the web address from which it was downloaded, and the date on which it was downloaded. EX1023. Further, Dr. Jeffay provides the web address from which Exhibit 1023 can be downloaded in his reply declaration (*see* EX1020, ¶16), and thus Exhibit 1023 can also be authenticated under FRE 901(b)(1).

Exhibit 1025 is an RFC for “The Syslog Protocol.” It can be authenticated under FRE 901(b)(4) because it has distinctive characteristics that authenticate it, including notations that it is a Request for Comment (“RFC”) from the Network

Working Group that “specifies an Internet standards track protocol for the Internet community, and requests discussion and suggestions for improvement.” EX1012, p. 1. Exhibit 1025 further explains that “[t]his document describes the syslog protocol, which is used to convey event notification messages.” *Id.*, p. 2. Exhibit 1025 also provides a title and copyright date to help authenticate it. *Id.*, p. 1.

Exhibit 1028 is a copy of the Release Notes for the Cisco ACNS Guide prior art reference. Exhibit 1028 is authenticated under FRE 901(b)(1) by the declaration testimony of Eli Fuchs in his initial declaration (EX1012, ¶¶9-10, 13) and his supplemental declaration (EX1027, ¶¶2-3). Mr. Fuchs explains what the Release Notes are, and he also states that he has personal knowledge of them. *Id.* Further, Exhibit 1028 corroborates the testimony of Mr. Fuchs, and can be authenticated under FRE 901(b)(4), because it has distinctive characteristics that authenticate it, including the title “Release Notes for Cisco ACNS Software, Release 5.5.1,” a notation at the bottom of the page indicating it comes from “Cisco Systems,” and a copyright date. EX1028 at 1. Exhibit 1028 also states that “[t]hese release notes contain information about the Cisco Application and Content Networking System (ACNS) 5.5.1 software.” *Id.*

Exhibits 1029 and 1030 are two documents from the Internet Archive relating to the above-discussed Release Notes. They are authenticated under FRE 901(b)(1) by the declaration testimony of Jeffrey D. Blake explaining that he downloaded them

from searches of the Internet Archive. *See* EX1031. Exhibits 1029 and 1030 are also authenticated under FRE 901(b)(4) because they have distinctive characteristics, including the web addresses from which they were downloaded and the date on which they were downloaded. EX1029; EX1030.

C. Exhibit 1027 Should Not Be Excluded.

Centripetal seeks to exclude the supplemental declaration of Eli Fuchs (EX1027) based on the inaccurate assertion that it introduces “new evidence and arguments for the first time with its Petitioner’s Reply.” Paper 24, p. 2.¹ The facts demonstrate that Centripetal is wrong. The supplemental Fuchs declaration relates to two topics. First, Dr. Fuchs addresses Release Notes relating to the ACNS Guide that have been filed as Exhibit 1028. Dr. Fuchs discussed these Release Notes in his initial declaration filed with the Petition because the Release Notes help demonstrate the public accessibility of the ACNS Guide (EX1008). *See* EX1012, ¶¶9-10, 13. However, the Release Notes were inadvertently left out of the exhibits filed with the Petition and initial Fuchs declaration.

The Patent Owner Preliminary Response filed by Centripetal did not identify that the Release Notes had been left out of the exhibits filed with the Petition, nor

¹ Cisco is mindful of the guidance in the Trial Practice Guide to address the exhibits “in order” (*see* 77 Fed. Reg. at 49767). However, Cisco responds to them in the order presented in Centripetal’s motion in the interest of clarity.

did the Patent Owner Preliminary Response challenge the public accessibility of the ACNS Guide. *See* Paper 7. Further, Centripetal never mentioned the Release Notes in its objections to the Petition evidence, despite the fact that Centripetal specifically discussed the initial Fuchs declaration and the ACNS Guide in those objections. *See* Paper 10 at 2. Instead, Centripetal first raised a question about whether the Release Notes had been inadvertently left out of the filed exhibits during the deposition of Mr. Fuchs on June 28, 2019. *See* EX2021 at 29:15-31:20. Centripetal's Patent Owner Response (filed July 5, 2019) then raised for the first time an argument about the public accessibility of the ACNS Guide, including an incorrect assertion that the only evidence discussed in the Fuchs declaration was the ACNS Guide and failing to mention the discussion of the Release Notes. *See* Paper 15 at 19-22.

The discussion of the Release Notes in Paragraphs 2-5 of the supplemental Fuchs declaration is provided in reply to the public accessibility argument in the Patent Owner Response. Mr. Fuchs explains that the Release Notes filed as Exhibit 1028 are the Release Notes discussed in his initial declaration but inadvertently left out of the exhibits filed with the Petition. EX1027, ¶¶2-3. He also replies to the Patent Owner Response by discussing specific information in the Release Notes that supports the public accessibility of the ACNS Guide – which Mr. Fuchs also addressed in his initial declaration. *Compare* EX1027, ¶¶4-5 with EX1012, ¶¶9-10, 13.

The second topic in the supplemental Fuchs declaration is also in direct reply to the Patent Owner Response. That Response cited deposition testimony from Mr. Fuchs that the Content Engine disclosed in the ACNS Guide did not perform security analysis. *See* Paper 15 at 23. Paragraph 6 of the supplemental Fuchs declaration replies by addressing “whether the ACNS Guide disclosed that its Content Engine performed any security analysis.” EX1027. Mr. Fuchs explains that he “want[s] to correct that answer” from his deposition. EX1027, ¶6. He states that he “had the opportunity to further review the ACNS Guide, and it discloses that, while the main function of ACNS is content delivery, the Content Engine can also perform security analysis.” *Id.* The supplemental declaration goes on to cite the portions of the ACNS Guide that relate to security analysis. *Id.* This is testimony properly raised in reply to arguments made in the Patent Owner Response. It is not a new argument or new evidence.

Indeed, in *Flir*, the Board specifically explained that the IPR process is set up to allow just these types of reply arguments to Centripetal’s opposition to the Petition:

The rules authorize a reply. *The object of a reply is to address arguments made in an opposition.* While it may be true that Petitioner theoretically could have presented the reply arguments and evidence with the Petition, it is

also true that *a Petitioner does not have to anticipate all arguments which might be made in an opposition*. To some extent, the relief sought by Patent Owner would in effect mean that a petitioner could never file a reply. Such a position is inconsistent with the procedures established by the rules, including authorization of reply on the merits.

Flir, IPR2014-00411, Paper 113 at 11-12 (emphasis added); *see also* 37 C.F.R. § 42.23. Moreover, the current IPR procedures mitigate against exclusion even more than those in place at the time of *Flir* because Centripetal was able to address the supplemental Fuchs declaration in the Patent Owner Sur-reply. *See* Paper 22 at 24-26. Further, Centripetal can also address the supplemental Fuchs declaration at the oral hearing it requested. *See* Paper 23. As such, Centripetal should not be heard to complain.

In addition, the Board has been clear that “[m]otions to exclude are for evidentiary objections previously raised on the record,’ and are ‘not a proper vehicle for use by a party to raise the issue of a reply exceeding the proper scope.’” *Brose N.A., Inc., et al. v. UUSI, Inc.*, IPR2014-00417, Paper 49, pp. 25-26 (P.T.A.B. July 20, 2015) (quoting *Honeywell Int’l Inc. v. Int’l Controls & Measurements Corp.*, IPR2014-00219, Paper 38, p. 2 (P.T.A.B. Jan. 5, 2015)).

D. Exhibit 1008 Should Not Be Excluded.

Centripetal also argues the substantive issue of the public accessibility of the ACNS Guide prior art reference (EX1008) in its motion to exclude. Paper 24, pp. 2-3. However, “[a] motion to exclude is the wrong vehicle to challenge public availability, which is a substantive legal issue that goes to the sufficiency of the evidence, not to admissibility at issue here.” *Arista Networks, Inc. v. Cisco Sys., Inc.*, IPR2016-00303, Paper 53, pp. 9-10 (P.T.A.B. May 25, 2017); *Flir*, IPR2014-00411, Paper 113 at 9 (“Furthermore, where a patent owner’s motion to exclude raises the same issue (i.e., authenticity based on an alleged lack of accessibility) as an issue required to be proved by a petitioner as part of a case-in-chief (i.e., accessibility), there is no need to further consider that issue in connection with a motion to exclude.”); *see also* 77 Fed. Reg. 48,419, 48,767 (Aug. 14, 2012) (Aug. 14, 2012) (“A motion to exclude ... may not be used to challenge the sufficiency of the evidence to prove a particular fact.”).

This is simply the wrong vehicle in these proceedings for the Board to address the public accessibility of the ACNS Guide. Cisco demonstrated the public accessibility of the ACNS Guide in its Petition (Paper 1, p. 18; EX1004, ¶127), as evidenced by the ACNS Guide itself (EX1008), the initial Fuchs declaration (EX1012), and the Release Notes (EX1028). As discussed above in Section II.C, Cisco also addressed the public accessibility of the ACNS Guide in its Reply to

Centripetal's arguments concerning the public accessibility of the ACNS Guide, and the supplemental Fuchs declaration properly supported Cisco's Reply. *See* Paper 17, pp. 3-6; EX1027, ¶¶2-5. Centripetal then had the opportunity to address public accessibility in its Sur-reply. The parties can further discuss the issue at the oral hearing, if the Board desires. There is simply no basis for using a motion to exclude the ACNS Guide to argue the substantive issue of public accessibility, particularly when Cisco has demonstrated clearly that it was publicly accessible. The ACNS Guide (EX1008) should not be excluded.

E. Exhibit 1020 Should Not Be Excluded.

Finally, Centripetal makes a half-hearted argument that the declaration of Cisco's expert Dr. Kevin Jeffay (EX1020) submitted in support of Cisco's Reply should be excluded. Paper 24, pp. 3-4. Centripetal is wrong. The Jeffay declaration is a proper reply to the declaration of Centripetal's expert Dr. Michael Goodrich, which was submitted in support of the Patent Owner Response (Paper 15). *See* 37 C.F.R. § 42.23(b).

Centripetal baldly asserts that the Jeffay declaration (EX1020) "purports to authenticate references filed with the Petition and should have been served as supplemental evidence in response to Patent Owner's objections." Paper 24, p. 3. But Centripetal cites no support for its assertion. Centripetal does not identify a single paragraph of the Jeffay declaration that purports "to authenticate references

filed with the Petition.” This contradicts the requirements set out in the Trial Practice Guide that a motion to exclude must “[i]dentify where in the record the evidence sought to be excluded was relied upon by the opponent.” 77 Fed. Reg. at 49767. Moreover, the reply Jeffay declaration only authenticates documents raised in reply to the Goodrich declaration – not references filed with the Petition.

Centripetal also argues that the Jeffay declaration (EX1020) should be excluded because it seeks to “introduce new evidence and arguments” in support of Cisco’s Reply. Paper 24, pp. 3-4. That is not correct. The Jeffay declaration directly responds to the Goodrich declaration (EX2004). As a prime example, Dr. Goodrich raises a new argument that the ACNS Guide analyzes reassembled messages or transactions, and thus cannot act on a packet-by-packet basis, as required by the claims of the ’213 Patent. *See, e.g.*, EX1020, ¶¶32-35, 59-61, 67-70 and 74085. Dr. Jeffay replies to that new argument in his declaration and conclusively demonstrates that the ACNS Guide does teach packet-by-packet analysis, as well as packet digest logging. *Id.* This is entirely proper in a reply declaration under 37 C.F.R. § 42.23(b).

Further, Dr. Goodrich’s declaration provides his analysis of the claim constructions adopted by the Board in the Institution Order (*see* Paper 8 at 7-15). *See* EX1020, ¶¶22-26. Dr. Jeffay, in turn, replies to Dr. Goodrich’s claim construction arguments. *Id.* In addition, Dr. Goodrich discusses purported objective indicia of non-obviousness, including long-felt need and industry praise, which is

the first time this purported evidence was raised in this proceeding. *See* EX1020, ¶¶94-107. Dr. Jeffay properly replies to these objective indicia arguments in Exhibit 1020. *Id.*

As the Board noted in *Flir*, “The object of a reply is to address arguments made in an opposition.” IPR2014-00411, Paper 113 at 11-12. Dr. Jeffay replied point-by-point to the arguments made by Dr. Goodrich. That is entirely proper. Indeed, the *Belden Inc. v. Berk-Tek LLC* case cited by Centripetal in its motion specifically approved of such an expert declaration in support of a Reply in an IPR. *See* 805 F.3d 1064, 1080-81 (Fed. Cir. 2015). Simply put, the Jeffay declaration is part of a proper reply, and it should not be excluded. *See Brose N.A.*, IPR2014-00417, Paper 49 at 25-26 (explaining that a motion to exclude is “not a proper vehicle for use by a party to raise the issue of a reply exceeding the proper scope” (citation omitted)).

III. CONCLUSION

For the foregoing reasons, Cisco respectfully requests that the Board deny Centripetal’s motion to exclude.

Respectfully submitted,

Date: December 4, 2019

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CERTIFICATE OF SERVICE

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

<i>Date of service</i>	December 4, 2019
<i>Manner of service</i>	Electronic Mail (jhannah@kramerlevin.com ; jprice@kramerlevin.com ; mhlee@kramerlevin.com ; bwright@bannerwitcoff.com)
<i>Documents served</i>	PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE PETITIONER'S EVIDENCE
<i>Served upon</i>	James Hannah Jeffrey H. Price Michael Lee Bradley C. Wright (Counsel for Patent Owner)

Date: December 4, 2019

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