

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CISCO SYSTEMS, INC.,
Petitioner,

v.

CENTRIPETAL NETWORKS, INC.,
Patent Owner.

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

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

I. INTRODUCTION

Patent Owner's Motion to Exclude (Paper No. 24, "Motion") should be granted for the reasons set forth in the Motion and below.

II. ARGUMENT

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

Petitioner's arguments that it submitted evidence to authenticate each of Exhibits 1010-1011, 1022-1023, 1025, 1028-1030 is without merit. As a proponent of evidence, Petitioner bears the burden of establishing that the proffered evidence, Exhibits 1010-1011, 1022-1023, 1025, 1028-1030, meets the requirements of FRE 901. *See Flir Systems, Inc. v. Leak Surveys, Inc.*, IPR2014-00411, Paper 113 at 5 (P.T.A.B. Sep. 3, 2015). But Petitioner has failed to provide any evidence to support of finding that the documents are what Petitioner claims they are, and thus 1010-1011, 1022-1023, 1025, 1028-1030 are inadmissible.

Petitioner's arguments regarding Exs. 1010 and 1011 are unpersuasive and as a result these exhibits should be excluded. Petitioner attempts to authenticate Exs. 1010 and 1011 under FRE 901(b)(1) with the testimony of Dr. Jeffay. However, Dr. Jeffay relies on information displayed on the face of these exhibits without providing any explanation demonstrating that these exhibits are what they "claimed to be" under FRE 901(b)(1). Petitioner further incorrectly argues that Exs. 1010 and 1011 are authenticated because they have "distinctive

characteristics” under FRE 901(b)(4). Petitioner identifies the title of both documents and other information on the face of these exhibits as “distinctive characteristic[s].” However, Petitioner fails to explain why this plain text on the front page of these documents are “distinctive characteristics” that authenticate the exhibits. Finally, while Petitioner also alleges that these exhibits are ancient documents under FRE 901(b)(8) because they facially show a copyright date that is at least twenty years old, the copyright date does not properly establish when the document was created or last updated.

Petitioner also fails to authenticate Exhibit 1022. Petitioner incorrectly asserts that Exhibit 1022 has “distinctive characteristics” that authenticate it under FRE 901(b)(4) by pointing to plain text on the face of the exhibit, including an emblem and a statement that purports to define the document. However, as explained above, Petitioner has not sufficiently shown why plain text on the face of the document is a “distinctive characteristic.” Further, Petitioner alleges that under FRE 901(b)(7), Exhibit 1022 is a public record. Paper 25 at 6. FRE 901(b)(7) allows for evidence about public records that demonstrate “(A) a document was recorded or filed in a public office as authorized by law; or (B) a purported public record or statement is from the office where items of this kind are kept. However, Petitioner fails to show that either of these conditions are met and merely points out that this exhibit purports to be a document from the Department of the Navy

without showing that it was actually filed or recorded with the Navy or that the Navy keeps these types of documents.

Likewise, Petitioner also fails to authenticate Exhibit 1023. Petitioner incorrectly asserts that Exhibit 1023 has “distinctive characteristics” such as the title of the document, the web address, and the date on which it was downloaded. Paper 25 at 6. However, as argued above, plain text on the face of a document cannot persuasively be considered a “distinctive characteristic.” Further, Petitioner cannot authenticate Ex. 1023 under FRE 901(b) by simply providing a link to a Wikipedia page without providing testimony that the exhibit is what it claims to be.

With regard to Exhibit 1025, Petitioner half-heartedly attempts to authenticate this exhibit using the plain text on the face of the document by claiming this information is a “distinctive characteristic” of the document. Plain text on the face of a document is not a “distinctive characteristic” as discussed above.

Petitioner fails to authenticate Exhibit 1028 using the declaration of Mr. Fuchs under FRE 901(b)(1) because Mr. Fuchs cites Exhibit 1028 for the truth of the matter asserted in the exhibit (that the ACNS guide was released on a certain date), rather than as evidence about whether Exhibit 1028 is an authentic document. Ex. 1027 at 2-3. Further, as discussed above, Petitioner cannot

authenticate Exhibit 1027 by asserting that plain text on the face of the document represent “distinctive characteristics.” Paper 25 at 7.

Finally, Petitioner fails to authenticate Exhibits 1029 and 1030 using the declaration of Mr. Fuchs. In fact, while Petitioner claims that Mr. Fuchs properly authenticated Exhibit 1030, Mr. Fuchs' declaration does not discuss Exhibit 1030 at all, let alone attempt to authenticate Exhibit 1030. *See* Ex. 1027. With regard to Exhibit 1029, the Fuchs declaration simply states “[t]he results of the Internet Archive search can be found at Exhibit 1029.” *Id.* at 3. This statement is clearly not sufficient to authenticate Exhibit 1029 under FRE 901(b)(1) as testimony of a witness with knowledge.

B. The Board Should Exclude Exhibit 1027

The Supplemental Declaration of Eli Fuchs (Exhibit 1027), filed with Petitioner's Reply should be excluded because it is untimely filed as evidence to support Petitioner's *prima facie* case of invalidity. *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.”).

First, Petitioner filed Exhibit 1027 to belatedly introduce new evidence in the form of Mr. Fuchs' personal opinion to support its *prima facie* case. Mr. Fuchs “worked on the team that created ACNS system that is the subject of [Exhibit

1008]” as a “Senior Engineering Manager.” Ex. 1012 at 2. Petitioner submitted the first declaration of Eli Fuchs with the Petition to establish Mr. Fuchs’ personal knowledge about the public accessibility of Ex. 1008. However, during the deposition of Eli Fuchs, Mr. Fuchs provided damaging testimony to Petitioner’s *prima facie* case when he testified that the component Petitioner alleges is the claimed “packet security gateway” does not perform any security analysis and does not look at any individual packets. Ex. 2021 at 15:2-15.

In an attempt to walk-back this damaging testimony, Petitioner filed Ex. 1027, the supplemental declaration of Eli Fuchs, along with Petitioner’s Reply so that Mr. Fuchs could recant his own deposition testimony and introduce new evidence in the form of a new personal opinion to support Petitioner’s *prima facie* case of invalidity. *See* Ex. 1027 at 2 (“I submit this supplemental declaration...to clarify some of my previous deposition testimony”), 4 (“I was asked during my deposition whether the ACNS Guide disclosed that its Content Engine performs any security analysis. I responded, ‘it does not.’... I want to correct that answer.”)¹. Because Mr. Fuchs was a Senior Engineering Manager at Cisco who worked on ACNS, his supplemental declaration purports to give his personal

¹ Ex. 1027 mischaracterizes the question asked of Mr. Fuchs because Mr. Fuchs was not asked what the “ACNS Guide disclosed.” Mr. Fuchs was asked “[d]oes the content engine perform any security analysis on the request?” and he answered “it does not.” As the former Senior Engineer Manager who worked on ACNS, Mr. Fuchs was answering based on his personal knowledge.

opinion—rather than a statement that he misspoke or misread Ex. 1008—and is therefore new evidence supporting Petitioner's *prima facie* case. Indeed, if Mr. Fuchs' personal opinion stating that the Content Engine performs security analysis was not new evidence, Petitioner would not have included this new information in a supplemental declaration. Accordingly, Petitioner's argument that Ex. 1027 does not include new evidence is without merit.

Second, Petitioner filed Exhibit 1027 as a means to circumvent the requirement of 37 CFR § 42.64(b) to provide supplemental evidence in response to Patent Owner's objections to evidence. *See* Ex. 1027 at 2-4 (introducing Exs. 1028-1029 as evidence of the public accessibility of Ex. 1008). Specifically, Petitioner inappropriately filed Ex. 1027 to introduce supplemental evidence Exs. 1028-1029 in an effort to establish public accessibility of Ex. 1008. This is improper and Exs. 1027 and 1028-1029 should be excluded. *See Toshiba Corporation v. Optical Devices, LLC*, IPR2014-01447, Paper 34 at 44-47 (P.T.A.B. Mar. 9, 2016) (Excluding evidence not submitted in compliance with 37 CFR § 42.64(b)).

C. The Board Should Exclude Exhibit 1008

Petitioner has failed to provide sufficient evidence to support a finding that Exhibit 1008 is what Petitioner claims it is, and thus, Exhibit 1008 is inadmissible. Specifically, there is insufficient evidence to support a finding that Exhibit 1008 is

a document that was publically available at the time Petitioner purports it was available. Petitioner has relied on the declaration of Eli Fuchs to establish that Exhibit 1008 is a document available to the public as of the critical date of the '213 Patent. Ex. 1012. However, Mr. Fuchs admitted that he did not provide any evidence that Ex. 1008 was in fact available to the public prior to the critical date. 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]; is that correct? And your testimony? A. Yes.).

Patent Owner timely objected to Exhibit 1008 as unauthenticated and Petitioner should have filed supplemental evidence in response to Patent Owner's objections within 10 business days of service of the objection. *See* Paper 10 at 2; 37 CFR § 42.64(b)(1). However, Petitioner failed to serve supplemental evidence. In an effort to belatedly supplement evidence and attempt to establish the public accessibility of Ex. 1008, Petitioner filed the supplemental declaration of Eli Fuchs (Ex. 1027), which relied upon belatedly filed Exhibits 1028-1029 to establish the public accessibility of Ex. 1008. Because Ex. 1008 has not been properly authenticated, and Exs. 1028-1029 are not admissible, Ex. 1008 should be excluded.

D. The Board Should Exclude Exhibit 1020

Petitioner incorrectly argues that Ex. 1020 was submitted in response to the Declaration of Dr. Goodrich and does not provide new evidence or arguments to support of Petitioner's *prima facie* case of invalidity. This is demonstrably false as Petitioner filed Ex. 1020 to introduce an *eleven page* motivation to combine argument after Petitioner only provided a cursory *one page* motivation combine section in the Petition and supporting declaration of Eli Fuchs. *Compare* Petition at (iii) and Ex. 1004 at (ii) with Ex. 1020 at (i). Using Ex. 1020 to supplement Petitioner's *prima facie* invalidity case with a lengthy motivation to combine argument is a clear attempt to make up for deficiencies in Petitioner's case in chief. *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.”). Accordingly, Ex. 1020 should be excluded.

III. CONCLUSION

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

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

Respectfully submitted,

Dated: December 11, 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 December 11, 2019

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