

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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PALO ALTO NETWORKS, INC.,  
Petitioner,

v.

FINJAN, INC.,  
Patent Owner.

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Case IPR2015-01974<sup>1</sup>  
U.S. Patent No. 7,647,633

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

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<sup>1</sup> Case IPR2016-00480 has been joined with this proceeding.

Pursuant to 37 C.F.R. § 42.64, Patent Owner Finjan, Inc. ("Patent Owner") hereby moves to exclude the following evidence submitted in this proceeding by Petitioner Palo Alto Networks, Inc. and Blue Coat Systems, Inc. ("Petitioner"): 1002, 1004, 1005, 1006, 1007, 1008, 1009, 1041, 1082, 1092, 1093, 1095, 1099, 1101, 1035. The Board should grant Patent Owner's Motion to Exclude Evidence for the reasons set forth below.

Patent Owner timely raised the objections set forth in this Motion to Exclude. On April 12, 2016, Patent Owner timely filed its objections to the evidence in Petitioner's Petition. Paper 10 (objecting to Exs. 1002, 1004, 1005, 1006, 1007, 1008, 1009, 1041, 1082, 1092, 1093, 1095). On November 10, 2016, Patent Owner timely filed its objections to the evidence in Petitioner's Reply. Paper 33 (objecting to Exs. 1099, 1101, 1035).

**I. The Board Should Exclude Dr. Rubin's Claim Construction Testimony (Ex. 1002)**

The testimony of Dr. Rubin regarding claim construction (¶¶ 79-93) should be excluded because Petitioner characterized those opinions as irrelevant and did not permit Patent Owner to question Dr. Rubin regarding those opinions, rendering them irrelevant, conclusory and unreliable. Fed. R. Evid. 702; Fed. R. Evid. 401; Fed. R. Evid. 402; *Intellectual Ventures Mgmt., LLC v. Xilinx, Inc.*, Case IPR2012-00020, Paper 34 at 10 (P.T.A.B. Feb. 11, 2014) (stating that an expert's "conclusory testimony is entitled to little or no weight."); *Tietex Int'l, Ltd. v.*

*Precision Fabrics. Grp., Inc.*, Case IPR2014-01248, Paper 39 at 17 (P.T.A.B. Jan. 27, 2016) (a lack of objective support for an expert opinion “may render the testimony of little probative value in [a patentability] determination.”) (quoting *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 294 (Fed. Cir. 1985).

Specifically, Petitioner argued during the deposition of Dr. Rubin that his opinions on claim construction, in particular those regarding Claim 14 of the ‘633 Patent, were outside the scope of his declaration and irrelevant. Ex. 2022 at 93:7-94:12, 107:4-11. Petitioner specifically instructed Dr. Rubin not to answer questions regarding his opinion on claim construction. Ex. 2022 at 91:13-15. Because of Petitioner’s direction to Dr. Rubin not to answer questions regarding claim construction and objections to his opinions as being beyond the scope of the Petition and his declaration, Dr. Rubin’s opinions regarding claim construction should be given no weight. *Praxair Distribution, Inc. v. INO Therapeutics LLC*, IPR2015-00529, Paper 33 at 2 (P.T.A.B. Dec. 22, 2015) (declarations are accorded little or no weight if there has not been a fair opportunity to challenge the testimony). To provide a proper invalidity opinion, an expert “must identify each claim element, state the witnesses’ interpretation of the claim element, and explain in detail how each claim element is disclosed in the prior art reference.” *Schumer v. Lab. Computer Sys., Inc.*, 308 F.3d 1304, 1315-1316 (Fed. Cir. 2002). Thus, Dr.

Rubin's testimony should be excluded because Petitioner's refusal to allow Dr. Rubin to answer questions regarding claim construction render his invalidity analysis improper. Moreover, Dr. Rubin's declaration should be given no weight because Petitioner argues (via its objections) that Dr. Rubin did not provide a claim construction opinion in his declaration.

Accordingly, Dr. Rubin's testimony should be given no weight and excluded in these proceedings. At the very least, the Board should exclude paragraphs 79-93 of Exhibit 1002 as unreliable.

## **II. The Board Should Exclude the Grenier Declaration (Ex. 1005)**

The Board should exclude the Grenier Declaration (Ex. 1005) for lack of personal knowledge, authentication and relevance. Fed. R. Evid. 602, 901, 401, 402. Mr. Grenier purports to authenticate a version of Poison Java that he obtained from the IEEE Xplore website in *September 2015*. However, Mr. Grenier admitted that the earliest this version of Poison Java could have been publicly available is at least May 2000 when IEEE Digital Explore was launched. Ex. 2023, Grenier Tr. at 34:12 – 18. A May 2000 (or later) version of Poison Java is irrelevant to these proceedings, as Petitioner is relying on a purported *August 31, 1999* version of Poison Java. Petition at 4. The May 2000 version is after the priority date of all challenged claims, as admitted by Petitioner. *Id.* Therefore, Mr.

Grenier's testimony has no relevance to the prior art at issue, and should be excluded. Fed. R. Evid. 401, 402.

Mr. Grenier's Declaration also should be excluded for lack of foundation and personal knowledge. Specifically, Mr. Grenier admits he was never involved with the printed version of the IEEE magazine (alleged to be the source of Poison Java), and he based his statement that the Poison Java document was available as of August 31, 1999 on a magazine that Petitioner has not produced. Ex. 2023, Grenier Tr. at 33:5–34:11. Accordingly, Mr. Grenier's testimony should be excluded under FRE 602 as not based on "personal knowledge of the matter."

### **III. The Board Should Exclude Ex. 1006 ("Author's Webpage")**

The Board should exclude the Author's Webpage based on lack of authentication, because it is hearsay, and because it is not relevant. Fed. R. Evid. 901, 801, 802, 401, 402, 403. Specifically, Petitioner relies on a date on Ex. 1006 to attempt to establish that the Shin Document (Ex. 1009) was publicly accessible. Paper 1 at 5; Paper 31 at 9. However, such a date lacks independent authentication and cannot demonstrate that the Shin Document was publicly accessible. Fed. R. Evid. 901; *see, e.g., TRW Automotive U.S. LLC v. Magna Elecs. Inc.*, Case IPR2014-01347, Paper 25 at 5–12 (P.T.A.B. Jan. 6, 2016). Further, the alleged publication date is hearsay because Petitioner relies on the date to prove the truth of the matter asserted—that the Shin Document was publicly accessible as of 1998.

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