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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Inter Partes Review No. 2015-01979[1]
U.S. Patent No. 8,141,154

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**PETITIONER'S MOTION TO EXCLUDE
EVIDENCE UNDER 37 C.F.R. § 42.64(c)**

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[1] Case IPR2016-00919 has been joined with this proceeding.

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Pursuant to 37 C.F.R. § 42.64(c), Petitioner moves to exclude Exhibits 2009 and 2011-2013 submitted by Patent Owner. Petitioner objected to these exhibits on July 19, 2016. (Paper 23 at 3-5 (objections to each exhibit based on relevance, hearsay, and lack of authentication).)

I. THE KERNEL32.DLL WEBOPEDIA DEFINITION (EX. 2009) SHOULD BE EXCLUDED BECAUSE IT IS IRRELEVANT AND IS INADMISSIBLE HEARSAY

Petitioner moves to exclude Exhibit 2009 because it is irrelevant and hearsay, with no applicable hearsay exception. Patent Owner relies on Exhibit 2009 in the Declaration of Dr. Medvidovic. (Ex. 2002 at ¶¶ 65, 93.)

Exhibit 2009 is a Webopedia dictionary entry relied on by Patent Owner to show the definition of "kernel32.dll" as used in the Khazan reference and how kernel32.dll would have been understood by a person of ordinary skill in December 2005. (Ex. 2002 at ¶¶ 32-39, 65, 93.) Evidence is relevant if "it has a tendency to make a fact more or less probable than it would be without the evidence." Fed. R. Evid. 401. Exhibit 2009 bears no publication date and was retrieved on July 12, 2016, more than 10 years after the December 2005 priority date of the challenged patent. (Ex. 2009 at 1; Ex. 2002 at ¶ 34.) Accordingly, Exhibit 2009 is not probative of how kernel32.dll would have been understood by a person of ordinary skill in the art in 2005 and should be excluded. Fed. R. Evid. 401-402. (Ex. 2002 at ¶¶ 33-36 ("Counsel has informed me, and I understand, that the [POSA] is a hypothetical

person who is presumed to be familiar with the relevant scientific field and its literature at the time of the invention.").)

Exhibit 2009 is also an out-of-court statement offered for the truth of the matter asserted. Patent Owner quotes from Exhibit 2009 to show that a "[k]ernel32.dll is the 32-bit dynamic link library found in the Windows operating system kernel." (Ex. 2009 at 1; Ex. 2002 at ¶¶ 65, 93.) Exhibit 2009 as used by the Patent Owner is inadmissible hearsay and Patent Owner did not argue that a hearsay exception applies. Fed. R. Evid. 802. The most obvious hearsay exception that might apply here is the learned treatise exception, which requires that the publication be established as a reliable authority either through expert testimony or judicial notice. Fed. R. Evid. 803(18). Patent Owner has not established that Webopedia is reliable or technically accurate, or shown that the Webopedia information reflects the knowledge of a person skilled in the art in 2005, so the learned treatise exception does not apply. (Ex. 2002 at ¶¶ 65, 93.)

Patent Owner also has not produced evidence that Exhibit 2009 is what it purports to be. Nor has Patent Owner presented any evidence that Dr. Medvidovic, or any other witness, had first-hand knowledge of Exhibit 2009. Patent Owner failed to authenticate Exhibit 2009. Fed. R. Evid. 901. Exhibit 2009 should be excluded.

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