

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

Palo Alto Networks, Inc.  
Petitioner

v.

Finjan, Inc.  
Patent Owner

*Inter Partes* Review No. 2015-02001  
*Inter Partes* Review No. 2016-00157  
U.S. Patent No. 8,225,408<sup>1</sup>

---

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

---

<sup>1</sup> Cases IPR2015-02001 and IPR2016-00157 are consolidated. Cases IPR2016-00955 and IPR2016-00956 have been consolidated and joined with this consolidated proceeding.

## TABLE OF CONTENTS

	<b>Page</b>
I. THE CISCO WEB PAGE (EX. 2006) SHOULD BE EXCLUDED .....	1
II. PARAGRAPHS 14-15 AND 18-23 OF THE BIMS DECLARATION (EX. 2013) SHOULD BE EXCLUDED .....	3
A. Dr. Bims’s opinions on licensing and alleged nexus should be excluded.....	3
B. Dr. Bims’s opinions on industry praise should be excluded.....	6
III. CONCLUSION.....	6

## TABLE OF AUTHORITIES

Page(s)

### Cases

<i>In re Antor Media Corp.</i> , 689 F.3d 1282 (Fed. Cir. 2012) .....	4
<i>Apple, Inc. v. Ameranth, Inc.</i> , CBM2015-00080, Paper 44 (PTAB Aug. 26, 2016) .....	4
<i>Graftech Int'l Holdings, Inc. v. Laird Techs, Inc.</i> , 652 Fed. Appx. 973 (Fed. Cir. June 17, 2016) .....	5
<i>Qualtrics Labs, Inc. v. OpinionLab, Inc.</i> , IPR2014-00421, Paper 41 (PTAB. July 24, 2015) .....	6

### Other Authorities

37 C.F.R. § 42.64(c).....	1
Fed. R. Evid.	
401-402 .....	1
702, 703.....	3, 4, 5, 6
802.....	2
803(18).....	2
901.....	2

..

Pursuant to 37 C.F.R. § 42.64(c), Petitioner moves to exclude Exhibit 2006 submitted by Patent Owner and paragraphs 14, 15, and 18-23 of the Bims Declaration (Ex. 2013). Petitioner objected to these exhibits on August 16, 2016. (Paper 20.)

**I. THE CISCO WEB PAGE (EX. 2006) SHOULD BE EXCLUDED**

Petitioner moves to exclude Exhibit 2006 because it is irrelevant and inadmissible hearsay, with no applicable hearsay exception.

Exhibit 2006 is an article titled “What Is the Difference: Viruses, Worms, Trojans, and Bots?” purportedly posted on a Cisco web page. (Ex. 2006.) Patent Owner and its technical expert, Dr. Medvidovic, rely on this article as evidence that a person of ordinary skill in the art would have recognized a distinction between the “exploits” recited in the challenged claims and prior art teachings regarding malicious code such as polymorphic viruses. (See Paper 19 at 9, 39; Ex. 2007 at ¶¶ 49, 86.)

Exhibit 2006 bears no publication date and indicates that it was retrieved on August 9, 2016, twelve years after the August 2004 priority date of the challenged claims. (Ex. 2006 at 1; Ex. 2002 at ¶ 34.) Accordingly, Exhibit 2006 is not probative of how a person of ordinary skill in the art in 2004 would have understood terms like “exploit” and “malware,” and should therefore be excluded. Fed. R. Evid. 401-402. (Ex. 2007 at ¶ 35 (“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.") (emphasis added.)

Exhibit 2006 is also an out-of-court statement offered for the truth of the matter asserted. Patent Owner quotes from Exhibit 2006 to show that "[a]lthough malware, such as viruses, can sometimes include an exploit, they are not the same thing." (Ex. 2006 at 9; *see also id.* at 39.) Exhibit 2006 as used by Patent Owner is therefore inadmissible hearsay, and Patent Owner did not argue that a hearsay exception applies. *See* 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). But Patent Owner has not established that the Cisco web page is reliable or technically accurate or shown that it reflects the knowledge of a person skilled in the art in 2004, so the learned treatise exception does not apply. *See id.*

Patent Owner also has not produced evidence that Exhibit 2006 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 2006. Patent Owner therefore failed to authenticate Exhibit 2006. *See* Fed. R. Evid. 901. Exhibit 2006 should be excluded for this additional reason.

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.