

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CISCO SYSTEMS, INC.,

Petitioner,

v.

FINJAN, INC.,

Patent Owner.

Case IPR2018-00391

U.S. Patent No. 7,647,633

**PETITIONER'S MOTION TO EXCLUDE PATENT OWNER'S
EVIDENCE UNDER 37 § 42.64**

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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(c), Petitioner Cisco Systems Inc., (“Petitioner”) moves to exclude the Hartstein Declaration (Exhibit 2012), and Exhibits 2013- 2025, 2030, 2031 and 2035 referred to and introduced by the Hartstein Declaration, which was relied on by Patent Owner Finjan, Inc. (“Patent Owner”) in its Response Under 37 C.F.R. § 42.120 (Paper No. 12), filed September 10, 2018. Petitioner timely objected to these exhibits on September 17, 2018 (Paper No. 14).

The Federal Rules of Evidence (“F.R.E.”) apply to this proceeding. *See* 37 C.F.R. § 42.62. Exercising its discretion, the Board may “exclude the ... evidence in their entirety, or alternatively, decline to consider the ... related evidence.” *CBS Interactive Inc. v. Helferich Patent Licensing, LLC*, IPR2013-00033, Paper 79, at 3 (PTAB Aug. 9, 2013).

Further, Exhibit 2012, which sets forth the declaration of Mr. Phil Hartstein, is inadmissible because it is replete with hearsay, an evident lack of personal knowledge (F.R.E. 602), improper opinion testimony (F.R.E. 702) and irrelevant, non-probative material (F.R.E. 401, 403). Accordingly, Petitioner requests that all of this exhibit be excluded from the trial of this matter.

II. ARGUMENT

Exhibit 2012 and the Exhibits Introduced Therein Should be Excluded on Multiple Grounds

In its Response, Patent Owner relies on the testimony of Mr. Phil Hartstein set forth in Exhibit 2012, to try to show secondary considerations of nonobviousness. *See* Paper 12, at 36-45. The testimony is irrelevant, lacks personal knowledge for key assertions, is replete with inadmissible hearsay and is based on documents that have not been properly authenticated. For these reasons, the Hartstein Declaration (Exhibit 2012) as well as the Finjan SEC Filings (Exhibits 2013-2019) , the Gartner Report Documents (Exhibits 2020-2022), the Proofpoint Documents (Exhibits. 2023-2025) and the Websense Documents (Exhibits 2030, 2031, 2035) to which the Hartstein Declaration refers to and introduces should be excluded.

1. Hartstein Declaration fails to show personal knowledge as required under F.R.E. 602.

The Hartstein Declaration Exhibit 2012, because it does not introduce evidence of Mr. Hartstein’s personal knowledge of the subject matter of the testimony contained therein, is inadmissible under FRE 602. For example, the Hartstein Declaration states that Mr. Hartstein is the “current” President of Finjan, but it does not indicate when he became president of Finjan, when he became

employed by Finjan, his roles and responsibilities at Finjan or any other facts that demonstrate that he has personal knowledge regarding the matters discussed in his Declaration. In addition, the Hartstein Declaration contains testimony regarding the terms of several Patent Owner license agreements, but the Hartstein Declaration includes no facts that demonstrate that he has personal knowledge regarding the license agreements.

2. The Hartstein Declaration is inadmissible under FRE 702

Federal Rule of Evidence 702 permits admission of expert testimony from a qualified expert only if “the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue,” and if the testimony is based upon sufficient data and reliable methods. Rule 702 further requires that an expert be qualified “by knowledge, skill, experience, training, or education” in the relevant field. F.R.E. 702. Expert testimony must be based on a reliable foundation and be relevant to the task at hand. See *Daubert v. Merrell Dow Pharm, Inc.*, 509 US 579, 597 (1993).

The Hartstein Declaration offers inadmissible expert testimony because the opinions contained in his Declaration are conclusory, do not disclose supporting facts or data, are biased and unreliable, and the Hartstein Declaration provides no basis to support Mr. Hartstein’s qualifications as an expert. In one example, Hartstein states “It invested over \$65 million dollars in developing patented

technologies related to proactive content behavior inspection. Such investment contributed to Finjan being awarded 29 U.S. issued patents and 27 issued foreign patents.” Exhibit 2012 p. 2. There is no evidence of Mr. Hartstein’s expert qualifications with respect to patents nor the relevant technology required to provide such an opinion. Accordingly, Hartstein’s opinions are inadmissible under FRE 702.

3. Finjan SEC Filings are inadmissible

Finjan SEC Filings under FRE 401, 402, and 403 are irrelevant, prejudicial, misleading, and of minimal probative value. For example, none of these exhibits identify the ‘633 Patent or otherwise explain how they are relevant to the ‘633 Patent. The Finjan SEC Filings are also inadmissible hearsay under FRE 801 and 802, and lack authentication under FRE 901.

4. Gartner Report Documents are inadmissible.

The Gartner Report Documents under FRE 401, 402, and 403 are irrelevant, prejudicial, misleading, and of minimal probative value. For example, none of these exhibits identify the ‘633 Patent or otherwise explain how they are relevant to the ‘633 Patent. The Gartner Report Documents are also inadmissible hearsay under FRE 801 and 802, and lack authentication under FRE 901.

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