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

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

Patent Owner Finjan, Inc., ("Patent Owner") opposes Petitioner, Cisco Systems, Inc.'s, ("Petitioner") Motion to Exclude (Paper 23, "Motion"). The Board should deny Petitioner's request to exclude Ex. 2012 and the exhibits referenced therein, including Exhibits 2013–2025, 2030, 2031, and 2035.

I. THE HARTSTEIN DECLARATION IS ADMISSIBLE

A. Mr. Hartstein Demonstrated Personal Knowledge of Finjan's Licensing Practices

Petitioner incorrectly asserts that the Hartstein Declaration (Ex. 2012) "does not introduce evidence of Mr. Hartstein's personal knowledge of the subject matter of the testimony contained therein." Motion at 3–4. To the contrary, Mr. Hartstein testified that he is "the current president of Finjan" and that through that position he is "familiar with Finjan's licensing practices and the licensing of Finjan's world-wide patent portfolio." Ex. 2012, ¶¶ 3–4. Accordingly, Mr. Hartstein has the requisite personal knowledge to testify about licenses taken for the '633 Patent. Petitioner's argument regarding Mr. Hartstein's knowledge rings especially hollow considering that Cisco cross-examined Mr. Hartstein and decided not to enter the transcript into evidence.

Further, in response to Petitioner's objections, Patent Owner served Ex. 2036, "Supplemental Declaration of Phil Hartstein in Support of Patent Owner's Response." ("Supplemental Declaration"). In the Supplemental Declaration, Mr.

Hartstein testified that as part of his responsibilities and "in connection with preparing [his] Declaration, he "reviewed Finjan's business records, maintained in the ordinary course of Finjan's regular business activities." Supplemental Declaration, ¶ 6. For the same reasons, Mr. Hartstein testified that he reviewed "Finjan's SEC filings" (Exs. 2013–2019), the "Gartner Magic Quadrant reports" (Exs. 2020–2022). *Id.* at ¶¶ 7, 9. Mr. Hartstein also reviewed business records relating to patent licenses entered into prior to Mr. Hartstein assuming the role of President, all of which were "maintained in the ordinary course of Finjan's business," and that he is currently "involved in ensuring that Finjan complies with any ongoing obligations under these licenses." *Id.* at ¶¶ 7–8, 10–14. Mr. Hartstein further testified that he "was the President of Finjan during the negotiations for, and execution of, each of [several other] licenses" and thus has personal knowledge of the same. *Id.* at ¶ 15.

Accordingly, Petitioner's argument that Mr. Hartstein lacks the personal knowledge of the subject matter of his testimony is baseless, and Ex. 2012 should not be excluded under F.R.E. 603.

B. Rule 702 is Inapplicable Because Mr. Hartstein is Not an Expert Witness

Petitioner argues that the "Hartstein Declaration offers inadmissible expert testimony." Motion at 4. However, Mr. Hartstein testified to facts and was not,

therefore, an expert witness. Indeed, while Petitioner identifies the following statement as allegedly being unsupported expert testimony, it is a verifiable factual statement, not an opinion:

> "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."

Id. Indeed, Mr. Hartstein testified that he "reviewed Finjan's business records, maintained in the ordinary course of Finjan's regular business activities, including documentation of and relating to (a) Finjan's research and development efforts since its founding in 1997; (b) Finjan's 29 U.S. issued patents and 27 issued foreign patents." Supplemental Declaration, ¶ 6.

Accordingly, Ex. 2012 should not be excluded under F.R.E. 702.

II. THE SEC EXHIBITS ARE ADMISSIBLE

Petitioner's argument that Exhibits 2013–2019 ("the SEC exhibits") should be excluded under FRE 401, 402, and 403 is meritless. *See* Motion at 5. For example, the SEC exhibits support at least Mr. Hartstein's testimony regarding the "non-exhaustive list of Finjan licensees that received a license to the '633 Patent after the July 5, 2011 issuance." Ex. 2012, ¶ 7. The SEC exhibits are therefore

relevant under FRE 401, 402, and 403 because the "ha[ve] a tendency to make a fact more or less probable than it would be without the evidence." FRE 401.

The SEC exhibits are not hearsay because they fall under the business records exception of hearsay. Fed. R. Evid. 803(6)(B)-(C) ("the record was kept in the course of a regularly conducted activity of …[an] organization… [and] making the record was a regular practice of that activity.").

Furthermore, the SEC exhibits have been properly authenticated. *See, e.g.* Supplemental Declaration, ¶ 7; Ex. 2037 ("Price Declaration"), ¶¶ 5–11. Accordingly, Patent Owner has come forward with "evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901. The Federal Rules of Evidence specifically provide that such evidence may come in the form on "[t]estimony of a [w]itness with [k]nowledge . . . that an item is what it is claimed to be." *Id.*; *see also United States v. Turner*, 718 F.3d 226, 232 (3d Cir. 2013) ("[t]he standard for authenticating evidence is slight and may be satisfied by evidence sufficient to support a finding that the item is what the proponent claims it is.") (internal quotations and citation omitted).

III. THE GARTNER REPORT DOCUMENTS ARE ADMISSIBLE

Petitioner's argument that Exhibits 2020–2022 ("the Gartner Reports") should be excluded under FRE 401, 402, and 403 is meritless. *See* Motion at 5. For example, the Gartner Reports support at least Mr. Hartstein's testimony that

DOCKET ALARM

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.