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

Patent 7,647,633

PETITIONER'S REPLY TO PATENT OWNER'S OPPOSITION TO PETITIONERS' MOTION TO EXCLUDE EVIDENCE

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Patent Owner Finjan, Inc.'s ("Finjan") Opposition to Petitioner Cisco Systems, Inc.'s ("Petitioner") Motion to Exclude ("Opp.") fails to set forth any viable basis to admit the Hartstein Declaration (Exhibit 2012) ("Declaration") or Exhibits 2013-2025, 2030, 2031 or 2035. All such evidence should be excluded in this proceeding.

I. The Declaration

Hartstein's role as president does not imbue him with knowledge of all aspects of Finjan's licensing activities, and Finjan fails to set forth any other foundation as to how Hartstein *himself* perceived the facts underlying his statements. *See Ward v. First Fed. Sav. Bank*, 173 F.3d 611, 617-18 (7th Cir. 1999) (bank VP's affidavit inadmissible under R. 602 because it lacked the "source of [his] awareness"); Fed. R. Evid. 602, advisory committee's note (rule "requir[es] that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact.").

Finjan effectively concedes the Declaration was inadequate because it offers a "supplemental" declaration from Hartstein ("Supp. Decl.") purporting to cure the Declaration's inadequacies. However, the Supplemental Declaration still fails to state how Hartstein actually has *personal* knowledge of any of the matters set forth therein. Hartstein bases most of his declaration on his review of documents. Besides being a mere repeater of hearsay, a person lacks personal knowledge where "the extent of his knowledge . . . is limited to the mere text of [documents]" and "is equally ascertainable by anyone presented with the [documents] to read." *Aspex Eyewear, Inc. v. E'Lite*

Optik, Inc., 127 Fed. App'x 493, 497 (Fed. Cir. 2005).

Finjan further claims that Rule 702 is inapplicable in this context, and that Hartstein's claim that Finjan's investment "contributed to" Finjan's securing 29 domestic patents and 27 foreign patents is a "verifiable factual statement." Opp. at 3. But the scientific and legal considerations at play when the USPTO is deciding whether to award a patent are examples of "specialized knowledge" beyond that of the layperson, and which require a showing of adequate foundation under Rule 702. Moreover, even if Hartstein's claim is not an expert opinion, Finjan offers no explanation as to how his lay opinion is helpful to the trier of fact—a necessity under Rule 701(b). Hartstein's theory as to the cause of Finjan's receipt of patents sheds no light on any issue relevant in this case, and it is excludable on that ground as well.

II. SEC Exhibits

Petitioner contended that the SEC 8-K forms Finjan proffers make no reference to the '633 Patent or otherwise explain how they are relevant to the '633 Patent. Finjan has failed to refute this point, offering no explanation as to how any claim within the '633 Patent shares any nexus with the license agreements referenced in the SEC 8-Ks. Finjan fails to note that in order to be relevant, evidence must not only make a fact "more or less probable," but also that the fact must be "of consequence in determining the action." Fed. R. Evid. 401(b). Finjan has not drawn any connection between the claims in the '633 Patent, the licenses referenced in the Declaration, and the matters relevant in this proceeding, making the 8-Ks irrelevant. Their admission would also,

therefore, be unnecessarily cumulative. *See* Fed. R. Evid. 403.

Finjan likewise fails to satisfy the necessary elements of the business records exception. A document is a business record only if it is "made at or near the time by – or from information transmitted by – someone with knowledge." Fed. R. Evid. 803(6)(A). Hartstein's Supplemental Declaration refers to "Finjan's officers," but leaves out any indication as to who these officers are, what their role(s) were with respect to the 8-Ks, or their knowledge of the 8-Ks' contents. While an 8-K has the potential to be a business record, it may be admitted "only after" a witness "la[ys] a foundation for its admission." *S.E.C. v. Jasper*, 678 F.3d 1116, 1122 (9th Cir. 2012); *see also U.S. v. Foster*, 829 F. Supp. 2d 354, 364 (W.D. Va. 2011) (excluding proffered "business records" where authenticating witness did not, *inter alia*, testify as to the document makers' knowledge or identity). Hartstein has not done so.

III. Gartner Report Documents

The Opposition sets forth no basis to admit the Gartner Reports. These documents, which Finjan claims support Hartstein's assertion that Finjan's licensees are competitors, do not actually say anything about the competitiveness by and between the licensees. They do nothing to make any fact more or less likely.

Even if they did, the documents are blatant examples of hearsay. These are not documents produced by Finjan or Petitioner, but rather by a third party with no involvement in this matter. Finjan claims they are admissible under the "market reports" exception, yet Finjan fails to provide any meaningful foundation that these

documents are relied on by other firms within Finjan's industry or the general public (beyond a token recitation in the Supplemental Declaration). Even if these reports *were* relied on by a particular industry, admissibility under the "market reports" exception must be based on "the motivation of the compiler to foster reliance by being accurate." Fed. R. Evid. 803(17), advisory committee's note. These reports all end with a disclaimer: "Gartner disclaims all warranties as to the accuracy, completeness or adequacy of such information." They lack the necessary indicia of reliability.

Finjan attempts to salvage these documents by claiming they are not being offered for the truth of the matter asserted. However, they are *absolutely* being used to prove the truth of the matter asserted therein. Finjan claims the documents state that its licensees are competitors in the computer security field. They offer the documents to support Hartstein's assertion that Finjan's licensees are competitors in the computer security field. There can be no clearer example of a statement being offered for the truth of the matter asserted. These reports are inadmissible, irrelevant hearsay.

IV. Proofpoint & Websense Documents

None of these documents are admissible. With respect to the Proofpoint and Websense documents offered to show those companies' revenues (Exhibits 2025 and 2035), Finjan is using them to prove the truth of the matter asserted. They want to prove the companies' revenues and are using the proffered exhibits, which contain revenue figures, as proof.

Finjan's documents offered to show Websense and Proofpoint "practiced the

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