Filed on behalf of EMC Corporation and VMware, Inc.

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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EMC CORPORATION and VMWARE, INC.,
Petitioners

v.

Patent Owner of
U.S. Patent No. 6,415,280 to Farber et al.

IPR Case No. IPR2013-00083

<u>PETITIONERS' OPPOSITION TO PATENT OWNER'S</u>

<u>MOTION TO EXCLUDE EVIDENCE</u>

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I.   Introduction

Patent Owner moves to exclude various statements in Dr. Clark's Reply

Declaration. The challenged statements are relevant to the instituted grounds and

are admissible to respond to the arguments in Patent Owner's Response. Patent

Owner further claims that Langer (Ex. 1003) is non-authenticated hearsay, but it

has been authenticated under multiple provisions of FRE 901 and 902 and falls

under multiple hearsay exceptions. Patent Owner's motion to exclude should

therefore be denied.

II.   Dr. Clark's Statements Referencing Langer, and Langer Itself, Should Not Be Excluded

A.   Dr. Clark's Statements Should Not Be Excluded

Dr. Clark's reference to Langer in ¶ 10 – offered in response to Patent

Owner's new argument that Woodhill does not disclose a "client request"

including a hash of the contents of a data file (Resp. 3-6; Dewar Decl. ¶102; Ex.

2013) – are relevant and admissible. Contrary to Patent Owner's contentions, Dr.

Clark's testimony is directly relevant to an instituted ground (invalidity based on

Woodhill) and confirms that it was well-known at the time of Woodhill to request

a file using a hash-based identifier and is directly relevant to how much detail one

would expect Woodhill to state within this context. (*See* Ex. 1078 ¶10.) Indeed,

Patent Owner appears to concede this point in a related IPR, where it states that

"Langer appears to disclose accessing a standalone file by employing an MD5 of

the file contents." (IPR2013-00085, Resp. 41; Ex. 1079.) Dr. Clark is not relying

on Langer as prior art per se but as evidence concerning the state of the art and

requisite detail needed for a basic computer operation.

B. Langer Should Not Be Excluded

1. Langer has been authenticated

Patent Owner contends that Langer (Ex. 1003) cannot be authenticated

without direct testimony from a witness with "personal knowledge" that the

manual existed prior to the critical date. But this argument rests on a faulty legal

premise. Petitioners need only produce evidence "sufficient to support a finding"

that the reference "is what the proponent claims it is." *See* Fed. R. Evid. 901(a).

This burden is "not high" and requires only a "*prima facie* showing" that the

evidence is what the proponent claims it to be. *U.S. v. Vidacak*, 553 F.3d 344, 349

(4th Cir. 2009). As one court explained, "There is no single way . . . to

authenticate evidence. . . . [T]he direct testimony of a custodian or a percipient

witness is not a *sine qua non* to the authentication of a writing." *U.S. v. Garcia*,

452 F.3d 36, 40 (1st Cir. 2006) (internal quotations omitted); *see also Moleculon*

Research Corp. v. CBS, Inc., 793 F.2d 1261, 1272 (Fed. Cir. 1986) ("It is hornbook

law that direct evidence of a fact is not necessary. 'Circumstantial evidence is not

only sufficient, but may also be more certain, satisfying and persuasive than direct

evidence.'") (citations omitted). Langer (Ex. 1003) easily meets the requirements

for authentication under multiple provisions of FRE 901 and 902.

First, Petitioners have submitted sworn testimony from Keith Moore, a

person skilled in the art of Usenet formatting and distribution during the timeframe

surrounding Langer's August 7, 1991 posting date, and who authenticated Langer

under FRE 901(b)(1) and (4). (Ex. 1048 at 5-7.) Mr. Moore testified that, during

the 1991-1992 timeframe and while working at the University of Tennessee's

Computer Science Department, his responsibilities included maintaining the

department's local Usenet node, developing Usenet-related software, and studying

in detail the standards specifying Usenet article formatting. (*Id.* at 6-7.) Based on

this knowledge and experience, Mr. Moore observed that the distinctive markings

on Langer (Ex. 1003) were consistent with those found on Usenet newsgroup

periodicals posted in the 1991-1992 timeframe and verified Langer's authenticity

as a 1991 Usenet periodical on that basis. (Ex. 1048 at 7-11.) For example, he

confirmed that Langer's distinctive header fields contained unique 1991-era Usenet

formatting and content. (*Id.* at 7-8.) Patent Owner has not offered any testimony

to the contrary.

Second, Langer (Ex. 1003) also has been independently authenticated under

FRE 901(b)(3) by Mr. Moore's testimony comparing it with an equivalent version

(the "Langer Authentication Specimen") he obtained from the "Google Groups"

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