

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RPX, INC.
Petitioner,

v.

VIRNETX, INC. AND SCIENCE APPLICATION INTERNATIONAL
CORPORATION,
Patent Owner

Patent No. 6,502,135

Issued: December 31, 2002

Filed: November 29, 1999

Inventors: Victor Larson, *et al.*

Title: Agile Network Protocol For Secure Communications
With Assured System Availability

Inter Partes Review No. IPR2014-00171

**THIRD PARTY APPLE'S OPPOSITION TO PATENT OWNER'S
MOTION FOR ADDITIONAL DISCOVERY**

VirnetX’s requested discovery should be denied. First, VirnetX presents no basis, beyond its own speculation, to support its discovery demands. It identifies no evidence to suggest Apple exercised any control over RPX’s decision to prepare or file the RPX petitions, and mischaracterizes what it seeks, stating its discovery “narrowly target[s non-public] information about [REDACTED],” when, in reality; it seeks *any* information “regarding the RPX IPRs” to be used in both this IPR and related district court proceedings. VirnetX also improperly dismisses the burden of its discovery, ignoring that its requested discovery of Apple, by its very nature, is duplicative of what it demands from RPX. It similarly dismisses legitimate concerns about forcing Apple to reveal its litigation strategies and positions, including privileged communications. And, throughout its motion, VirnetX fails to show how the discovery it seeks relates specifically to the RPX petitions – the necessary focus of the privity inquiry.

I. VirnetX Has Not Shown that Relevant Evidence Actually Exists

Although it argues its discovery “seek[s] only a small set of materials directly related to the RPX IPRs,” Mot. at 7, VirnetX’s actual requests seek *any* evidence “regarding the RPX IPRs,” regardless when that evidence might have come into existence, whether it is privileged or whether it is even relevant to the issue of privity or these IPR proceedings. Ex. 2004 at 4; Ex. 2005 at 1. Given VirnetX’s admission they would seek to use whatever they discover in their district

[REDACTED]

court discovery efforts here (Ex. 1074 at 30:21-31:17; Ex. 1077 at 14:8-15:10), one can assume they will use this discovery to aid their district court litigation.

But even if the discovery were limited to interactions between Apple and RPX *before* the RPX petitions were filed, it should be denied. VirnetX has produced nothing to show the evidence they seek exists, much less that it specifically concerns the preparation or filing of the RPX petitions, and ignores the substantial evidence to the contrary. For example, it presents nothing to counter the unequivocal statements in the RPX petitions that *RPX* was solely responsible for (i) its decision to contest the VirnetX patents, (ii) picking which claims to contest, (iii) selecting the grounds to raise, and (iv) paying the costs of preparing the petitions and conducting the proceedings (Pet. at 6), statements which counsel for RPX expressly confirmed in response to questions from the panel. Ex. 2001 at 63:12-65:6. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. In three Board calls and in its motion, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

████████████████████

Instead, VirnetX presents only irrelevant speculation. First, it theorizes that if RPX successfully establishes that VirnetX’s patent claims are unpatentable, it will have “advanced Apple’s interests.” Mot. at 2. But the Board has recognized that is irrelevant to privity. *See* IPR2013-00215, Paper 10 at 4. Indeed, any of the companies VirnetX has sued under these patents would equally benefit if RPX prevails. And VirnetX cites nothing to support its contention that ██████████

████████████████████

████████████████████ (Mot. at 1). VirnetX also does not address the evidence in its own exhibits that shows that RPX pursues a wide variety of activities (only one of which is initiating PTO proceedings) to advance its openly stated corporate mission of mitigating risks from patents of questionable validity. *See* Ex. 2006 at 1; Ex. 2007 at 6-7.

VirnetX also speculates that Apple must have controlled the RPX petitions because “RPX contends the grounds in its petitions are ‘substantially identical’ to the time-barred non-instituted Apple petitions.” Mot. at 1. But, the Apple petitions are publicly available, as are more than 3 years of *inter partes* reexamination records concerning the VirnetX patent claims, Ex. 2001 at 68:16-20, and as the Board noted in a recent call, it is common practice for one party to copy publicly available material from PTAB files and use them in its own filing.

████████████████████

[REDACTED]. Mot. at 2. VirnetX strains to attach significance to this fact, claiming that “RPX and Apple took care not to share with the Board the relationship between RPX and Apple’s counsel” (*Id.* at 2) [REDACTED]. Yet, Sidley’s representation of RPX was freely admitted, so no further discovery is necessary to establish this fact. And, while VirnetX labels [REDACTED] [REDACTED] [REDACTED], much less evidence contradicting the RPX statements that it was solely responsible for preparing and filing its petitions. Ex. 2001 at 63:12-65:6; Ex. 1074 at 12:11-20.

In any event, prior Board decisions refute the legal premise of this theory. For example, in IPR2013-00028, which presents facts closely analogous to this proceeding, Patent Owner contended because Petitioner’s counsel “represent[ed] some of the co-defendants in a related litigation *the co-defendants have had an opportunity to exercise control*” of the Petition. *Id.*, Paper 31 at 4 (emphasis added). The Board dismissed that argument as speculation, observing that Patent Owner identified *no evidence* suggesting the co-defendants actually “*have exercised control of [the] proceeding in any manner.*” *Id.* Notably, the Board relied on representations from Petitioner’s counsel that the “real party-in-interest

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