UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

RPX CORPORATION Petitioner, v. VIRNETX INC. Patent Owner.	Case IPR2014-00171 Patent 6,502,135
RPX CORPORATION Petitioner, v. VIRNETX INC. Patent Owner.	Case IPR2014-00172 Patent 6,502,135
RPX CORPORATION Petitioner, v. VIRNETX INC. Patent Owner.	Case IPR2014-00173 Patent 7,490,151
RPX CORPORATION Petitioner, v. VIRNETX INC. Patent Owner.	Case IPR2014-00174 Patent 7,921,211
RPX CORPORATION Petitioner, v. VIRNETX INC. Patent Owner.	Case IPR2014-00175 Patent 7,921,211

(Caption continues on next page)

Wednesday, January 8, 2014

2:15 p.m. EST

Teleconference before the Patent Trial and Appeal Board

(Continued caption:)

RPX CORPORATION Petitioner, v. VIRNETX INC. Patent Owner.	Case IPR2014-00176 Patent 7,418,504
RPX CORPORATION Petitioner, v. VIRNETX INC. Patent Owner.	Case IPR2014-00177 Patent 7,418,504
APPLE INC. Petitioner, v. VIRNETX INC. AND SCIENCE APPLICATION INTERNATIONAL CORPORATION Patent Owner.	Inter Partes Review No. IPR2014-00237 Patent 8,504,697
APPLE INC. Petitioner, v. VIRNETX INC. AND SCIENCE APPLICATION INTERNATIONAL CORPORATION Patent Owner.	Inter Partes Review No. IPR2014-00238 Patent 8,504,697

Wednesday, January 8, 2014
2:15 p.m. EST

Teleconference before the Patent Trial and Appeal Board, the proceedings being recorded stenographically by Jonathan Wonnell, a Registered Professional Court Reporter (NCRA #835577) and Notary Public of the State of Minnesota, and transcribed under his direction.

A P P E A R A N C E S O F C O U N S E L

(All participants appearing by phone)

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JONATHAN WONNELL, Court Reporter

P R O C E E D I N G S

(2:15 p.m. EST)

JUDGE TIERNEY: Judge Tierney on the line. Is Judge Siu on the line?

JUDGE SIU: Yes. I'm on the line.

JUDGE TIERNEY: Welcome to the call. I have Judge Easthom in my office so the panel is all set. I'm going to start off with a brief roll call and make sure that we have the parties on the line, keeping in mind that we have -- in my understanding we have RPX representatives, we're going to have Apple representatives and Virnetx representatives.

I'm going to start with RPX. Is there a representative from RPX on the phone today?

MR. ASHE: Yes. This the Oliver Ashe.

JUDGE TIERNEY: Welcome to the call.

MR. ASHE: Thank you.

JUDGE TIERNEY: Is there anyone else with you today?

MR. ASHE: My assistant, Phoebe Nguyen. Other than that, no.

JUDGE TIERNEY: Thank you. And then

we'll go -- the next one, the next petitioner, was Apple. Do we have a representative from Apple today?

MR. KUSHAN: Yes, Your Honor. This is Jeff Kushan from Sidley Austin. I have with me Joe Micallef, my partner, and I also believe David Melaugh from Apple is on the phone.

JUDGE TIERNEY: What was the last name?

MR. KUSHAN: Melaugh, M-e-l-a-u-g-h.

JUDGE TIERNEY: And then lastly but not least, Virnetx. Do we have a representative from Virnetx here today?

MR. PALYS: Yes, Your Honor. It's Joseph Palys with Finnegan Henderson for Virnetx. And with me is Naveen Modi, Elliott Cook and James Stein calling in from Atlanta.

JUDGE TIERNEY: Welcome to the phone conference call today. For purposes of order going on following the call, I'm just going to put on the first named person that we had today rather than have a complete list. But if you need a complete list let me know right now.

Not hearing any objection we'll just go ahead and we'll have Mr. Ashe, Kushan and Palys listed as representatives for today along with others and we'll just have others.

Starting off I did ask for this call with the panel. We wanted to talk about the scheduling. We did receive a couple e-mails recently from the parties suggesting we broaden out the purpose of the call.

The first point, though, I would like to --

MR. PALYS: Your Honor, I really apologize to interrupt you. I just want to let you know that we have a court reporter on. I don't know if he's identified himself.

JUDGE TIERNEY: Who is speaking, please?

MR. PALYS: Your Honor, this is Joseph Palys. And I apologize for interrupting you. I just wanted to make sure you're aware of that.

JUDGE TIERNEY: I was not aware. And in the future could you please alert the panel before we have the call?

MR. PALYS: Yes, sir. I apologize.

JUDGE TIERNEY: Not a problem. It makes note taking a little bit easier, as you probably understand.

MR. PALYS: I understand, sir. Sorry.

JUDGE TIERNEY: So since we do have a court reporter you're aware we would want to have a copy of the transcript filed as an exhibit?

MR. PALYS: Mm-hmm. Yes.

JUDGE TIERNEY: Okay. As long as we are aware of that.

MR. ASHE: Your Honor, this is Oliver Ashe. To the extent that we cover any material that might be under the protective order or relating to sealed materials, I think it would be appropriate for that exhibit to also be subject to that protective order.

JUDGE TIERNEY: Do we have any objection?

MR. PALYS: No, Your Honor.

JUDGE TIERNEY: Okay. Not hearing any objection, Mr. Palys, did you alert the other

parties that you were going to have a court reporter today?

MR. PALYS: Yes.

JUDGE TIERNEY: Okay. I assume I'm going to RPX and a representative from Apple. Any objections?

MR. ASHE: Not from RPX, Your Honor.

MR. KUSHAN: Not from Apple.

JUDGE TIERNEY: Okay. I justed want to make sure since we do have -- I do recall the motion to seal being brought in.

Okay. So we will proceed with the understanding that the transcript to the extent of if it's needed to be filed that it will be filed as an exhibit. Provisionally have it under seal just in case we cover anything. At the end of the call I would recommend that the representatives from RPX and Apple chime in, if they hear anything that they believe should be under seal alert us so that we don't accidentally have something going into a transcript that is marked as public when it should actually be marked as private.

Any comments on that before I begin? Going to RPX?

MR. ASHE: No. We're fine with that, Your Honor.

JUDGE TIERNEY: Any from Apple?

MR. KUSHAN: No. We're fine with that procedure.

JUDGE TIERNEY: Virnetx?

MR. PALYS: No, Your Honor.

JUDGE TIERNEY: Okay. So the first question we had today, I'm going to start off with the question that was posed originally for the conference call, which was scheduling. My understanding -- I'm looking at the record -- was RPX had filed their petitions November 20th and then Apple had filed petitions to patents which claimed benefit of certain patents that were challenged in the RPX petitions.

Apple filings were filed on December 6th of 2013. And the question we were wanting to pose is should we put them on a -- the same or a similar schedule going forward. And I wanted to pose that

question to the parties.

I will start with Virnetx. If you could please give us your thoughts on this.

MR. PALYS: Yes, Your Honor. Thank you. This is Joseph Palys for Virnetx. The issue regarding the schedule actually dovetails into some of the issues that we raised in our e-mail regarding the real party in interest and privity. We think that these issues actually affect the schedule in some form.

And I was wondering if, some leeway with the board, if we can get from a high level to explain why that would affect that schedule I can get into that.

JUDGE TIERNEY: Actually, the question I've posed today is simply should they be on the same schedule. And I understand you're going to want to go and tell us what the schedule should be, but from a high level point view, do you want to be on the same schedule or not?

MR. PALYS: Okay. Sure, Your Honor. With respect to the IPRs filed by Apple and the

IPRs filed by RPX, we don't think that they should be on the same schedule. They have different notice of filing dates. And, as you know, we have nine IPR matters that we're dealing with.

So between those two sets of matters, it's Virnetx's position that they should not be on the same schedule.

JUDGE TIERNEY: And the rationale just being because they were filed different dates?

MR. PALYS: They are different patents, Your Honor. They address different issues. They -- yes, one of the other reasons, they were filed on different dates. They were filed by a different party. And we think that these issues coupled with -- a lot of it is some of the variances between what these patents, which have not been subject to any previous IPRs, were going to require different issues.

Some of them there may be some overlap there, Your Honor, but we don't think that warrants that they be on the same schedule.

JUDGE TIERNEY: Go into overlap.

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(At this point the court reporter's phone dropped off the conference call. With the Judge's permission the resulting 40 seconds of missing proceedings are omitted from the transcript.)

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JUDGE TIERNEY: -- amount of overlap between the two proceedings. For example, claim constructions, specifications, understanding what they mean, one of ordinary skill in the art, et cetera, et cetera.

MR. PALYS: Yes. Well, there certainly is overlap. We're not suggesting that there isn't any overlap as far as they rely on the same specifications from the same family. But there are different claims, claim terms. We think that may require -- introduce different claim constructions that are not common to the other matter.

That's just to begin with. I apologize. I'm looking through my notes right now, Your Honor. So --

JUDGE TIERNEY: I'm just curious. For consistency purposes, wouldn't you say that for where there are common terms being used in the claims, since they are going back through common specifications for benefit, that we would want to be consistent in our decisions to institute or to not institute?

MR. PALYS: Yeah, go ahead. My partner, Naveen Modi, wants to chime in, Your Honor.

MR. MODI: Your Honor, this is Naveen Modi. Maybe I can address some of your questions. I generally agree with you that obviously to the extent claim terms are the same across these patents they should be construed consistently. I guess what we're trying to get at is that we don't disagree with you that there's overlap.

We just think, you know, there are obviously nine pending IPRs right now and we have seven with RPX and two naming Apple. Just there's a lot of volume, you know, a lot of material here. And I think what we're trying to get is, the issues, yes, they do overlap, but they are

different.

For example, the Apple IPRs raise a new primary reference, Wesinger, Your Honor, that's not part of the Apple IPRs. So from that perspective, the issues are different. And that's what we were getting at.

I don't know if -- you know, I guess what does the board have in mind when you're saying you wanted to align the schedules? And if you could shed some light to that, that would be helpful.

JUDGE TIERNEY: Understood. I can clarify. We're looking at having potentially -- and this is why we wanted to talk to the parties today -- basically the time for filing the patent owner preliminary response should be filed on the same date for all the proceedings as one option. And we were contemplating to try and keep these cases consistent in their analysis by the board, and that's why we're having the discussion on this point.

Maybe at this point maybe it's better if

we talked to RPX and Apple and see what their views are also, because I think we have your views understood unless there's something else you'd like to say before we move on.

MR. PALYS: I think that's good, Your Honor.

THE REPORTER: Judge Tierney, sorry to interrupt. This is the court reporter. And my phone cut out a little bit. I didn't want to interrupt.

JUDGE TIERNEY: Okay. What would you like to do?

THE REPORTER: I guess I'd leave that up to you. There was about a two minute portion when I was off the phone.

JUDGE TIERNEY: I think it's best we just continue going forward instead of trying to recapture everything, unless -- Mr. Palys, would you like for the record to make any statement about the last two minutes that may not have been captured?

MR. PALYS: No. I think we can move on,

Your Honor.

THE REPORTER: Sorry about that.

JUDGE TIERNEY: Not a problem.

Apple, I'll begin with you. For scheduling purposes, yours was filed I believe a little bit later in time, December 6th. What are your views on trying to have the same schedule for patent owner preliminary response between the two -- the two series of cases between Apple and RPX's?

MR. KUSHAN: Thank you, Your Honor. Let me -- so we generally are supportive of aligning these proceedings and for some of the reasons you've already foreshadowed. First, you know, the disclosure that's being relied on for all these patents is essentially the same part of the same patent. They use similar or very similar concepts and terms.

While there are individual references that may be different among some of the petitions, there is -- and each of the patents have been challenged by three common references. Those are

the Aventail, Beser and Kiuchi references.

So there's a lot of overlap in the patentability issues that are going to be presented and considered in the proceeding based on those three references. And it make a lot of sense in our view to treat them as what they are, which is a very closely related set of patents that are going to present very similar patent issues.

I also think you should be aware that there is a common expert used by both Apple and RPX to support their various petitions. That's Mike Fratto. And in fact in our view it would probably be even appropriate in the context of these cases to consider a joinder type of procedure for the various proceedings given the similarity of the different patents and the issues they present.

You might also want to think about joinder in the sense that it would obviate some of the questions that have been raised by the issue that Virnetx is attempting to manufacture about privity between Apple and RPX.

And finally, when it's appropriate to do

so, I want to bring your attention to the fact that there are pending reexaminations involving the same patents that are the subject of the RPX petitions which you should have in mind, as well as the fact that we have filed reconsideration motions or hearing requests on petitions we filed on the same four patents that are the subject of the RPX petitions.

And so in our view those petitions we filed last summer are essentially still on the table for evaluation.

JUDGE TIERNEY: And correct me if I'm wrong, but all those petitions were denied, that they were not instituted, and the request for hearing is to change those decisions from a non-institute to an institute?

MR. KUSHAN: That is correct, Your Honor.

JUDGE TIERNEY: So at this point in time, we understand that the cases may not be completely over, but for purposes of today the status of the case is that there is not an

institution?

MR. KUSHAN: That's correct. They're not instituted. You know, obviously we think that there is a very strong basis for changing that determination based on the circumstances of those petitions which are presenting somewhat novel questions under 315(b), the transition date for implementing the AIA.

JUDGE TIERNEY: And I believe you're familiar with at least some of the members on the phone today are members of the panel on those cases. The board is aware of the other IP reexams and the other IPRs that were filed and the status of them. Could you please give us some background as to what you want us to do with this particular information, though?

MR. KUSHAN: Sure. What we'd actually like to see the board to consider is a motion to transfer the reexamination proceedings over to the board. And the reason for doing that is pretty simple. Those reexams were filed back in August of 2011. Each of the four patents has been subjected

to rejections of all their claims for unpatentability on a number of the grounds that are the same as those raised in the RPX and our prior petitions filed in the summer.

A big problem we faced is the unpredictable delays in progressing those proceedings to completion. And we think one big reason why there have been delays is the conduct of Virnetx in those cases. It may shock you to learn that Virnetx to our count has filed more than 45 petitions in four proceedings, those four reexamination proceedings. I have to tell you I've never seen anything like this.

We have one of those proceedings sitting waiting -- and this is the '151 patent -- which has been sitting for over a year with no action. The '135 patent has been sitting there since the summer with no action, waiting for PTO action.

On the appeals that have actually progressed or started on the other two patents, Virnetx filed three consecutive extension of time requests just to file their appeal brief.

JUDGE TIERNEY: I understand you're saying that they may not be as diligent as you would like. Please explain, though, why the board would exercise its discretion to transfer the cases and take jurisdiction. What would we then do? Would we then proceed to administer the IP reexam from the board but having board personnel do it?

MR. KUSHAN: Well, two thoughts. First, you have the authority under 315(d) to transfer the proceedings to the board. And the reason you might do that is that they are addressing common patentability issues to those raised in the petitions filed by RPX. The same patents are the subject of both the IP reexams and the concurrent IP petitions.

The other variable that is relevant is that the same -- many of the same patentability issues are presented. There's certain issues in the IP reexams that are not subject of the RPX or earlier Apple petitions, but there are a significant number of issues that overlap on the same prior art or patentability grounds.

As far as how you might do that, it seems appropriate to essentially put them onto the footing of an IPR proceeding. That would make in our view the most sense because that would allow you to conduct those proceedings in line with the schedule and the procedures you've already established for IPR petitions.

I think the commonality of the patentability issues that are presented in both the IP reexams and in the IP petitions is the hook that gives you the authority to move the cases over to the board under 315(d).

And we obviously would be open to your guidance for whether we would be asked to present or narrow some of the issues to align to the issues that would be presented in the IPR. You know, I think you have, as you probably recognize, a fair amount of discretion to proceed in multiple actions or multiple activities involving the same patent that are pending before the Office.

JUDGE TIERNEY: Well, the panel has heard the concerns. At this point in time because

we have not instituted the cases we decline to exercise jurisdiction and transfer the cases at this point in time. Should we decide to institute the cases, in particular the challenges that have been brought forth in the petitions, we can revisit the issue again during an initial conference call.

MR. KUSHAN: Your Honor, just very briefly, this is kind of uncharted waters I think. I don't think I've seen any activity by the panel on a transfer issue. I've seen some activity relating to consolidation issues. Would it be appropriate for us to at least brief and present a motion for transfer of these proceedings for your consideration?

JUDGE TIERNEY: Well, I do have a court reporter. I'll elucidate a little bit on the reasoning so we can have it on the record as to why we will not at this time exercise jurisdiction. We have jurisdiction. Exercise it in such a manner to transfer the cases to the board.

In particular at this point in time we're early in the proceeding. We have not had the

opportunity -- again, this is before the preliminary response has even come in from a patent owner. While we have taken a brief review of the petitions and the art filed, we have not given it such an understanding at this point in time that it would behoove us to go ahead and decide whether or not to transfer because we do not want to transfer a case to then go ahead, determine that there was nothing to institute at all, and then have to transfer it back and cause even further delay into a record in which you at least allege that there has been considerable delay in.

Now, if we go ahead and we were to institute at that point in time we know that there are grounds to challenge which we have found to be at least a reasonable likelihood of prevailing on by the petitioner.

Under that circumstance we may wish to discuss with you or you may wish to discuss with us whether it would be expedient and the efficient for the office to go ahead and take the IP reexams which you're telling us are similar in nature to

these up here -- at least there's some common grounds -- and then go ahead and have a form of proceeding where we go forward with both.

But again, if we were to transfer it up here under a time where we did not institute and then we have been to -- I would recommend at that point to the panel that we would just be transferring it right back, all of which would be considered a delay in a proceeding which is already delayed.

Any questions about that, starting with of course Apple?

MR. KUSHAN: Sure, Your Honor. I think the authority under 315(d) is not necessarily contingent on there being -- well, let me start to with the very first --

JUDGE TIERNEY: Let's back up. This is Judge Tierney. I don't believe I said anything about lacking authority to transfer or what would happen should we deny institution. I have the authority today under the rules of the statute along with my panel members to transfer the case up

here.

What we're doing is exercising our discretion and we decline to exercise our discretion based on the facts presented.

MR. KUSHAN: Sure, Your Honor.

JUDGE TIERNEY: We are not contesting your allegation that we have authority to do so should we choose to do so of transferring it.

MR. KUSHAN: Sure. Then the only other clarification I'd like to make is the commonality of the issues. There are patentability grounds. For example, lack of -- there are claims that are anticipated over, for example, Aventail, Beser, you know, those type of patentability grounds that are presently the subject of rejections of the IP reexams which I think correlate precisely to the grounds that are set forth in the RPX petitions.

And so I just wanted to make sure you appreciate that there's not a lot of daylight between the patentability defects that have been articulated and rejections in the reexamination proceedings relative to the patentability issues

that have been framed for your review in these petitions by RPX.

JUDGE TIERNEY: Understood. But, again, we have not had -- as an office we have not had the opportunity yet to review the patent owner preliminary response should one be filed by Virnetx.

Virnetx, do you have any questions or concerns regarding our decision to not transfer at this time?

MR. PALYS: No. We don't have any concerns about your decision. Just that we disagree with the representations about being diligent. Other than that, no, Your Honor.

JUDGE TIERNEY: Understood. All right. I'll go lastly, RPX, do you have any questions or concerns about our decision at this time not to exercise discretion and transfer the IP reexams to the board?

MR. ASHE: No, Your Honor.

JUDGE TIERNEY: Apple, going back to you, we had questions about the schedule and that's

where we started the conversation. I'd like to continue on that discussion.

I believe you said in line with a suggestion -- and I'm not suggesting that we do align them. I'm just throwing it out as an idea. But I believe what you're telling us is because of the commonality of the cases and the issues, a common expert, that it would beneficial for the cases to align the schedules between RPX's challenges and those of Apple's in the petitions. Have I summarized that properly?

MR. KUSHAN: Well, yes. And with one other point, and that is we've seen situations where the patents and issues are aligned closely as they are here warranting actually something that may be a step further which would be a joinder. And that might be appropriate in this setting given the commonality of issues, evidence, et cetera, to make the proceedings really run coherently.

JUDGE TIERNEY: Understood. We do have different patents under challenge here. To date the board has not exercised discretion to try and

have a joinder between two distinct patents, challenges to two different patents. Furthermore, but I will point out it's a little bit premature to discuss joinder at this time. I recognize that it's something you may be requesting.

But it does say in the joinder -- I'm pulling up 315(c). "If director institutes an inter partes review, the director, in his or her discretion, may join as a party to that inter partes review." But the first part says "if the director institutes an inter partes review." To date we have not instituted an inter partes review. Accordingly it would seem as though the time to join would be once it's actually instituted.

MR. KUSHAN: Your Honor, I wanted to alert you to the fact that last summer -- I think it was Judge Medley -- had engaged that issue of timing. I think the issue that's of interest here is briefing relative to decision. And what she did was in connection with a joinder issue at that point before institution she had authorized briefing on the joinder issue prior to institution

with the recognition, as you've just outlined, that a decision would not occur until, you know, if there were a first decision to institute the trials.

And so given kind of the experience we had with related cases earlier this summer, last summer, I was putting that on the table as an issue that would be efficient to brief and address prior to your decision.

JUDGE TIERNEY: No. I'm aware of how the case was handled and in particular the prior briefing. At this time I don't know if we have quite the need for a joinder given that they are -- the challenges here by Apple are addressing a different set of patents than the RPX set.

I realize the commonality and that -- the challenges to the Virnetx patents raised by Apple. Those Virnetx patents do seek benefit through 35 U.S.C. 120 of those challenges and petitions being brought by RPX. But at this time I don't believe joinder is necessary to discuss.

But we can revisit this once we go ahead

and should we -- after a decision to institute. Should we decide not to institute the issue would be moot. So I think it's best to wait and to see how we proceed with the case on institution, a decision to whether or not we institute.

Any question, comment? I'll go to Virnetx. Do you believe briefing would be best, though, now to have on joinder or do you believe that, consistent with what I've just stated, it would be better to have -- once we actually have a decision, to institute, because there's always a possibility we don't institute and it would be moot?

MR. PALYS: We agree with the board, Your Honor.

JUDGE TIERNEY: RPX, any questions, concerns?

MR. ASHE: I don't have any questions on that point.

JUDGE TIERNEY: Okay. At this time we will hold up on briefing joinder until a point in time where if we institute we can revisit the

issue.

Again, the question was on scheduling. I think we've addressed that with Apple and that Apple would like to have this consistent schedule for the time for filing a patent owner preliminary response between the RPX cases and Apple.

Are there any questions? Again, we are focusing on schedule. Mr. Kushan, are there any questions before we move on to getting RPX's viewpoints?

MR. KUSHAN: The only other question on schedule would just -- we really want to make sure that all of these proceedings move as expeditiously as possible. I would note that Virnetx has already filed preliminary patent owner statements in the proceedings, petitions, that we filed last summer. And it would seem hopefully that you could take advantage of that fact to at least encourage them to file their preliminary responses as promptly as possible to --

JUDGE TIERNEY: Have you discussed with your -- have you discussed with Virnetx and RPX

voluntarily going ahead and expediting things?

MR. KUSHAN: We have not. I mean, we are open to that discussion and whether we can have it -- I mean, we're obviously interested in getting to as expeditious an outcome as possible.

JUDGE TIERNEY: Okay. At this time I understand there's a desire to expedite. However, given that the cases were filed -- basically one case was only filed a month and two days ago -- I think we need to have a little bit more information before we go ahead and expedite.

So if you could talk amongst the parties, if there's a belief that we still need to expedite it and you're unable to come to an arrangement, you can arrange for a conference call at that time. But I think that's something we'll pick up not necessarily today but in a future call, because I think Virnetx will have a certain viewpoint on whether or not they're expediting further than the three months.

But let's go ahead and, Virnetx, to turn back to you again for scheduling, I understand your

points. Do you have any comments you'd like to make before we move on for the record on the position that these cases should be expedited and therefore having less than three months for the patent owner's preliminary response?

MR. PALYS: No, Your Honor.

JUDGE TIERNEY: Okay. I'm going back. So Apple, I've heard from you concerning the question about aligning schedules. Now, we're going to RPX.

Mr. Ashe, if you could give us a viewpoint of RPX, whether the schedules should be aligned between the two sets of cases.

MR. ASHE: Sure. Thank you, Your Honor. I mean, from our perspective I think it makes sense to synchronize the schedules. At some point it would seem that the patent owner preliminary response is a logical point for that, with the assumption that what you have in mind is that once the cases are instituted that there would also be a synchronized schedule.

And I think that touches on some of the

issues regarding cross-examination of witnesses, witness convenience, consistency in pleadings, et cetera. I think it makes good sense.

JUDGE TIERNEY: Okay. Thank you. Now the next question -- and we'll take it into consideration -- would be the timing. For simplicity, we would basically have -- from a forward point of view I would be considering along with my colleagues moving Apple's time, the time to file a preliminary patent owner response, to the three month date going from the earlier of the filings which is on the -- November 20th.

So then the filing would be due -- correct me if I'm wrong-- but February 20th 2013 for all patent owner preliminary responses for all cases.

Virnetx, do you have any concerns if we were to move them all to that date?

MR. PALYS: Yes, we do, Your Honor. And briefly, first, from our understanding the notice of filing dates were actually provided on the 6th of December for the RPX filings and the 23rd of

December for the Apple ones. So it's our understanding that three month date given in those notices was actually March 6th and March 23rd respectively.

At the bare minimum we are requesting at least we get that time frame. But in terms of consolidation we were hoping that it would actually be the other way where you would move the seven RPX matters to the same date as the Apple RPX.

I don't think it's -- there's no secret here. We've got nine IPR matters to deal with and notwithstanding the representations that we have overlap and preliminary responses have already been filed, it doesn't negate the fact that there are some issues that warrant additional considerations.

And I won't go into those details unless you want me to, Your Honor, about some of those differences. But we feel that we would be severely prejudiced if we're forced to move up our dates or shorten the schedule for the preliminary response.

JUDGE TIERNEY: Correct my understanding and walk me through this. Maybe I'm just -- the

RPX petitions and exhibits files along with them, are they -- how different are they than the prior challenges that were brought by New Bay Capital and Apple?

MR. PALYS: Oh. The difference between New Bay and the ones between RPX? Is that the question, Your Honor?

JUDGE TIERNEY: Yes.

MR. PALYS: Yeah. I'll let Naveen answer that.

MR. MODI: Your Honor, there are obviously similarities, but they different. So the RPX petitions -- I'll just give you some examples, Your Honor. For instance, the RPX 171 and 173 petitions raised at least one new obviousness combination. The 171 and 173 also -- actually, there are at least two that I have notes.

JUDGE TIERNEY: Stepping back here, I understand that there's some differences. How extensive are the differences? Because I've looked at them and I guess I gather that you've looked at them in great detail. It appears that there's a

lot of similarity.

MR. MODI: Sure, Your Honor. Again, we don't disagree there are similarities. But, for example, the other differences that we are thinking of are if you look at claim constructions. So what happened was, as you're aware, when Virnetx filed its preliminary responses we had responded and provided claim constructions and arguments for claim constructions to both the New Bay and Apple petitions.

And what RPX has done is essentially in its petitions it's responded to Virnetx's arguments on those claim constructions. So there are -- a lot of those arguments are new, Your Honor, and they would require further consideration from us to respond to those issues.

In addition, as you know there is a real party in issue and privity issue that has taken a lot of our time. And there has been intervening holidays. As you know, Your Honor, we had Thanksgiving and Christmas since these petitions were filed.

So I feel all of those factors would -- it would really severely prejudice us if the board was to order us to file all preliminary responses by February 20th.

JUDGE TIERNEY: Understood. But going back, I'm seeing quite a bit of similarities between the petitions that RPX previously filed by Apple and New Bay Capital. And so at least there's going to be some -- it would seem a large amount of efficiency gains -- since you've already been familiar with the art, familiar with many of the arguments, you are aware that the claim terms, which you're now saying you need to do reconstructions on.

But this is not new to Virnetx. This is all things that you're very familiar with. So in that sense I'm not seeing why we have to extend time by a great deal to take up these cases.

MR. MODI: Your Honor, I understand and appreciate your comments. I think what we're just asking, Your Honor, as you can imagine, we do have nine IPRs and the declarations also, Your Honor, I

know they're -- again, the declarations are similar. But they are different in the sense -- for example, Mr. Fratto took the Kiuchi discussions from the Housley declarations that were put in by New Bay. And it's actually quite different.

So it does take time, as Your Honor can appreciate, to go through these petitions and these references. And given all the reexams we also have -- we have over 20 co-pending proceedings, Your Honor, that we're dealing with. And I appreciate the board is trying to align these and expedite them as much as possible. And we certainly appreciate that and we'll do whatever we can, Your Honor.

We just ask that -- you know, I feel February 20th would really seriously prejudice us, especially given, like I said, the real party in interest and privity issues which hopefully the board will let us address shortly.

So, you know, we're not opposed to, like I said, alignment of some sort. It sounds like the board is leaning towards that way. We would just

ask that we be given at least the three months. And given the issues here, the real party in interest and privity issue, we were hoping to discuss those with you and then perhaps we can come back to the schedules.

But at the end of the day we do appreciate where you're coming from from a similarity of the issues.

JUDGE TIERNEY: Okay. What I gather from Virnetx very clearly -- I think they made out a case as to February 20th may be extremely difficult for them to meet. March 6th may be somewhat difficult but at least it gives them the extra couple weeks and will still give them approximately two months from today's date.

We are cognizant that Applc has requested we expedite. We have already denied the request to transfer because we are concerned about making sure these dates go on time. The board is open to a March 6th date for synchronizing.

I'm going to go to Apple and then RPX and then lastly we'll have Virnetx have the last

word on this. But starting with Apple, do you have any concerns or questions about a March 6th date for filing the patent owner preliminary responses?

MR. KUSHAN: Well, we start from your perspective where you began, which is there's really zero reason in our mind why they need more time. They've had the issues on claim construction, on prior art, on patentability grounds not just since last summer but probably for the last two and a half to three years.

And the number of issues that you rightly identify, I would say the overlap between the grounds that we've seen and our prior petitions and those of New Bay is almost a hundred percent. I mean, it seems -- I think at bottom all we're hearing them say is they want to delay things as long as possible.

If you look at their e-mail asking for their issue to be addressed on the privity issue, they basically want you to have an open-ended let them file their preliminary opposition whenever you resolve the privity issue.

This is -- it's just silly in our view --

JUDGE TIERNEY: Let's watch the word "silly," please.

MR. KUSHAN: I apologize for that. But it's just -- we're at a point now where we can't see a really legitimate reason why they should not follow the schedule you started with, which was February 20th. Obviously it's only a couple of weeks and we would urge you to go with the most aggressive schedule you can.

JUDGE TIERNEY: I did hear them point out that because there are nine cases, that keeping them consistent would be taking a little bit of extra time and therefore March 6th was already a difficult time for them to meet. And February 20th -- I got a sense of a large amount of concern on their part that February 20th date may be very, very difficult for them to meet.

So it wasn't just the fact that they would find it convenient to try to delay the case. I want to just point that out on the record. I

understand your concern that you would rather pick the February 20th day over the March 6th.

Going to RPX, can I hear from you, please?

MR. ASHE: Sure, Your Honor. In principle we don't have a problem with the March 6th date. You know, I think that my answer, though, is qualified for what might lie ahead in this conference call in terms of what they want to do in terms of further extending that date.

But in principle for where we're at right now in the discussion, I think that RPX is fine with a March 6th date for a synchronized patent owner preliminary response date.

JUDGE TIERNEY: Okay. The panel has conferred and the panel has selected the March 6th date based upon the facts presented here. We understand Apple's position that they would like it even further expedited. But we are cognizant that Virnetx has large concerns about meeting a February 20th date and that March 6th, while it would put some pressure upon them to meet such a date, it

would be at least something they could meet without having prejudice to their being able to submit the preliminary responses.

So at this time we adopt the March 6th date for the preliminary responses for all the cases. That's both the RPX and the Apple cases. They will be synchronized to a March 6th patent owner preliminary response date.

I believe that takes care of the scheduling issue. We've heard from Apple about their transfer issue and the additional cases within the office. I am aware, though, Virnetx did request for the conference call today we discuss the real party in interest issue. Unless there's another issue I need to be aware of, we'll start with that.

I'll turn to Apple and RPX. Is there something I need to know before we turn to the real party in interest issues? Apple?

MR. KUSHAN: No, Your Honor. We obviously still want you to pay attention to the motions for rehearing of the petitions which are on

the same patents as the RPX patents.

JUDGE TIERNEY: We understand the concerns there before the office. They will be decided in due course.

RPX, anything I need to know before we turn it over to the real party in interest issue?

MR. ASHE: No, Your Honor.

JUDGE TIERNEY: Okay. Virnetx if you could please -- you have requested that we discuss the real party in interest issues and how it effects the case. In particular it's directed toward the RPX challenge, the RPX petitions and their challenges. You have the floor. Please give us the information you'd like us to know.

MR. PALYS: Thank you, Your Honor. This is Joseph Palys again. I think a brief history as to the issues relating to these IPRs may be instructive as we get into these issues.

I think it's public record that Virnetx asserted these patents that are at issue in the RPX IPRs against Apple in district court. And during that litigation Apple sought, as the board knows,

multiple inter partes reexamination of the patents. Others did as well. But it's also public record that Apple was found to infringe these patents.

Following that determination Apple then filed -- a brief history -- filed three IPRs. This was in June of last year. Soon after, New Bay, which was an unknown company that was recently formed right before they filed their IPRs, they filed four more IPRs on similar patents. Apple followed suit with four more. So at that time, as the board knows, we had 11 IPRs pending.

Those IPRs, again, as the board knows, have been terminated. While that decision to terminate was being considered, then pops up these seven IPRs from RPX that were just filed.

With that backdrop, what we have here is RPX in our view is the like the requester in In re Guan, which is essentially a company that's contracting with other companies to provide defensive patent services on their behalf.

And we think -- well, before I go further, Your Honor, I just want to make sure of

the protective order issue. I know we have -- we discussed that in the beginning. But I'm going to be getting into some of the issues that were filed as RPX confidential.

We have Apple's counsel on the line. I know that Virnetx -- our team has agreed to abide by the protective order and obviously RPX has, but I don't know if we have that assurance from Apple. And I just want to be sensitive to RPX's confidential information before we move forward.

JUDGE TIERNEY: We'll stop here. Apple, do you agree to the default protective order for purposes of this call? And certainly if you need to change it you can go ahead and have a discussion at a later date. But for purposes of this call we would be adopting at least a default protective order. Do you agree at this time or do we need to take you off the call?

MR. KUSHAN: No. We agree to abide by the terms of the default protective order.

JUDGE TIERNEY: Understood.

MR. MELAUGH: Do I need to drop off,

though? This is David Melaugh, in-house counsel of Apple.

JUDGE TIERNEY: I would appreciate it if you did.

MR. MELAUGH: I will then. Thank you very much.

JUDGE TIERNEY: Is anyone else in-house counsel that would not be subject to a protective order or potentially subject to a protective order that I need to be aware of? I'm going once, twice. I need to know if there is anyone on the phone who is not subject to a protective order. Speak up now.

Hearing none, everyone on this phone is subject to the protective order, the default protective order. You may proceed, Mr. Palys.

MR. PALYS: Thank you, sir.

[redacted]

[redacted]

[redacted]

In a nutshell, RPX's business model -- and this is public information from their website and represented in their petition -- their business model is to provide defensive patent services on behalf of its clients.

[redacted]

Now, I think it's clear just from our discussion today and from the petitioners, there's no mistaking -- even the board has recognized the

[redacted]

similarities between these petitions. You know, while we think that there are differences in terms of the scheduling and for purposes of --

JUDGE TIERNEY: Okay. Mr. Palys. Let's clarify for the record, though.

MR. PALYS: Yeah.

JUDGE TIERNEY: The fact that there are similarities between the petitions, quite often when a party is seeking joinder they basically photocopy a petition and file it. And in fact I've seen your law firm do the same. So the fact that there's similarities between petitions later filed in time, I'm not sure where you're going with that.

MR. PALYS: Yeah, well -- I'm sorry, Your Honor. Were you finished? I didn't mean to interrupt.

JUDGE TIERNEY: Yeah, I am finished. I'm just trying to figure out where we are going.

MR. PALYS: Yeah. I was getting there, Your Honor. I wasn't suggesting just the fact that there's similarities and that was the end deal. I was working my way to the point.

So, yes, we have similarities between the patents and they closely parallel the petitions. But like -- there are some facts supporting the IPR privity issue that Virnetx is seeking. [redacted]

And in In re Guan one of the interesting factors that was considered in that case was -- in Guan on page 7 it says "An entity named as a sole real party in interest may not receive a suggestion from another party that a particular patent should be the subject of a request for inter partes reexamination and be compensated for that."

The trial practice guides also provides guidance, as I'm sure the board knows, the relevant factors when considering real party in interest and privity issues, [redacted], or others, who may be in privity

with the petitioner and the petition, including the nature and degree in involvement in the filing, and the nature of the entity filing the petition, in this case the relationship with RPX.

And the factors or the facts associated with supporting these requests for getting into investigations for real party in interest and privity rely on these business models. RPX in its website even says -- and this is public information, Your Honor. They call themselves an extension of in-house legal -- of the legal team, of an in-house legal team.

They provide -- they say that they're a trusted intermediary. These are all things that we would obviously provide citations to if we are given the opportunity to do so, Your Honor.

[redacted]

And, again, as the board knows, there's a 315(b) problem with Apple. So a long story short is we believe that there's enough suggestion in the record to support investigations and an inquiry into this issue of real party in interest because if, as we believe, there's a privity relationship and/or a real party interest issue relating to Apple, that that is a case-dispositive issue which -- the last point here -- which brings me to the scheduling issue, Your Honor, which I tried to address in the beginning.

If these issues can be addressed before we get to the preliminary response date it doesn't put any burden on the board through the statute to determining institution from the three month date of that preliminary response date.

So I'll stop there. I mean, there's

[redacted]

many other details I want to get into, but I don't want to hold the floor too long. And I invite questions from the board on this.

JUDGE TIERNEY: Basically I'm still trying to figure out the allegation. Is there an allegation that Apple is controlling the proceedings that RPX has filed, the petitions that RPX filed?

MR. PALYS: Well, our request, Your Honor, is -- it's not so much an allegation, I guess. But our request is that the board issue an order to show cause to RPX to show why they should have these filing dates for these -- for their IPR petitions from a privity and real party in interest standpoint.

And in the alternative, if the board is not inclined to do that, we seek leave for additional discovery relating to these real party and privity issues so we can, again, ask leave to move for a motion to dismiss should the discovery go that route.

The point here, Your Honor, in a

nutshell is we believe there is a privity issue, we think the record shows this relationship. And however we get there from in terms of getting investigation and inquiry to these issues, whether it's through an order to show cause or through its additional discovery, we just want to make sure that not only the board but also the parties fully vet this issue because in our view it is case dispositive.

When we get to this term of direction and control, that's one factor to consider when you're looking at real party in interest and privity issues, as the board knows. But I think an interesting point here is that while RPX has said in their petition, look, we do things in our sole discretion or maybe there's no direction or control, there's some things which are missing from the record which is what we're asking to get further investigation into.

Having direction and control or sole discretion is not the same as not receiving suggestions from -- let's say suggestions or

assistance from Apple or Apple's counsel in terms of drafts or arguments our even, in re: Guan, a suggestion of the patents to pursue.

[redacted]

JUDGE TIERNEY: I --

MR. PALYS: Go ahead.

JUDGE TIERNEY: I appreciate you having the floor. If you could take only one more minute, though, and summarize before I move on.

MR. PALYS: Sure. I think -- well, I'll just wrap it up and say that Virnetx respectfully requests the opportunity -- either the board to issue an order to show cause to get into these related issues and/or in the alternative that we get an opportunity to file a motion for additional discovery.

[redacted]

We think the record -- the public record, the record in these IPRs, support that. And we would appreciate that consideration.

JUDGE TIERNEY: Okay. I'm going to turn it over to RPX. But I would like to have RPX in particular discuss the issues raised by Virnetx. I would like to point out I would like to have an explanation of page 3 of the petition. I'm looking at the IPRs of 2014-00171 page 3.

A second full paragraph states "RPX has exercised its sole discretion in deciding to file the present petition." If you could elaborate upon that. And it also says in the second sentence in that paragraph, "RPX alone shall control" -- "RPX alone shall control the participation of RPX at any proceeding," et cetera.

And then the third sentence goes "RPX alone is responsible for paying the cost of preparing," et cetera, et cetera. So in each of those instances it's using the term "RPX's sole discretion" or "RPX alone."

Maybe you could elaborate upon those,

Mr. Ashe.

MR. ASHE: Okay. If I could start with the issues that have been raised by Mr. Palys, I'll address them briefly.

First of all, with regard to an order to show cause, I'm not aware of any provision in the rules that allow for that. Mr. Palys has outlined basically what I would envision his patent owner's preliminary response to be. And it sounds to me that he believes he has all the evidence that he needs to make the argument that he wants to make and he's certainly entitled to do that.

RPX in its petition has stated its explanation for why it's the sole real party in interest and, you know, that would be the response to an order to show cause. So I don't think that there's procedurally any ground for that. I don't think that it's going to substantively advance the case.

With regard to discovery, again, I understand the outline of his patent owner preliminary response, but I haven't heard anything

outside of speculation as to why he thinks there's any additional information that would be useful in addressing this information.

It sounds like essentially a fishing expedition and that's not sufficient to satisfy the interest of justice standard for additional discovery in these proceedings.

So with that, unless you have particular questions with regard to those comments, I can move on to the points that you'd like to address on page 3 of the 171 petition.

JUDGE TIERNEY: Please move forward and discuss the statements on page 3 and whether or not they're correct.

MR. ASHE: Sure. Well, I believe that they are correct. With regard to the sole discretion in deciding to file the petitions, control of the proceeding and the responsibility for paying the costs of preparing it, it's my understanding that all of those statements are correct.

RPX is in the business of trying to

bring rational pricing to the patent marketplace and that involves a number of different activities. It involves licensing, defensive streamlining, et cetera. RPX also has a number of initiatives that I believe are natural, logical and legitimate outgrowths of its primary business purpose and that is, again, to bring rational pricing to the patent marketplace.

One of these initiatives is to identify patents that are basically -- pose a risk to that marketplace. And I think anybody following the public record, number one, would understand that these patents have been asserted against a number of different companies.

The arguments that are included in the RPX petition are a matter of public record. [redacted]

[redacted]

So RPX is responsible for any bills that they incur, any expenses that they incur. That's my explanation. But I'm certainly willing to answer any questions that you have.

JUDGE TIERNEY: At this time the only -- it's not really a question. It just pointing out. The rules do provide that the board may enter an order as appropriate and should the board believe an order of show cause be appropriate we could exercise our authority and issue such an order.

The fact that we have such discretion, though, notwithstanding, at this time the panel does not believe an order to show cause would be appropriate. We agree with the suggestion that the issues raised by Virnetx could be raised in a patent owner preliminary response.

I'm going to turn -- before I go on to the additional discovery question that was raised by Virnetx --

MR. ASHE: If --

[redacted]

JUDGE TIERNEY: -- I will -- yes?

MR. ASHE: If I could just -- on the issue of them addressing this in the patent owner preliminary response, to the extent that they do, I would ask that RPX has an opportunity to file a reply brief or a supplemental briefing --

JUDGE TIERNEY: To the extent it gets -- at this time I will not guess as to what they wish to put in their patent owner preliminary response. As soon as they put in something in the patent owner preliminary response that you believe needs to be addressed by RPX, you may raise it after reading their patent owner preliminary response.

MR. ASHE: Okay. Thank you.

JUDGE TIERNEY: But I'm going to turn over -- I will give Apple one moment to discuss if they would like to do so the issue of additional discovery on this issue, understanding that it may or may not impact them.

MR. KUSHAN: Thank you, Your Honor. Our stance on additional discovery is that they have -- that Virnetx has not articulated and set forth for

the board grounds that are sufficient to justify the additional discovery.

You asked them point blank is there an allegation that Apple is controlling the proceeding and rather than suggesting there was they just avoided that question which I take to be no. And that I think disposes this entire issue.

But as to the discovery question, under the standards we understand the board follows for additional discovery, there has to be a definiteness in the existence of the evidence you're pursuing. It has to be shown to have -- not be an issue that's duplicative or redundant to the issues or evidence they already have and a number of other criteria that are important to the interests of justice standard. And under those criteria I can't see how it would be justified given what they have represented so far.

At the end of the day it's up to the discretion of the board to authorize that discovery and we'll comply with whatever your order is.

JUDGE TIERNEY: Virnetx, I will give you

the last word on this before the panel comes to a decision.

MR. PALYS: Thank you, Your Honor. I'll try to be brief. One thing I haven't heard from the parties -- I know the question and I heard Apple's counsel talk about direction and control. I think as the board knows, that that is one factor, but it's not just direction and control. It's any assistance, any suggestions, any assistance in that manner.

And one thing I haven't heard from the parties as you asked, Your Honor, is whether RPX has received any suggestions, assistance, drafts of any kind from Apple or Apple's counsel. And I'm wondering if we can get a representation from that.

JUDGE TIERNEY: Well, at this time they were already a public record. Do you mean directly from Apple or -- they could have achieved them through the public record, because Apple had already filed petitions.

MR. PALYS: Yeah. Outside the public record, Your Honor. Through Apple or Apple's

counsel.

JUDGE TIERNEY: So are you saying did they receive them directly from Apple and not going onto our website or through some third source publicly available material?

MR. PALYS: That's right, Your Honor. Whether they received any assistance or suggestions in the form of drafts of anything from Apple or Apple's counsel directly, not from the PTO's website.

JUDGE TIERNEY: I'm going direct assistance. I want -- I need to make sure I'm being very clear because they're asking a very specific question.

I will go ahead and I'll open the floor. RPX, to the extent you wish to answer the question at this time, please do so. To the extent the question is either a compound question or unclear, please ask for clarification.

MR. ASHE: Thank you, Your Honor. I think the question puts the cart before the horse. It's a discovery question and our position is --

and I think it's confirmed by Virnetx's arguments at the outset of this portion of the conference call that they have all the information they need. They have not identified any information that is contradictory within the petition or within the agreement.

So our position is that they're not entitled to discovery and the purpose of this conference call was to give them an avenue to seeking discovery on the call. I think it's inappropriate.

JUDGE TIERNEY: Okay. Apple, do you have any question before we go ahead and make a decision? Mr. Kushan, any comment before we go ahead and make a decision on this?

MR. KUSHAN: Yes, Your Honor. Just very briefly, first of all, I think equating Apple with Apple's counsel is improper. You've already had decisions, I believe, in the board which have confirmed that sharing counsel among different parties is not establishing a connection between the parties.

And the second issue is I more or less echo the comments from Mr. Ashe regarding the timeliness of the question that's being presented in this case.

JUDGE TIERNEY: At this point in time --

MR. PALYS: I think - I'm sorry, Your Honor. It's Joe Palys. I apologize again. I just wanted 30 seconds of your time just to respond to that last comment, if that's okay.

JUDGE TIERNEY: Please do so.

MR. PALYS: One of the things -- I know we're talking about the first factor in Garman with additional discovery. One of the things that we have come across which is one of the reasons why we had some delay raising this issue was there's metadata that's been involved with the Apple or the RPX petitions.

If you go to the petitions that were provided by or filed with the patent office in the public record you will see metadata that provides a link between RPX and Apple's counsel for these documents.

And so we think -- I can get into specifics about that. But we think that provides us more than pure speculation whether -- this is one factor again coupled with all the other factors that we raised on this issue that there is -- worthy of additional -- at least additional discovery in this matter.

JUDGE TIERNEY: At this point in time the panel will take it under advisement. We'll be back on the phone in approximately three minutes. It's 4:21. Let's shoot for 4:25. I would like to talk to my co-panelists to see how we would like to proceed. We will be on the phone at 4:25. Thank you, everyone. I am muting my phone now.

(Pause.)

JUDGE TIERNEY: This is Judges Tierney and Easthom back on the line. Is Judge Siu back on the line now?

JUDGE SIU: Yes, sir. I'm back on the line.

JUDGE TIERNEY: Welcome back. The panel has -- I'll just confirm. An RPX representative on

the line?

MR. ASHE: Yes. Here.

JUDGE TIERNEY: Apple representative on the line?

MR. KUSHAN: Yes, Your Honor.

JUDGE TIERNEY: And Virnetx, you're represented? Mr. Palys still on the line?

MR. PALYS: Yes, sir.

JUDGE TIERNEY: I ask that because once I went off line and came back and I think I came back a minute early and one counsel was aghast that we had started talking and hadn't confirmed that he was on the line.

So now that we are confirmed that everyone is available, the panel has conferred and come to the following conclusions. Based upon the discussion today RPX has confirmed that the statements made in its petitions are correct.

Specifically RPX has confirmed to the board's satisfaction at this point in time that they exercise sole discussion in deciding whether to file the petitions. RPX again has confirmed

that they alone shall control the participation in the proceeding, and RPX again has confirmed that they alone are responsible for paying the cost of preparing and filing the petitions and subsequent costs in connection with the proceedings.

Based on their confirmation of the statements in the petition, we decline at this point to go ahead and authorize additional discovery on the issue of the real party in interest.

We, however, do note for the record that should Virnetx wish to pursue the issue they are free to pursue the issue in a patent owner preliminary response based upon the evidence and the facts that they have before them and we look forward to seeing their arguments should they wish to bring it to our attention in the form of a patented owner preliminary response.

Having so ruled we do go to the parties to see if they have any questions or concerns. We will start right now with Virnetx. Do you have any questions regarding our decision?

MR. PALYS: No, Your Honor.

JUDGE TIERNEY: Apple?

MR. KUSHAN: No, Your Honor.

JUDGE TIERNEY: RPX?

MR. ASHE: No, Your Honor.

JUDGE TIERNEY: Having ruled on that, I believe that covered the issues that were brought to our attention for the purposes of this call. However it may have come to the parties' attention that there may be additional issues. So before we adjourn today I will go back to the parties to make sure that there are no additional issues for discussion.

I'll start with Virnetx. Are there any additional issues today?

MR. PALYS: Your Honor.

JUDGE TIERNEY: Apple?

MR. KUSHAN: No, Your Honor.

JUDGE TIERNEY: And last but not least, RPX, are there any additional issues we need to discuss before we adjourn today?

MR. ASHE: Thank you. No, Your Honor.

JUDGE TIERNEY: It's been a little longer conference call than I expected but at least we covered quite a bit of ground today. Should any issues arise please bring them to our attention.

We do look forward to receiving a copy of the transcript. I just ask as a matter of form approximately how long do you expect before a transcript would be filed here? And I'm not asking for it to be rushed. I'm just generally asking what time frame do you expect to file one. And please do file it under seal, given the information we've been discussing today.

MR. PALYS: This is Joseph Palys. Hey, Jon, can you let us know how fast you think you can get it?

THE REPORTER: I could have it to you Monday.

JUDGE TIERNEY: That is fine with us. I was just inquiring for more informational purpose. If you needed more time than that that's also acceptable. We just wanted to know approximately when to expect it.

MR. PALYS: Understood.

JUDGE TIERNEY: So do not in any way feel rushed on getting the transcript in, but once you do get it, you know, obviously sooner is better than later, but I'm not asking you to expedite. All right?

So are there any questions about filing of the transcript that we need to discuss or are we ready to adjourn? Mr. Palys? It's up to you. Anything you need to --

MR. PALYS: No. Nothing further, Your Honor.

JUDGE TIERNEY: All right. Well, thank you. That adjourns our call for today. We'll have an order commemorating it. But again, we do have a transcript covering what we discussed today so the order going out will be more a shorter form because the information which we discussed is already recorded via the transcript.

Thank you, everyone. We look forward to going forward with this case. Should anything arise, we look forward to talking to you again.

But until then we're adjourned. Thank you.

MR. KUSHAN: Thank you, Your Honor.

MR. PALYS: Thank you, Your Honor.

MR. ASHE: Thank you.

(Whereupon, the conference call ended at 4:30 p.m. EST.)

CERTIFICATE OF REPORTER

I, Jonathan Wonnell, a Registered Professional Court Reporter (NCRA #835577) and Notary Public of the State of Minnesota, County of Hennepin, do hereby certify that the foregoing transcript is a true and accurate record of these proceedings; that said proceedings were taken in Stenotype note by me on the 8th day of January, 2014, commencing at 2:15 p.m. EST and ending at 4:30 p.m. EST.

I further certify that present on behalf of Party Virnetx were Joseph Palys, Esq., Naveen Modi, Esq., James Stein, Esq., and Elliott Cook, Esq., of Finnegan, Henderson, Farabow, Garrett & Dunner, LLP; on behalf of Party RPX Corporation was Oliver R. Ashe, Jr., Esq., of Ashe P.C.; and on behalf of Party Apple Inc. were Jeffrey Kushan, Esq., and Joseph A. Micallef, Esq., of Sidley Austin LLP, and Apple Inc. in-house counsel and David Melaugh, Esq.

I further certify that I am not related to, nor associated with any of the parties or their attorneys, nor do I have any disqualifying interest, personal or financial, in the actions within.

Dated this 9th day of January, 2014, in Hennepin County, Minnesota.

_____

Jonathan Wonnell
Notary Public, Hennepin County, Minnesota
My Commission expires January 31, 2017

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