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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION
Petitioner

v.

VIRNETX INC.
Patent Owner

Case IPR2014-00558
Patent 6,502,135

**PATENT OWNER'S OPPOSITION TO
MICROSOFT'S MOTION FOR JOINDER**

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I.   INTRODUCTION

Microsoft seeks joinder in the event its Petition is <u>barred</u> under 35 U.S.C. § 315(b).   Because its Petition is barred, it cannot be joined under 35 U.S.C. § 315(c), which permits joinder only if a petition "warrants the institution of an inter partes review under section 314."   Microsoft's request is based on a partial quotation of 35 U.S.C. § 315(c), which omits the above language, and is also contrary to the broader statutory framework of the America Invents Act.

Microsoft's requested joinder would also add unnecessary complexity and the likelihood of delay to the proceedings.   Though Microsoft contends that joinder will allow for "efficient" and "timely" resolution (Paper No. 3 at 3), the fact is that joinder would substantively and procedurally complicate the RPX proceeding because different declarants are involved in each proceeding.   And Microsoft apparently anticipates presenting divergent arguments from RPX's, claiming that "Microsoft's interests will not be fully and fairly represented in the RPX IPR" absent joinder. (*Id.* at 8.)   Although one may question that claim given that RPX's website identifies Microsoft as an RPX client (Ex. 2001), Microsoft's argument foreshadows differing positions that will necessarily complicate the proceedings.

Joinder is also inappropriate because the Board should not institute RPX's IPR2014-00171 for the reasons discussed in Patent Owner's Preliminary Response in that proceeding, including that RPX's '171 Petition fails to name a real party-in-

interest in violation of 35 U.S.C. § 312(a)(2), is time-barred under § 315(b), and has a number of other substantive and procedural defects. (IPR2014-00171, Paper No. 35 at 2-17.) Not instituting RPX's '171 proceeding would moot Microsoft's request for joinder.

Accordingly, VirnetX respectfully requests that the Board deny Microsoft's request to join its IPR2014-00558 with RPX's IPR2014-00171.

II. PRECISE RELIEF REQUESTED

VirnetX requests that the Board deny Microsoft's motion for joinder.

III. STATEMENT OF FACTS

VirnetX first served Microsoft with a complaint alleging infringement of U.S. Patent No. 6,502,135 ("the '135 patent") on February 15, 2007. (Ex. 2002.) That litigation, *VirnetX, Inc. v. Microsoft Corp.*, No. 6:07-cv-00080 (E.D. Tex.) ("the 2007 Litigation") proceeded to a jury trial, in which Microsoft was found to willfully infringe the '135 patent and Microsoft's invalidity arguments were rejected. (Ex. 2003.)

On March 17, 2010, VirnetX filed a separate suit against Microsoft alleging infringement of the '135 patent by different products—*VirnetX, Inc. v. Microsoft Corp.*, No. 6:10-cv-00094 (E.D. Tex.) ("the 2010 Litigation"). Microsoft's counsel accepted service of the complaint on March 22, 2010 (Ex. 2004) and Microsoft filed an agreed motion to extend its deadline to respond to the complaint based on

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