Paper No. 38

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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APPLE INC.,
Petitioner,

v.
VIRNETX INC.,
Patent Owner.

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Case No. IPR2015-00810
U.S. Patent No. 8,868,705

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**PETITIONER'S OPPOSITION TO**
**PATENT OWNER'S MOTION TO EXCLUDE**

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## Cases



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## I. Introduction

The evidence of record establishes that Exhibits 1003-1005, 1009-1011, 1013-1035, 1037-1041, 1043-1048, 1060, 1063-1065, and 1068 are admissible. Patent Owner has failed to show otherwise, and thus, its motion must be denied. *See* Paper 36 ("Mot.").

## II. Argument

### A. Patent Owner's Motion is Facially Deficient

With respect to the exhibits Patent Owner seeks to exclude based on hearsay (Exs. 1060 and 1063-1065), Patent Owner's motion is facially deficient – it does not identify any specific statements in those exhibits alleged to be hearsay. Mot. at 2-3; *see* 37 C.F.R. § 42.22(a)(2). Instead, Patent Owner alleges that the exhibits "***include*** out-of-court statements" without identifying them. Mot. at 2-3 (emphasis added). It is not Petitioner's burden to identify purported hearsay – Patent Owner, as the moving party, "has the burden of proof to establish that it is entitled to the requested relief." 37 C.F.R. § 42.20(c).

Patent Owner's failure to identify the putative hearsay also is prejudicial. For example, if Patent Owner in its reply attempts to cure these deficiencies, Petitioner will have no opportunity to respond. Patent Owner's motion to exclude these exhibits should therefore be denied.

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