

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner,

v.
VIRNETX INC.,
Patent Owner.

Case No. IPR2015-00811
U.S. Patent No. 8,868,705

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

Table of Contents

I. Introduction.....1

II. Argument1

 A. Patent Owner’s Motion is Facially Deficient.....1

 B. Exhibits 1022, 1023, 1043, and 1057-1059 Are Admissible.....2

 C. Exhibits 1060 and 1063-1065 Are Admissible8

 D. Exhibits 1003, 1004, 1007, 1015-1017, 1024-1035, 1037-1041, 1044-1048, and 1067-1069 Are Admissible13

 E. Exhibit 1005 Is Admissible in Its Entirety.....15

III. Conclusion15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Apple Inc. v. Smartflash LLC</i> , CBM2014-00180, Paper 50 (Sep. 25, 2015)	13
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974).....	3
<i>Doe v. United States</i> , 976 F.2d 1071 (7th Cir. 1992), <i>cert. denied</i> 510 U.S. 812 (1993)	2
<i>In re Epstein</i> , 32 F.3d 1559 (Fed. Cir. 1994)	7
<i>Ericsson Inc. v. Intellectual Ventures I LLC</i> , IPR2014-00527, Paper 41 (May 18, 2015).....	12
<i>Google Inc. v. Intellectual Ventures II LLC</i> , IPR2014-01034, Paper 41 (Dec. 7, 2015).....	15
<i>The Mangrove Partners Master Fund, Ltd., v. VirnetX Inc.</i> , IPR2015-01047, Paper 52 (Apr. 15, 2016).....	3
<i>Poole v. Textron, Inc.</i> , 192 F.R.D. 494 (D. Md. 2000)	11
<i>Samsung Electronics America, Inc. v. Smarthflash LLC</i> , CBM2014-00193, Paper 45 (Mar. 30, 2016).....	15
<i>Ultratec, Inc. v. Sorenson Commc'ns, Inc.</i> , No. 13-CV-346, 2014 WL 4829173 (W.D. Wis. Sept. 29, 2014).....	11
<i>United States v. North</i> , 910 F.2d 843 (D.C. Cir. 1990) <i>cert. denied</i> 500 U.S. 941 (1991).....	2
<i>VirnetX, Inc. v. Apple Inc.</i> , 10-cv-00417 (E.D. Tex.).....	5

VirnetX, Inc. v. Microsoft Corp.,
 07-cv-00080 (E.D. Tx.).....6

Other Authorities

37 C.F.R. § 42.20(c).....1
 37 C.F.R. § 42.22(a)(2).....1
 37 C.F.R. § 42.51(b)(2).....3, 8
 37 C.F.R. § 42.53(f)(5)14
 37 C.F.R. § 42.6513
 Fed. R. Evid. 801(c)(2)9
 Fed. R. Evid. 807*passim*
 FRE 401 and 402.....13

I. Introduction

The evidence of record establishes that Exhibits 1003-1005, 1007, 1015-1017, 1024-1035, 1037-1041, 1043-1048, 1057-1060, 1063-1065, and 1067-1069 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. 1022, 1023, 1043, 1057-1060, 1063-65), Patent Owner's motion is facially deficient – it does not identify any specific statements in those exhibits alleged to be hearsay. Mot. at 2-5; *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 2-5 (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.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.