Paper No. ___
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner

v.

VIRNETX INC.
Patent Owner

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

PATENT OWNER'S REPLY IN SUPPORT OF MOTION TO EXCLUDE

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On May 16, 2016, Petitioner Apple Inc. ("Apple") filed an Opposition (Paper No. 38) to Patent Owner's Motion to Exclude (Paper No. 36). Apple, however, provides insufficient reasons for admitting the exhibits at issue, i.e., Exhibits 1003, 1004, 1007, 1015-1017, 1024-1035, 1037-1041, 1043-1048, 1057-1060, 1063-1065, and 1067-1069, and portions of Exhibit 1005. As such, Patent Owner's Motion to Exclude should be granted.

I. Exhibits 1022, 1023, 1043, 1057-1060, and 1063-1065 Should be Excluded

Apple asserts that VirnetX should have identified "specific statements in [these] exhibits alleged to be hearsay." Paper No. 38 at 1. Apple misses that VirnetX asserted these exhibits were hearsay in their entirety. Paper 36 at 2-5, Paper 18 at 1,2, Paper 11 at 1. Moreover, there is no requirement to identify "specific statements," *see* 37 C.F.R. 42.22, and Apple does not deny that Exhibits 1022, 1023, 1043, 1057-1060, and 1063-1065 constitute hearsay.

Apple further argues that these exhibits should be admitted under the residual exception of Fed. R. Evid 807. Apple states that courts have "wide discretion" in applying the residual exception to the hearsay rule. *See* Paper 38 at 2 (citing *Doe v. United States*, 976 F.2d 1071, 1076-77 (7th Cir. 1992)). This is wrong. Apple's reliance on *Doe*, which involves out of court statements made by a *child abuse victim against his abuser*, is misplaced. As provided by *Doe*:

> Congress intended that the residual exceptions be *used sparingly*; although trial judges are given considerable discretion in evaluating hearsay offered thereunder, that discretion is "tempered by the *requirement that the exception be reserved for exceptional cases*."

Id. at 1074 (emphasis added). Indeed, the Federal Circuit recently excluded a sworn declaration assumed to be trustworthy. *Pozen Inc. v. Par Pharm., Inc.*, 696 F.3d 1151, 1161 n.6 (Fed. Cir. 2012) (even if the declaration at issue was trustworthy, "this is not an exceptional case and thus does not warrant the residual hearsay exception").

A. Exhibits 1022, 1023, 1043, and 1057-1059 Should Be Excluded

Ignoring the mandate that the residual hearsay exception is to be "used sparingly" for truly "exceptional cases," Apple attempts to establish that these exhibits meet the five requirements of Rule 807. But they do not meet all of those requirements. Apple first argues that the statements have circumstantial guarantees of trustworthiness because they corroborate one another. That is incorrect. The declarations were prepared long after the events they purport to memorialize and are unsubstantiated.

Mr. Hopen baldly "estimate[s]" that "thousands of" copies of *Aventail* were distributed in the first six months of 1999. (Ex. 1023 at ¶ 16.) The time lapse of over ten years between *Aventail*'s alleged distribution and Mr. Hopen's statement

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