

Filed on behalf of: VirnetX Inc.

By:

Joseph E. Palys

Paul Hastings LLP

875 15th Street NW

Washington, DC 20005

Telephone: (202) 551-1996

Facsimile: (202) 551-0496

E-mail: josephpalys@paulhastings.com

Naveen Modi

Paul Hastings LLP

875 15th Street NW

Washington, DC 20005

Telephone: (202) 551-1990

Facsimile: (202) 551-0490

E-mail: naveenmodi@paulhastings.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner

v.

VIRNETX INC.
Patent Owner

Case IPR2015-00812
Patent No. 8,850,009

PATENT OWNER'S MOTION TO EXCLUDE

Table of Contents

- I. Precise Relief Requested1
- II. Legal Standard1
- III. Exhibits 1001, 1002, 1009-1035, 1037-1041, 1043-1048, 1060, 1063-1065, 1068, and 1069, and Portions of Exhibit 1005 Should be Excluded from the Record1
 - A. Exhibits 1060 and 1063-1065 Constitute Inadmissible Hearsay2
 - B. Exhibits 1001, 1002, 1009-1035, 1037-1041, 1043-1048, 1068, and 1069 Lack Relevance3
 - C. Portions of Exhibit 1005 Lack Relevance.....4
- IV. Conclusion4

TABLE OF AUTHORITIES

	Page(s)
Federal Regulations	
Federal Rule of Evidence 401	3, 4
Federal Rule of Evidence 402.....	1, 3, 4
Federal Rule of Evidence 403.....	3, 4
Federal Rule of Evidence 801	1, 2
Federal Rule of Evidence 802.....	1, 2
37 C.F.R. 42.62(a).....	1
Other	
Office Patent Trial Practice Guide, 77 Fed. Reg. 48758	1

I. Precise Relief Requested

Pursuant to 37 C.F.R. § 42.64, Patent Owner VirnetX, Inc. (“Patent Owner”) moves to exclude certain exhibits submitted by Apple Inc. (“Petitioner”). This motion is timely filed in accordance with the Board’s Scheduling Order (Paper No. 9). In particular, Petitioner requests that Exhibits 1001, 1002, 1009-1035, 1037-1041, 1043-1048, 1060, 1063-1065, 1068, and 1069, and portions of Exhibit 1005 be excluded from the record.

II. Legal Standard

The Federal Rules of Evidence apply to *inter partes* review proceedings. 37 C.F.R. § 42.62(a), Office Patent Trial Practice Guide, 77 Fed. Reg. 48758. Under Federal Rule of Evidence 402, “irrelevant evidence is not admissible.” Fed. R. Evid. 402. Also, unless an exception applies, an out of court statement offered for the truth of the matter asserted is inadmissible. Fed. R. Evid. 801, 802.

III. Exhibits 1001, 1002, 1009-1035, 1037-1041, 1043-1048, 1060, 1063-1065, 1068, and 1069, and Portions of Exhibit 1005 Should be Excluded from the Record

The Board should exclude exhibits 1001, 1002, 1009-1035, 1037-1041, 1043-1048, 1060, 1063-1065, 1068, and 1069 because one or more of these exhibits includes evidence that is inadmissible hearsay or the evidence in these exhibits is irrelevant to the instant proceeding. The Board should also exclude portions of Exhibit 1005 because they are irrelevant to the instant proceeding.

Patent Owner timely objected to these exhibits stating the precise grounds under which these exhibits are inadmissible. (Paper Nos. 11, 18, 30.)

A. Exhibits 1060 and 1063-1065 Constitute Inadmissible Hearsay

Exhibits 1060 and 1063-1065 should be excluded as inadmissible hearsay. *See* Fed. R. Evid. 801-802. Patent Owner previously objected to these exhibits on this ground. (Paper No. 18 at 1.) Petitioner has failed to rebut Patent Owner's objections. As such, these exhibits should be excluded.

In its Petition, Petitioner made the naked assertion that RFC 2401 "was published in November 1998." (Pet. at 26.) After trial was instituted, Petitioner submitted additional evidence (Exs. 1060-1065) as supplemental information in support of its contention that RFC 2401 qualified as a printed publication as of November 1998. (Paper No. 17 at 5-7.) Exhibit 1060 is a declaration from Sandy Ginoza, a representative of the IETF, submitted in litigation before the International Trade Commission (337-TA-858) and Exhibit 1063 is a "transcript of Ms. Ginoza's February 8, 2013 deposition that was taken as part of the ITC action." (*Id.* at 5-6.) Exhibit 1064 is allegedly "an article from InfoWorld magazine (dated August 16, 1999)" and Exhibit 1065 is allegedly "an article from NetworkWorld magazine (dated March 15, 1999)." (*Id.* at 6-7.) In its reply to the Patent Owner response, Petitioner further relied on the above exhibits to support its assertion regarding the publication date of RFC 2401. (Reply, Paper No. 28 at 19-

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.