

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 IPR2015-00866
Patent No. 8,458,341

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

Table of Contents

I. Exhibits 1060 and 1063-1065 Should Be Excluded.....1

II. Exhibits 1002-1004, 1006, 1010-1041, 1043-1048, 1050, 1051, 1053,
1054, 1069, and 1071 and Portions of Exhibit 1005 Should be
Excluded5

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Pozen Inc. v. Par Pharm., Inc.</i> , 696 F.3d 1511 (Fed. Cir. 2012)	1, 2
<i>Conoco Inc. v. DOE</i> , 99 F.3d 387 (Fed. Cir. 1996)	5
<i>Doe v. United States</i> , 976 F.2d 1071 (7th Cir. 1992)	1, 5
<i>Actifio, Inc., v. Delphix Corp.</i> , IPR2015-00108, Paper No. 56 (Apr. 29, 2016).....	5
<i>People v. Bowers</i> , 801 P.2d 511 (Colo.1990).....	3
<i>Delacruz v. State</i> , 734 So.2d 1116 (Fla. Dist. Ct. App. 1999).....	3
<i>In re Flannery</i> , 768 N.E.2d 34 (Ill. App. 2d Dist. 2002).....	3
<i>State v. Renly</i> , 827 P.2d 1345 (Or. App. 1992)	3
<i>A.P. v. Department of Public Welfare</i> , 696 A.2d 912 (Pa. Cmmw. 1997).....	3
Rules	
Federal Rule of Evidence 807.....	1, 2, 4

On June 6, 2016, Petitioner Apple Inc. (“Apple”) filed an Opposition (Paper No. 33) to Patent Owner’s Motion to Exclude (Paper No. 30). Apple, however, provides insufficient reasons for admitting the exhibits at issue, i.e., Exhibits 1002-1004, 1006, 1010-1041, 1043-1048, 1050, 1051, 1053, 1054, 1060, 1063-1065, 1069 and 1071, and portions of Exhibit 1005. As such, Patent Owner’s Motion to Exclude should be granted.

I. Exhibits 1060 and 1063-1065 Should Be Excluded

Apple argues that Exhibits 1060 and 1063-1065 should be admitted under the residual exception of Fed. R. Evid. 807. Paper No. 33 at 1. In support of this position, Apple states that courts have “wide discretion” in applying the residual exception to the hearsay rule. *See* Paper No. 33 at 1 (citing *Doe v. United States*, 976 F.2d 1071, 1076-77 (7th Cir. 1992)). This is incorrect. 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.*’” 976 F.2d 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”).

Ignoring the mandate that the residual hearsay exception is to be “used sparingly” for truly “exceptional cases,” Apple attempts to establish that statements in these exhibits meet the five requirements of Rule 807. They do not. Apple first argues that Ms. Ginoza’s statements in Exhibits 1060 and 1063 are corroborated by and corroborate Exhibits 1064 and 1065. *See* Paper No. 33 at 2-4. That is incorrect. Ms. Ginoza’s statements and the statements in Exhibits 1064 and 1065 have no circumstantial guarantees of trustworthiness. There is no evidence corroborating Ms. Ginoza’s statements. She was *not involved* with the RFC editor’s publication process until June of 1999. Ex. 1063 at 14 (page 50, lines 17-25). She failed to produce the RFC Editor records that formed the basis of her statements; she also could not explain what existed in those records that were the basis of her statements with respect to RFC 2401. *See* Ex. 1060 at ¶ 107; Ex. 1063 at 11 (p. 40, ll. 2-5). Therefore, her blanket assertion that “RFC 2401 has been publicly available through the RFC editor’s web site or through other means since its publication in November 1998” (Ex. 1060 at ¶ 107) has no “circumstantial guarantee[] of trustworthiness.” Further, there is no evidence having “circumstantial guarantees of trustworthiness” for the statements in Exhibits 1064

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.