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 IPR2015-00870
Patent No. 8,560,705

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

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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 1001-1004, 1006, 1009-1011, 1013-1041, 1043-1049, 1051-1054, 1060, 1063-1065, 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

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