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 IPR2015-00871
Patent No. 8,560,705

PATENT OWNER'S MOTION TO EXCLUDE

Table of Contents

TABLE OF AUTHORITIES

Page(s)

Cases

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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, Patent Owner requests that Exhibits 1001-1004, 1006, 1007, 1017, 1019, 1022-1041, 1044-1049, 1051-1054, 1057-1060, 1063-1065,1067, 1069, 1071 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 1001-1004, 1006, 1007, 1017, 1019, 1022-1041, 1044-1049, 1051-1054, 1057-1060, 1063-1065, 1067, 1069, 1071, and Portions of Exhibit 1005 Should be Excluded from the Record

The Board should exclude Exhibits 1001-1004, 1006, 1007, 1017, 1019, 1022-1041, 1044-1049, 1051-1054, 1057-1060, 1063-1065, 1067, 1069, 1071 because one or more of these exhibits includes evidence that is inadmissible hearsay, evidence that is irrelevant to the instant proceeding, or evidence that lacks authentication. 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. 12, 15, 28.)

A. Exhibits 1022, 1023, 1043, and 1057-1059 Constitute Inadmissible Hearsay

Exhibits 1022, 1023, 1043, 1057-1059 should be excluded as inadmissible hearsay. *See* Fed. R. Evid. 801-802. Patent Owner previously objected to these exhibits on this ground. (Paper No. 12 at 1; Paper No. 15 at 1.) Petitioner has failed to rebut Patent Owner's objections. As such, these exhibits should be excluded.

Specifically, absent an applicable exception, the rule against hearsay operates to prohibit out-of-court statements from being offered to prove the truth of the matter asserted. Fed. R. Evid. 801-802. Here, Petitioner submitted out-of-court declarations, i.e., declarations that were not made for purposes of the present proceeding, in an attempt to establish that *Aventail* (Ex. 1009), RFC 2401 (Ex. 1008), and RFC 2543 (Ex. 1013) qualify as printed publications. For instance, Petitioner contends that "Aventail is a printed publication that was distributed to the public without restriction no later than January 31, 1999." (Pet. at 18.) In attempting to prove the truth of this statement, Petitioner relies on out of court statements by three individuals—Christopher Hopen (Ex. 1023), Michael Fratto

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