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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 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, 1007, 1017, 1019, 1022-1041, 1044-1049, 1051-1054, 1057-1060, 1063-1065, 1067, 1069, and 1071, 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 argues that Exhibits 1022, 1023, 1043, 1057-1060, and 1063-1065 should be admitted under the residual exception of Fed. R. Evid 807. Paper No. 33 at 1. 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)). But "Congress intended that the residual exceptions be *used sparingly* . . . [a judge's discretion] . . . is 'tempered by the requirement that the exception be *reserved for exceptional cases*.'" *Doe*, 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).

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. For instance, Apple argues that the statements have circumstantial guarantees of trustworthiness. This is incorrect.

For instance, Mr. Hopen baldly "estimate[s]" that "thousands of" copies of *Aventail* were distributed in the first six months of 1999. Ex. 1023 at ¶ 16. But the time lapse of over ten years between *Aventail*'s alleged distribution and Mr. Hopen's statement cuts against the trustworthiness of his statements. *See, e.g.*, *Conoco Inc. v. DOE*, 99 F.3d 387, 392-394 (Fed. Cir. 1996). Indeed, Mr. Hopen failed to provide a single piece of evidence (e.g., an e-mail showing the distribution of *Aventail* to a customer) supporting his assertion. Ex. 1057 at 189:1-191:6.

Apple's contention that Mr. Hopen's statements have "circumstantial guarantees of trustworthiness" because they are corroborated (s*ee* Paper No. 33 at 2-6, citing Exs. 1022, 1023, 1043, and 1057-59) is incorrect. For instance, the documents attached to Mr. Hopen's declaration (Exhibits A, B, D, H, and J) say nothing about the dissemination activities in the time frame before the Patent's priority date and some of them do not even refer to the correct version of *Aventail* at issue, i.e., Aventail Connect v3.01 and AEC v3.0. Ex. 1023 at 10, 94, 293, 295, 424. Mr. Chester's statements regarding events in July 1998 are irrelevant to Mr. Hopen's statements regarding the alleged dissemination of *Aventail* in the first six months of 1999. Ex. 1022 at ¶ 19; Ex. 1023 at ¶ 16. Mr. Fratto's statement that he

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