Paper 14

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.

Petitioner,

v.

VIRNETX, INC.,

Patent Owner.

Case No. IPR2015-00871
Patent No. 8,560,705

PETITIONER'S MOTION TO SUBMIT SUPPLEMENTAL INFORMATION PURSUANT TO 37 C.F.R. § 42.123(a)

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I. Introduction

Petitioner Apple Inc. ("Petitioner") respectfully moves to submit Exhibits 1057 to 1065[1] as supplemental information under 37 C.F.R. § 42.123(a). Each of these exhibits is relevant to a claim at issue in this trial as required by 42.123(a)(2). Exhibits 1057 to 1059 are relevant because they are evidence of the public availability of the Aventail reference prior to February 2000, the effective filing date of the challenged patent. These exhibits include testimony, offered in related proceedings, from Aventail Corp.'s co-founder Chris Hopen. Exhibits 1060 to 1065 are relevant because they are evidence that RFC 2401 was published and publicly available in November 1998. These exhibits include a declaration and deposition testimony concerning RFC 2401 and numerous other RFCs by Sandy Ginoza, a representative of the Internet Engineering Task Force ("IETF"), and additional documentation that addresses RFC 2401's public availability.

The Board should admit these exhibits into the record because they are "additional evidence that allegedly confirms the public accessibility of" prior art

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[1] Petitioner has moved to submit Exhibits 1057 to 1065 as supplemental information in the proceedings that primarily rely on Aventail (IPR2015-00811 and -00871), and Exhibits 1060 to 1065 in the proceedings that primarily rely on Beser (IPR2015-00810, -00812, -00866, -00868, and -00871).

references at issue in this trial. *Palo Alto Networks, Inc v. Juniper Networks, Inc.*, IPR2013-00369, Paper 37 at 3 (Feb. 5, 2014). So, apart from being relevant to the claims at issue, these exhibits merely supplement information already present in the record, do not alter the scope of the instituted grounds, and their consideration will not unduly delay the trial's schedule. *Id.* at 3-4 (granting motion under § 42.123(a) based on consideration of these factors). Accordingly, Petitioner respectfully requests that its motion be granted.

II. Background

A. Legal Standard

A party may submit supplemental information under 37 C.F.R. § 42.123(a) if: (1) a "request for the authorization to file a motion to submit supplemental information is made within one month of the date the trial is instituted" and (2) the "supplemental information [is] relevant to a claim for which the trial has been instituted." Unlike supplemental information submitted later in trial (§ 42.123(b)) or information not relevant to a claim for which trial was instituted (§ 42.123(c)), a motion under § 42.123(a) need not "show why the supplemental information reasonably could not have been obtained earlier, and that consideration of the supplemental information would be in the interests-of-justice."

Instead, under § 42.123(a) the Board has considered whether the information changes "the grounds of unpatentability authorized in this proceeding" or "the

evidence initially presented in the Petition to support those grounds of unpatentability." *Palo Alto Networks*, IPR2013-00369, Paper 37 at 3; *see also Biomarin Pharma. Inc., v. Genzyme Therapeutic Prods Limited Partnership*, IPR2013-00534, Paper 80 at 5 (Jan. 7, 2015) (considering the same factors under § 42.123(b)). The Board has also considered whether granting the motion would prevent the just, speedy, and inexpensive resolution of the proceeding, *Palo Alto*, IPR2013-00369, Paper 37 at 4, or would prejudice the other party, *Unified Patents Inc., v. Dragon Intellectual Property, LLC*, IPR 2014-01252, Paper 43 at 3 (Apr. 14, 2015); *see also Rackspace US, Inc. v. Personal Web Techs., LLC*, IPR2014-00058, Paper 16 at 6 (Apr. 30, 2014) (denying motion to submit supplemental expert report that was presented to challenge the Board's claim constructions).

Where a party has sought to submit information that confirms the public accessibility of a prior art reference at issue in the trial, the Board has repeatedly found such evidence to be proper supplemental information. *See, e.g., Biomarin*, IPR2013-00534, Paper 80 at 5 (granting motion under stricter standard of § 42.123(b)); *Valeo North Am., Inc. v. Magna Elecs, Inc.*, IPR2014-01204, Paper 26 at 2-5 (Apr. 10, 2015); *Palo Alto Networks*, IPR2013-00369, Paper 37 at 2-5; *Motorola Sol'ns, Inc. v. Mobile Scanning Techs, LLC*, IPR2013-00093, Paper 39 at 2 (July 16, 2013). As the Board has recognized, "a trial is, first and foremost, a search for the truth." *Edmund Optics, Inc., v. Semrock, Inc.*, IPR2014-00599,

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