Paper No. 53

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

THE MANGROVE PARTNERS MASTER FUND, LTD., and APPLE INC.,
Petitioner,

v.
VIRNETX INC.,
Patent Owner.

Case No. IPR2015-01046[1]
Patent No. 6,502,135

PETITIONER APPLE INC.'S SEPARATE REPLY FILING

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[1] Apple Inc., who filed a petition in IPR2016-00062, has been joined as a Petitioner in the instant proceeding.

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The Board's order instituting *inter partes* review on Apple's petition (IPR2016-00062) authorized Apple to make a separate filing of no more than five pages addressing "an issue unique to" Apple or "a point of disagreement related to [a] consolidated filing." *See* Paper 28 at 5-6. This paper replies to issues raised by Patent Owner's Response that are unique to Apple. *See* Resp., 57-60.

I. Apple's Joinder Is Not Barred under Section 315(b)

Apple timely filed its petition and motion for joinder within one month of the Board's institution decision in this proceeding. 37 C.F.R. §§ 42.122(b), 42.101(b); 35 U.S.C. §§ 315(c), 316(a)(12). As this panel and others have repeatedly found, § 315(b) does not apply to a petition filed with a request for joinder. *E.g.*, IPR2013-00109, Paper 15; IPR2013-00256, Paper 10.

In response, Patent Owner argues Apple is time-barred based on its theory that § 315(b) provides an exception only for "a request for joinder," and not a petition. Resp., 57-60. That theory conflicts with the statute, the Board's rules and how the Federal Circuit has construed both. In *Achates Reference Publ'g, Inc. v. Apple Inc.*, 803 F.3d 652, 657 (Fed. Cir. 2015), a case which Patent Owner fails to even cite, the Federal Circuit held that § 315(c) permits "an otherwise time-barred party [to] nonetheless participate in an *inter partes* review proceeding if another party files a proper petition." The Court explained that "the [§]315(b) time bar does not impact the Board's authority to invalidate a patent claim," and by its

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