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

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

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

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On June 13, 2016, Petitioners' filed an Opposition (Paper No. 61) to Patent Owner's Motion to Exclude (Paper No. 59). Petitioners, however, provide insufficient reasons for admitting the exhibits at issue, i.e., Exhibits 1010, 1014, 1020, 1025, 1029, 1031-1033, 1037, and 1039-1042.[2] As such, Patent Owner's Motion to Exclude should be granted.

I. Exhibits 1025 and 1037 Should Be Excluded

Petitioners assert that Exhibits 1025 and 1037 are "not [relied on] for the truth of their contents." Paper 61 at 1. This is incorrect. Petitioners only rely on these exhibits for their alleged truth. *See, e.g.*, Paper No. 50 at 9 (relying on the alleged truth of Exhibit 1037 to "confirm Dr. Guerin's opinion"), Paper No. 1 at 10, 11 (relying on the alleged truth of Exhibit 1025 to show Dr. Guerin's opinion about the scope of the term VPN).

Thus, Exhibits 1025 and 1037 are hearsay with no exception.

II. Exhibits 1029 and 1031-1033 Should Be Excluded

Petitioners argue Exhibits 1029 and 1031-1033 should be admitted under the residual exception of Fed. R. Evid. 807 and assert that courts have "wide discretion" in applying this exception. Paper No. 61 at 3. However, "Congress intended that the residual exception[] be *used sparingly*" and any "discretion is 'tempered by the *requirement that the exception be reserved for exceptional*

[2] Patent Owner withdraws its request to exclude Exhibit 1005 as lacking relevance.

cases.'" *Doe v. United States*, 976 F.2d 1071, 1074 (7th Cir. 1992). Indeed, a sworn declaration assumed to be trustworthy was recently excluded. *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").

The statements in Exhibits 1029 and 1031-1033 do not meet the five requirements of Rule 807. Paper 59 at 3-6. Petitioners argue Ms. Ginoza's statements in Exhibits 1029 and 1031 are corroborated by and corroborate the statements in Exhibits 1032 and 1033 (Ex. 1032 at 9; Ex. 1033 at 3) relating to the availability of RFCs from the IETF website that Petitioners rely on for their truth.[3] Paper No. 61 at 4-6. This circular analysis must be rejected. "[T]he corroborative-evidence requirement cannot be satisfied by using one or several . . . hearsay statements to corroborate . . . another hearsay statement." *People v. Bowers*, 801 P.2d 511, 527 (Colo. 1990). No evidence corroborates Ms. Ginoza's statements, and no evidence corroborates the statements in Exhibits 1032 and 1033.

[3] Petitioners assert that Exhibits 1032 and 1033 are being submitted for another purpose as well and should be admitted. Paper No. 61 at 3 n.2. Patent Owner disagrees as these exhibits are being submitted for their truth. Paper No. 48 at 43, 44.

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