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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 6,502,135

Patent Owner's Reply in Support of Motion for Additional Discovery

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

Patent Owner VirnetX Inc. ("VirnetX") filed its motion for additional discovery to determine whether RPX Corporation ("RPX")—a third-party entity that previously sought to challenge VirnetX's patents on behalf of the time-barred Petitioner Apple Inc. ("Apple")—is an unnamed RPI and/or privy of Petitioner The Mangrove Partners Master Fund, Ltd. ("Mangrove"). Petitioners disparage VirnetX's argument as a "conspiracy theory." (Paper 82 at 1.) But the record shows both extensive ties between RPX and Mangrove, and RPX's keen interest in reducing risk from VirnetX's patent to Apple—who Mangrove singled out to its investors as one of RPX's main customers. (*See* Ex. 1051 at 3.) Specifically, the record shows: (1) RPX's role as a for-profit company that seeks to invalidate patents on behalf of its clients, (2) RPX's past attempt to invalidate the patent-at-issue on Apple's behalf after Apple was found to be time-barred, (3) Mangrove's extensive ties to RPX, including communications with RPX and substantial investment in RPX, (4) Mangrove's decision to hire RPX's former counsel to help try to invalidate the patent at issue here, and (5) Mangrove, like RPX (but unlike Apple), was never charged with infringement. (*See generally* Paper 81.)

Petitioners now admit that Mangrove's investment in RPX occurred in the ***exact same month*** that Mangrove filed its IPR petitions against VirnetX's patents, which further supports the need for additional inquiry. (Paper 82 at 4, 12 (acknowledging that Mangrove began acquiring RPX stock in April 2015).)

Petitioners argue the two decisions are "unrelated," and that Mangrove's decision to challenge VirnetX's patents was motivated solely by Mangrove's desire to short VirnetX's stock. (*Id.* at 7; *see also id.* at 1, 12.) But if so, Mangrove should not fear the limited and targeted discovery VirnetX proposed. More fundamentally, Mangrove's assertion that it initiated this proceeding solely as part of its short-selling strategy cannot outweigh the evidence of ties between Mangrove and RPX.

Petitioners' arguments against additional discovery, the denial of which would be highly prejudicial to VirnetX, are unavailing:

Post-Institution Information: Petitioners argue that "[t]he only information or acts relevant to compliance with § 315(b) would be dated ***before*** October 7, 2015, the date these proceedings were instituted." (Paper 82 at 5.) That is too simplistic an approach. First, documents dated after October 7, 2015 may nonetheless include information from before October 7, 2015 (e.g., emails and documents routinely contain earlier dated threads and attachments). Second, post-October 7, 2015 documents may be informative of Mangrove's motivation ***prior to*** that date.

Pre-Institution Information: Petitioners argue that discovery of pre-institution information should be denied because VirnetX has not demonstrated that RPX is a real party-in-interest ("RPI") or in privity with Mangrove. (Paper 82 at 6-8.) This argument puts the cart before the horse. The purpose of VirnetX's

motion is obtain the requested discovery so that VirnetX can make that showing. *Garmin* does not require a moving party to demonstrate it will win an underlying issue to obtain additional discovery. Petitioners argue that Mangrove's investment strategies concerning RPX and VirnetX were independent. (Paper 82 at 6-7.) But these allegedly independent strategies were implemented simultaneously in April 2015. (*See* Paper 82 at 4, 12.) Evidence suggests this timing is more than a coincidence given the extensive connections between Mangrove and RPX, as well as the prior history between RPX and VirnetX. (*See* Paper 81 at 6-13.)

Petitioners assert that VirnetX further needs to show a direct link between Mangrove and Apple. (Paper 82 at 8.) Petitioners' position, if adopted, would lead to perverse results as an entity otherwise barred by 35 U.S.C. § 315(b) (e.g., Apple) could use intermediaries (e.g., RPX) to facilitate IPR challenges by others free from any efforts to expose that connection back to the time-barred party.[2]

Depositions: Petitioners argue that deposition discovery should be denied because "written discovery is far less burdensome." (Paper 82 at 11.) Petitioners ignore that VirnetX has already agreed to a single four-hour deposition of Nathaniel August to address *both* of VirnetX's deposition notices. (Paper 81 at 5 n.2.) More importantly, deposition discovery is a "critical component of the tools

[2] Even on this, it is telling that Apple has taken the lead on behalf of Mangrove in fighting against discovery in meet-and-confer telephone calls and correspondence.

of justice" and "rank[s] high in the hierarchy of pre-trial, truth-finding mechanisms." *Founding Church of Scientology of Washington, D.C. v. Webster*, 802 F.2d 1448, 1451 (D.C. Cir. 1986); *see also Alexander v. FBI*, 186 F.R.D. 113 (D.D.C. 1998) (at deposition, "'there is no opportunity to reflect and carefully shape the information given'") (citation omitted). Petitioners attempt to circumvent this important tool by "respond[ing] to VirnetX's present deposition requests as if they were interrogatories." (*Id.*) Allowing Petitioners to unilaterally replace deposition discovery with self-serving representations on deposition topics leaves VirnetX with no avenue to check the veracity of such statements and would be prejudicial. Moreover, as VirnetX anticipated (Paper 81 at 15), Mangrove's supposed responses are woefully inadequate and raise only more questions. For instance, Mangrove's assertions of "reasonable" efforts to locate communications are unclear and unverified. (Ex. 1049 at 2, 3, 5, 6.) It also appears that Mangrove did not investigate non-written communications, or written communications that no longer exist. Indeed, Mangrove repeatedly discussed and treated the deposition topics as "RFP[s]," and not interrogatories. (Ex. 1049 at 3, 6.)

Petitioners try to justify their resistance to deposition discovery because Mangrove ostensibly fears VirnetX may initiate litigation against Mangrove for seeking to shorten its stock. (Paper 82 at 13-14.) This contention is baseless. While VirnetX previously argued that Mangrove's conduct warrants denial of

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