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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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THE MANGROVE PARTNERS MASTER FUND, LTD., APPLE INC., and  
BLACK SWAMP IP, LLC,  
Petitioner

v.

VIRNETX INC.  
Patent Owner.

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Case IPR2015-01047<sup>1</sup>  
Patent No. 7,490,151

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

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<sup>1</sup> Apple Inc. and Black Swamp IP, LLC, who filed petitions in IPR2016-00063 and IPR2016-00167, respectively, have been joined as Petitioners in the instant proceeding.

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On June 13, 2016, Petitioners' filed an Opposition (Paper No. 68) to Patent Owner's Motion to Exclude (Paper No. 66). Petitioners, however, provide insufficient reasons for admitting the exhibits at issue, i.e., Exhibits 1012, 1013, 1029, 1031-1034, 1037, 1039-1042 and 1044.<sup>2</sup> As such, Patent Owner's Motion to Exclude should be granted.

### **I. 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. 68 at 1. 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 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 66 at 4, 5. Petitioners argue Ms. Ginoza's

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<sup>2</sup> Patent Owner withdraws its request to exclude Exhibits 1010 and 1014 as lacking relevance.

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.<sup>3</sup> Paper No. 68 at 2-4. 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.

Petitioners next argue Dr. Guerin’s declaration corroborates Ms. Ginoza’s statements. Paper No. 68 at 7-8 (citing *IBM Corp. v. Intellectual Ventures II LLC*, IPR2015-00089, Paper No. 44 (Apr. 25, 2016)). *IBM* does not support Petitioners’ position. In *IBM*, an Internet Archive manager provided an affidavit accompanied with objective evidence establishing the publication date of the non-patent literature in dispute. *IBM*, Paper No. 44 at 53-54. The Board relied on this affidavit as evidence corroborating non-declarant hearsay statements regarding the publication date. *Id.* at 53-57. In stark contrast, Dr. Guerin, which Petitioners

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<sup>3</sup> Petitioners assert that Exhibits 1032 and 1033 are being submitted for another purpose as well and should be admitted. Paper No. 68 at 2 n.2. Patent Owner disagrees as these exhibits are being submitted for their truth. Paper No. 48 at 43.

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