

# McKool Smith

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November 4, 2011

2854
Office of the Secretary Int'l Trade Commission

## **VIA HAND DELIVERY**

The Honorable James R. Holbein  
Secretary, U.S. International Trade Commission  
500 E Street, S.W., Room 112  
Washington, D.C. 20436

**RE: In the Matter of Certain Devices with Secure Communication Capabilities,  
Components Thereof, and Products Containing the Same.**

Dear Secretary Holbein:

Enclosed for filing on behalf of VirnetX, Inc. ("VirnetX") are the documents listed below in support of VirnetX's request that the Commission institute an investigation pursuant to Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. A request for confidential treatment of Confidential Exhibit Nos. 3C, 23C, and 27C is transmitted concurrently herewith.

We note that your office granted VirnetX permission to file several of the required copies of exhibits to the Complaint as Compact Disks ("CDs") rather than in paper form. We are grateful for this courtesy.

We have conferred with Supervisory Attorney-Advisor Jennifer Rohrbach of Docket Services, and, in consultation with Lisa Barton, have taken steps to ensure that exhibits filed on CD may be readily accessed by the Commission and Proposed Respondents. We have further determined that there are no viruses, password protection, or subfolders on any CD. In addition, we have included electronic indices for each CD for ease of reference.

Complainant has requested, but has not yet received, an original certified copy of the Patent, Assignment, and File History for U.S. Patent 8,051,181. We will submit original certified copies as soon as the copies are received from the United States Patent and Trademark Office. Additionally, we have conferred with Lisa Barton regarding outstanding technical references to Appendix B. We intend to supplement Appendix B as soon as we receive the additional technical references.

Accordingly, VirnetX submits the following documents for filing:

1. One (1) original and twelve (12) copies of the verified non-confidential Complaint pursuant to 19 C.F.R. §§ 201.6(a), 210.4(f)(2) and 210.8(a) (original and one copy unbound, without tabs pursuant to 19 C.F.R. § 201.8(d));
2. One (1) original and one (1) copy of the non-confidential exhibits to the Complaint pursuant to 19 C.F.R. §§ 201.6(a), 210.4(f)(2) and 210.8(a) (original and (1) copy unbound, without tabs pursuant to 19 C.F.R. § 201.8(d));
3. One (1) original and one (1) copy of the confidential version of the exhibits to the Complaint pursuant to 19 C.F.R. §§ 201.6(c), 210.4(f)(2) and 210.8(a) (original and (1) copy unbound, without tabs pursuant to 19 C.F.R. § 201.8(d));
4. Six (6) sets of CDs loaded with the accompanying Non-Confidential Exhibits for Commission use;
5. Six (6) sets of CDs loaded with the accompanying Confidential Exhibits for Commission use;
6. One (1) additional copy of both the Complaint and accompanying non-confidential exhibits for service upon the proposed respondent; and one (1) additional copy of the confidential exhibits for service upon counsel for the respondent once appropriate subscriptions to the protective order have been filed, pursuant to 19 C.F.R. §§ 210.8(a) and 210.11 (a)(1));
7. One (1) uncertified copy<sup>1</sup> of U.S. Patent No. 8,051,181 ("the '181 patent") is included as Exhibit 1 to the Complaint pursuant to 19 C.F.R. § 210.12(a)(9)(i);
8. One (1) uncertified copy<sup>2</sup> of the assignment for the '181 patent is included as Exhibit 2 to the Complaint pursuant to 19 C.F.R. § 210.12(a)(9)(i);
9. One (1) original<sup>3</sup> and three (3) CDs loaded with the certified prosecution history of the '181 patent are included as Appendix A pursuant to 19 C.F.R. § 210.12(c)(1);
10. Four (4) CDs loaded with each technical reference mentioned in the prosecution history of the '181 patent are included as Appendix B<sup>4</sup> pursuant to 19 C.F.R. § 210.12(c)(2);

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<sup>1</sup> Complainant has requested, but has not yet received, an original certified copy of the '181 patent. An uncertified copy has been submitted as Exhibit 1. Complainant will submit an original certified copy as soon as the copy is received from the United States Patent and Trademark Office.

<sup>2</sup> Complainant has requested, but has not yet received, an original certified copy of the '181 patent assignment. An uncertified copy has been submitted as Exhibit 2. Complainant will submit an original certified copy as soon as the copy is received from the United States Patent and Trademark Office.

<sup>3</sup> Complainant has requested, but has not yet received, an original certified copy of the prosecution history of the '181 patent. An uncertified copy has been submitted as Appendix A. Complainant will submit an original certified copy as soon as the copy is received from the United States Patent and Trademark Office.

<sup>4</sup> Complainant has requested, but has not yet received, each technical reference mentioned in the prosecution history of the '181 patent. We enclose 543 of the 754 total references. VirnetX will supplement Appendix B as soon as we receive the additional technical references.

11. A letter pursuant to Commission Rule 201.6(b) requesting confidential treatment of Confidential Exhibit Nos. 3C, 23C, and 27C.

Thank you for your attention to this matter.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Benjamin Levi".

Benjamin Levi

Enclosure

# McKool SMITH

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November 4, 2011

## **VIA HAND DELIVERY**

The Honorable James R. Holbein  
Acting Secretary, U.S. International Trade Commission  
500 E Street, S.W. Suite 112  
Washington, D.C. 20436

**RE: In the Matter of Certain Devices with Secure Communication Capabilities,  
Components Thereof, and Products Containing the Same**

Dear Secretary Holbein:


Complainant VirnetX, Inc. ("VirnetX") by counsel, hereby requests, pursuant to 19 C.F.R. § 201.6, confidential treatment of the confidential business information contained in Confidential Exhibit Nos. 3C, 23C, and 27C to VirnetX's Section 337 Complaint transmitted herewith.

Confidential treatment is sought for the following Confidential Exhibits:

1. Confidential Exhibit No. 3C, which discloses the identity of all licensees of the asserted patent;
2. Confidential Exhibit No. 23C which describes, among other things, facts and information supporting the domestic industry; and,
3. Confidential Exhibit No. 27C which is a copy of a license agreement.

The information described above qualifies as confidential information pursuant to 19 C.F.R. § 201.6 because it is not available to the public; unauthorized disclosure of such information could cause substantial harm to VirnetX's competitive position; and the disclosure of the information for which VirnetX seeks confidential treatment could impair the Commission's ability to obtain information necessary to perform its statutory functions.

Respectfully Submitted,

  
Benjamin Levi

Enclosure

UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C.

**In the Matter of**

**CERTAIN DEVICES WITH SECURE  
COMMUNICATION CAPABILITIES,  
COMPONENTS THEREOF, AND PRODUCTS  
CONTAINING THE SAME**

**Investigation No. 337-TA-\_\_\_\_\_**

**COMPLAINT OF VIRNETX, INC.  
UNDER SECTION 337 OF THE TARIFF ACT OF 1930, AS AMENDED**

**COMPLAINANT**

VirnetX, Inc.  
308 Dorla Court,  
Suite 206,  
Zephyr Cove, Nevada 89448  
Tel: (831) 438-8200

**PROPOSED RESPONDENT**

Apple Inc.  
One Infinite Loop  
Cupertino, CA 95014  
Tel: (408) 996-1010

**COUNSEL FOR COMPLAINANT**

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5	Apple FaceTime for Mac
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### **TABLE OF APPENDICES**

	<b>Description</b>
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<b>B</b>	Copies of Technical References from Prosecution History for U.S. Patent No. 8,051,181

## **I. INTRODUCTION**

1. VirnetX, Inc. (“VirnetX” or “Complainant”) files this Complaint under Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, based on the unlawful importation into the United States, the sale for importation, and the sale within the United States after importation by owners, importers, or consignees of certain devices with secure communication capabilities, components thereof, and products containing the same (collectively “Accused Products”) that infringe at least claims 1, 2, 4-12, 17, 19, 21, 22, 24-29 of U.S. Patent No. 8,051,181 (“the ‘181 patent” or the “Asserted Patent”).

2. The proposed respondent is Apple Inc. (“Apple,” “proposed respondent” or “respondent”).

3. An uncertified copy of the ‘181 patent is attached as Exhibit 1.<sup>1</sup> An uncertified copy of the recorded assignments for the ‘181 patent is attached as Exhibit 2. VirnetX owns by assignment all right, title, and interest in and to the ‘181 patent.

4. An industry as required by 19 U.S.C. §§ 1337 (a)(2) and (a)(3)(A), (B), and/or (C) exists and/or is in the process of being established.

5. VirnetX seeks as relief an exclusion order, barring from entry into the United States infringing devices with secure communication capabilities, components thereof, and products containing the same, manufactured or imported by or on behalf of respondent. VirnetX also seeks orders directing respondent and its related entities to cease and desist the importation into the United States, the sale for importation, and the sale after importation of infringing

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<sup>1</sup> Certified copies of the ‘181 patent and the assignments for that patent have been ordered and will be submitted upon receipt.

devices with secure communication capabilities, components thereof, and products containing the same, and to cease and desist all commercial activity relating to those infringing goods.

## **II. THE PARTIES**

### **A. Complainant**

6. VirnetX is a corporation organized under the laws of Delaware with its principal place of business at 308 Dorla Court, Suite 206, in Zephyr Cove, Nevada. VirnetX previously had its principal place of business at 5615 Scotts Valley Drive, Suite 110, in Scotts Valley, California.

7. VirnetX is an Internet security software and technology company. VirnetX's software and technology solutions, including its secure domain name registry and GABRIEL Connection Technology™, are designed to facilitate secure communications and to create a secure environment for real-time communication applications such as instant messaging, VoIP, smart phones, eReaders and video conferencing.

8. VirnetX's GABRIEL Connection Technology practices at least one claim of the '181 patent.

9. VirnetX's patent portfolio includes over 20 U.S. and 18 international patents and over 100 pending applications. VirnetX has licensed its patents, including the '181 patent. A list of such licensees is attached as Confidential Exhibit 3C.

### **B. Proposed Respondent**

10. Apple is a corporation organized under the laws of California with its principal place of business at One Infinite Loop in Cupertino, California. Apple, among other things, designs, manufactures or has manufactured, and sells devices with secure communication capabilities, including Apple's iPhone 4, iPhone 4S, iPad 2, iPod Touch, and its Macintosh computers with the "Lion" operating system.

11. According to Apple, it “designs, manufactures and markets mobile communication and media devices, [and] personal computers . . . . [Its] products and services include iPhone®, iPad®, Mac®, iPod®, Apple TV®, a portfolio of consumer and professional software applications, the iOS and Mac OS® X operating systems, [and] iCloud®.” Exhibit 38 at 1. Apple’s “Mac desktop and portable systems feature . . . [Apple’s] Mac OS X Lion operating system.” *Id.* at 3.

12. In June 2010, Apple “introduced the iPhone 4 featuring . . . FaceTime® video calling.” Exhibit 4 at 4.

13. Apple’s “iPod line of portable digital music and media players [includes the] iPod touch.” Exhibit 4 at 4. “The iPod touch is a flash-memory-based iPod with a widescreen display and a Multi-Touch user interface. [Apple’s] latest iPod touch, introduced in September 2010, includes features such as . . . FaceTime video calling.” *Id.*

14. Apple’s iPad 2 also includes the FaceTime video calling feature. Exhibit 5.

15. According to Apple, FaceTime “make[s] video calls to iPad 2, iPhone 4, the new iPod touch, or another Mac.” Exhibit 5.

16. According to Apple, “Mac OS X Lion includes support for . . . iCloud integration.” Exhibit 38 at 5.

17. According to Apple, iCloud “stores your music, photos, documents, and more and wirelessly pushes them to all your devices.” Exhibit 6. According to Apple, “iCloud’s features include iTunes in the Cloud, Photo Stream, Documents in the Cloud, Contacts, Calendar, Mail, automatic downloads and purchase history for applications and iBooks, and iCloud Backup.” Exhibit 38 at 4. Users can access iCloud “using a device running iOS 5 or a Mac running Mac OS X Lion.” *Id.*

18. According to Apple, “substantially all” of its “Macs, iPhones, iPads, iPods, logic boards and other assembled products are manufactured by outsourcing partners, primarily in various parts of Asia.” Exhibit 4 at 8. “Sole-sourced third-party vendors in China perform final assembly of substantially all of [Apple’s] Macs, iPhones, iPads, and iPods.” *Id.* at 9.

19. “As of September 24, 2011, [Apple] owned a manufacturing facility in Cork, Ireland . . . and facilities in Elk Grove, California, that included warehousing and distribution operations.” Exhibit 38 at 20.

20. Upon information and belief, Apple is involved in at least the manufacture, importation into the United States, sale for importation, sale after importation in the United States, and/or the distribution in or into the United States of Accused Products.

### **III. THE TECHNOLOGY AND PRODUCTS AT ISSUE**

21. The technology and products at issue generally concern secure communication applications between certain Apple products, including the latest iPhones, iPads, iPods, and Macintosh computers.

### **IV. THE ASSERTED PATENT -- U.S. Patent No. 8,051,181**

#### **A. Identification of the Patent and Ownership by VirnetX**

22. The ‘181 patent, entitled “Method for Establishing Secure Communication Link Between Computers of Virtual Private Network,” lists Victor Larson, Robert Durham Short, III, Edmund Colby Munger, and Michael Williamson as co-inventors. The ‘181 patent issued on November 1, 2011. Exhibit 1.

23. The ‘181 patent issued from application number 11/679,416, filed on February 27, 2007, and is a continuation of U.S. Patent No. 7,188,180, filed on November 7, 2003, which in turn is a divisional of application serial number 09/558,209, filed on April 26, 2000, which in turn is a CIP of U.S. Patent No. 6,502,135 filed on February 15, 2000, which in turn is a CIP of

U.S. Patent No. 7,010,604, filed on October 29, 1999, which in turn is based on provisional applications 60/106,261 and 60/137,704, respectively filed on October 30, 1998, and June 7, 1999.

24. VirnetX owns by assignment all right, title, and interest in and to the '181 patent.

25. The '181 patent is valid, enforceable, and in full force and effect.

26. This Complaint is accompanied by a certified copy and three copies of the prosecution history of the '181 patent and by four copies of all cited references.<sup>2</sup> Appendices A and B.

#### **B. Nontechnical Description of the '181 Patent**

27. The '181 patent generally describes a method for establishing and/or using a secure communications link between two computer devices.<sup>3</sup>

#### **C. Foreign Counterparts to the '181 Patent**

28. The following are believed to be foreign counterparts to the '181 patent:

Country	Case type	Status	App. No.	Filing Date	Patent No	Issue Date
WO	PCT	Expired	PCT/US01/13261	04/25/2001		
EP	PCT	Pending	01932629.7	04/25/2001		
EP	DIV	Pending	06014499.5	04/25/2001		
EP	DIV	Pending	06014500.0	04/25/2001		
EP	DIV	Pending	10012356	04/25/2001		
EP	DIV	Pending	10012357	09/30/2010		
EP	DIV	Pending	10012236	09/30/2010		
HK		Pending	07109112.7	08/21/2007		
HK		Pending	07109113.6	08/21/2007		
JP	PCT	Pending	2001-583006	04/25/2001		
JP	DIV	Pending	2010-239225	04/25/2001		
JP	DIV	Pending	2011-085051	04/07/2011		

<sup>2</sup> Certified copies of the file history for the '181 patent have been ordered and will be submitted upon receipt. Complainant has so far been able to obtain 543 of the 754 total references cited, and submits herewith copies of those references. Complainant intends to supplement upon receipt of the remaining references.

<sup>3</sup> No part of this Complaint, including any section herein or Exhibit hereto, construes, or is intended to construe, the specification, file history, or claims of the '181 patent.

JP	DIV	Pending	2011-085052	04/07/2011		
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29. No other foreign patents or patent applications corresponding to the '181 patent have been filed, abandoned, withdrawn, or rejected.

**D. Licensees**

30. Attached as Confidential Exhibit 3C is a list of licensees of the '181 patent.

**V. UNLAWFUL AND UNFAIR ACTS OF RESPONDENT**

31. On information and belief, Apple and its Accused Products directly and/or indirectly infringe at least claims 1, 2, 4-12, 17, 19, 21, 22, 24-29 of the '181 patent. Discovery may reveal that Apple and its Accused Products infringe additional claims of the '181 patent.

32. On information and belief, Apple, among other things, manufactures, has manufactured, distributes, imports into the United States, sells for importation, and/or sells after importation devices that operate in a manner covered by the asserted claims of the '181 patent.

33. On information and belief, exemplary products that infringe one or more claims of the Asserted Patent include, but are not limited to, Apple's iPhone 4, iPhone 4S, iPad 2, iPod Touch, and Macs running on the "Lion" operating system. Discovery may reveal additional products that infringe. This identification of specific products or types of products is intended only to be exemplary and is not intended to limit the scope of the investigation or remedy, which should extend to all infringing goods.

34. Attached as Exhibit 7 is a chart that applies independent claims 1, 2, 24, 26, 28, and 29 of the '181 patent to representative Accused Products. *See also* Exhibits 5, 8-17, 39.

35. On information and belief, Apple manufactures, has manufactured, distributes, imports into the United States, sells for importation, and/or sells after importation all elements of the asserted claims, thereby directly and indirectly infringing those claims.

36. Upon information and belief, Apple directly infringes claims 1, 2, 4-12, 17, 19, 21, 22, 24-29 of the '181 patent by providing certain devices with secure communication capabilities, components thereof and products containing the same.

37. Upon information and belief, Apple indirectly infringes claims 1, 2, 4-12, 17, 19, 21, 22, 24-29 of the '181 patent by contributing to the direct infringement of others, including users of the accused devices with secure communication capabilities, components thereof and products containing the same that are elements of VirnetX's patented invention and/or by providing devices with secure communication capabilities, components thereof and products containing the same that are materials or apparatuses for use in practicing VirnetX's patented methods and apparatuses, and constitute a material part of the invention. Apple knew or was willfully blind that the same was especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial non-infringing use.

38. Upon information and belief, Apple further actively induces others, including users of the accused devices with secure communication capabilities, components thereof and products containing the same to directly infringe asserted claims 1, 2, 4-12, 17, 19, 21, 22, 24-29 of the '181 patent by providing directions, demonstrations, guides, and/or manuals that encourage and facilitate others to perform actions known and intended by Apple to be acts of infringement. Upon information and belief, Apple knew or was willfully blind that its actions would cause infringement of the '181 patent and did so with intent to encourage infringement.

39. Apple knew of or was willfully blind to the existence of the '181 patent at least because on November 1, 2011, a district court action was brought against Apple alleging that it infringes the '181 patent.



## **VI. SPECIFIC INSTANCES OF UNFAIR IMPORTATION AND SALE**

40. Upon information and belief, Apple imports into the United States, sells for importation, and/or sells within the United States after importation products and/or products that infringe the asserted claims. Upon information and belief, Apple's accused products are manufactured abroad, sold for importation, and sold in the United States after importation by Apple or its authorized agents.

41. Prior to the filing of this Complaint, exemplary accused Apple products were purchased in the United States. Exhibit 18. Exhibits 19, 20, 21, and 22 show that those items were manufactured abroad.

## **VII. TARIFF CLASSIFICATION UNDER THE HARMONIZED TARIFF SCHEDULE**

42. The products as to which VirnetX seeks exclusion include, without limitation, computers classified under subheading 8471.30.01, HTSUS, cellular telephones classified under subheading 8517.12.00, HTSUS, and portable computing devices classified under subheading 8471.30.01, or 8471.41.01, HTSUS.

## **VIII. RELATED LITIGATION**

43. On August 11, 2010, VirnetX filed a complaint in the U.S. District Court for the Eastern District of Texas against Apple, among others. In that lawsuit, VirnetX alleges that Apple infringes U.S. Patent No. 6,502,135, U.S. Patent No. 7,418,504, U.S. Patent No. 7,490,151, and U.S. Patent No. 7,921,211. That action, styled *VirnetX Inc. v. Cisco Systems, Inc. et al.*, Civil Action No. 6:10-cv-417, is pending.

44. On November 1, 2011, VirnetX filed a complaint in the U.S. District Court for the Eastern District of Texas alleging that Apple infringes the '181 patent.

## **IX. DOMESTIC INDUSTRY**

### **A. VirnetX's Activities and Investments in Plant and Equipment, or Employment of Labor or Capital**

45. Pursuant to Section 337 (a)(2) and (a)(3)(A), a domestic industry exists or is in the process of being established by virtue of VirnetX's significant investments in plant and equipment made with respect to technology protected by the '181 patent.

46. VirnetX has made a significant investment in plant and equipment in the United States, including at its facilities in Zephyr Cove, Nevada and Scotts Valley, California, with respect to VirnetX's technology protected by the Asserted Patent, including its GABRIEL Connection Technology. Further details of VirnetX's significant investments in plant and equipment are provided in Confidential Exhibit No. 23C, ¶ 2.

47. Alternatively, or in addition, pursuant to Section 337 (a)(2) and (a)(3)(B), a domestic industry exists or is in the process of being established by virtue of VirnetX's significant employment of labor or capital with respect to articles protected by the '181 patent.

48. VirnetX has made a significant employment of labor or capital in the United States, including at its facilities in Zephyr Cove, Nevada and Scotts Valley, California, with respect to VirnetX's technology protected by the Asserted Patent, including its GABRIEL Connection Technology. Further details of VirnetX's significant employment of labor or capital are provided in Confidential Exhibit No. 23C, ¶ 3.

49. There is a nexus between VirnetX's significant investments in plant and equipment and its significant employment of labor or capital and the technology that practices the Asserted Patent.

50. As shown in the chart attached as Exhibit 24, VirnetX's GABRIEL Connection Technology practices at least claim 2 of the '181 patent. *See also* Exhibits 25 and 26. VirnetX

reserves the right to demonstrate at the evidentiary hearing that its GABRIEL Connection Technology practices other claims of the '181 patent.

51. In view of at least the foregoing, and pursuant to 19 U.S.C. § 1337(a)(3)(A) and/or (B), a domestic industry exists or is in the process of being established by virtue of VirnetX's significant investment in its plant and equipment and/or its significant employment of labor or capital with respect to technology protected by the Asserted Patent.

**B. VirnetX's Engineering and Research and Development**

52. Pursuant to Section 337 (a)(2) and (a)(3)(C), a domestic industry exists or is in the process of being established by virtue of VirnetX's substantial investments in the exploitation of the '181 patent through engineering and research and development.

53. VirnetX has made a substantial investment in the exploitation of the '181 patent through its engineering and research and development activities in the United States, including at its facilities in Zephyr Cove, Nevada and Scotts Valley, California. These substantial investments include engineering and research and development activities designed to exploit the '181 patent, and other efforts to engage potential investors, manufacturers, or licensees, and VirnetX's efforts to foster propagation or use of the '181 patent as well as efforts to facilitate or hasten the practical application of that invention by bringing it to market. Further details of VirnetX's substantial investment in the exploitation of the '181 patent through its engineering and research and development activities are provided in Confidential Exhibit No. 23C, ¶ 4.

54. VirnetX has expended substantial and significant resources towards the commercialization of its technology, including its GABRIEL Connection Technology, based upon its '181 patent. However, respondent has increasingly saturated the market with infringing products, and respondent's infringement has dampened and will continue to dampen the sales of

VirnetX's and its licensee's products that are protected by or licensed under the '181 patent. Confidential Exhibit No. 23C, ¶ 6.

55. There is a nexus between VirnetX's substantial investment in the exploitation of the '181 patent through its engineering and research and development and the Asserted Patent.

56. In view of at least the foregoing, and pursuant to 19 U.S.C. § 1337(a)(3)(C), a domestic industry exists or is in the process of being established by virtue of VirnetX's substantial investments in the exploitation of the '181 patent through engineering and research and development.

**C. The Activities and Investments of VirnetX's Licensee**

57. VirnetX has licensed its patent portfolio, including the '181 patent to Microsoft Corporation ("Microsoft"). A copy of the license agreement is attached as Confidential Exhibit 27C pursuant to 19 C.F.R. § 210.12(a)(9)(iv).

58. On information and belief, a domestic industry exists or is in the process of being established by virtue of the activities of VirnetX's licensee Microsoft pursuant to 19 U.S.C. § 1337(a)(3)(A), (B), and/or (C).

59. On information and belief, Microsoft engages in manufacturing, sales, customer support, and engineering and research and development activities in the United States with respect to Microsoft's licensed Windows Peernet Application Programming Interfaces (APIs) that practice at least one claim of the '181 patent. On information and belief, Microsoft's domestic investments in plant and equipment and in the employment of labor or capital are significant. On information and belief, Microsoft's investments in the exploitation of the "'181 patent through engineering and research and development is substantial.

60. Microsoft "creat[es] technology that transforms the way people work, play, and communicate." Exhibit 28 at 3. Microsoft "develop[s] and market[s] software, services, and

hardware that deliver[s] new opportunities, greater convenience, and enhanced value to people's lives." *Id.*

61. During fiscal years 2010, 2009, and 2008, Microsoft's research and development expense was \$8.7 billion, \$9.0 billion, and \$8.2 billion, respectively. Exhibit 28 at 9. These amounts represented 14%, 15%, and 14%, respectively, of revenue in each of those years. *Id.* Microsoft plans to continue to make significant investments in a broad range of research and product development efforts. *Id.*

62. Microsoft's main research and development facilities are located in the United States, in Redmond, Washington, and it also operates research and development facilities in other parts of the United States. Exhibit 28 at 9.

63. As of June 30, 2010, Microsoft had 54,000 full-time employees in the United States, with large numbers of employees devoted to product research and development, sales and marketing, product support and consulting services, manufacturing and distribution, and general and administration. Exhibit 28 at 13.

64. On information and belief, there is a nexus between Microsoft's significant investments in plant and equipment and its significant employment of labor or capital and between its licensed articles that practice the Asserted Patent. On information and belief, there is a nexus between Microsoft's substantial investment in the exploitation of the '181 patent through its engineering and research and development and the Asserted Patent.

65. As shown in the chart attached as Exhibit 29, Microsoft's licensed Windows Peernet APIs practices at least claim 2 of the '181 patent. *See also* Exhibits 30-37. VirnetX reserves the right to demonstrate at the evidentiary hearing that Microsoft's Peernet APIs practice other claims of the '181 patent.

66. In view of at least the foregoing, and pursuant to 19 U.S.C. § 1337(a)(3)(A), (B), and/or (C), a domestic industry exists or is in the process of being established by virtue of the activities of VirnetX's licensee Microsoft.

**D. VirnetX's Licensing of the '181 Patent**

67. Pursuant to Section 337 (a)(2) and (a)(3)(C), a domestic industry exists or is in the process of being established by virtue of VirnetX's substantial investments in the exploitation of the '181 patent through licensing.

68. VirnetX has made a substantial investment in the exploitation of the '181 patent through its licensing activities in the United States. Further details of VirnetX's substantial investment in the exploitation of the '181 patent through its licensing activities are provided in Confidential Exhibit No. 23C, ¶¶ 5-9.

69. VirnetX has made and continues to make a substantial investment in licensing its patent portfolio, including the licensing of the Asserted Patent. VirnetX's United States employees have met with several entities to discuss licenses to VirnetX's patent portfolio, including the '181 patent. Confidential Exhibit 23C, ¶ 7.

70. VirnetX also has made substantial investments in exploiting its patent portfolio, including the '181 patent, through litigation activities, which are related to its efforts to license that patent. Confidential Exhibit 23C, ¶ 10.

71. There is a nexus between VirnetX's substantial investments and (i) the Asserted Patent, (ii) the licensing of that Asserted Patent, and (iii) the United States.

72. In view of at least the foregoing, and pursuant to 19 U.S.C. § 1337(a)(3)(C), a domestic industry exists or is in the process of being established by virtue of VirnetX's substantial investment in its licensing activities.

**X. RELIEF REQUESTED**

Wherefore, by reason of the foregoing, Complainant requests that the U.S. International Trade Commission:

73. Institute an immediate investigation pursuant to Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, with respect to violations of Section 337 based on the importation into the United States, the sale for importation into the United States, and the sale within the United States after importation of devices with secure communication capabilities, components thereof, and products containing the same, that infringe one or more claims of the Asserted Patent;

74. Determine that there has been a violation of Section 337 based on said unlawful acts;

75. Issue a permanent exclusion order pursuant to 19 U.S.C. § 1337(d) excluding from entry into the United States all infringing articles that are manufactured, imported, or sold by or on behalf of the proposed respondent, its affiliates, subsidiaries, successors, or assigns that infringe at least one claim of the Asserted Patent;

76. Issue permanent cease and desist orders pursuant to 19 U.S.C. § 1337(f) prohibiting proposed respondent from engaging in unlawful importation of, sale within the United States after importation of, the distribution and transfer of, and all other commercial activities relating to, devices with secure communication capabilities, components thereof, and products containing the same, that infringe at least one claim of the Asserted Patent;

77. Impose a bond upon respondent should it continue to import infringing articles during the 60-day-Presidential review period Pursuant to 19 U.S.C. § 1337(j); and,

78. Issue such other and further relief as the Commission deems just and proper.

Dated: November 4, 2011

Respectfully submitted,

**McKool SMITH, P.C.**



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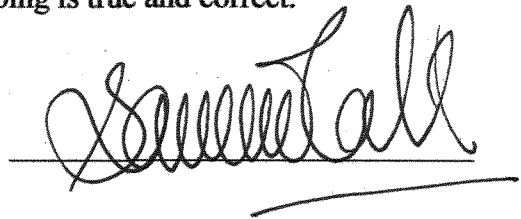
### **VERIFICATION BY COMPLAINANT**

I, Sameer Mathur, am the Vice-President of Corporate Development and Product Marketing of VirnetX, Inc. I am duly authorized to sign the foregoing Complaint under Section 337 of the Tariff Act of 1930, as Amended ("Complaint") on behalf of Complainant VirnetX, Inc. I have read the Complaint and am familiar with the allegations and statements contained therein. In accordance with the provisions of 19 C.F.R §§ 210.4(c) and 210.12(a), I hereby declare that, to the best of my knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

1. The Complaint is not being filed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
2. The claims and other legal contentions set forth in the Complaint are warranted by existing law or by a good faith, non-frivolous argument for extension, modification, or reversal of existing law, or by the establishment of new law; and
3. The allegations and other factual contentions have evidentiary support, or where specifically identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on November 2, 2011.

A handwritten signature in cursive script, appearing to read 'Sameer Mathur', is written over a horizontal line. The signature is fluid and stylized, with the first and last names being more prominent.