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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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APPLE INC.,  
Petitioner

v.

VIRNETX INC.  
Patent Owner

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Case IPR2015-00812  
Patent No. 8,850,009

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**PATENT OWNER'S REPLY IN SUPPORT OF MOTION TO EXCLUDE**

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On May 16, 2016, Petitioner Apple Inc. (“Apple”) filed an Opposition (Paper No. 37) to Patent Owner’s Motion to Exclude (Paper No. 35). Apple, however, provides insufficient reasons for admitting the exhibits at issue, i.e., Exhibits 1001, 1002, 1009-1035, 1037-1041, 1043-1048, 1060, 1063-1065, 1068, and 1069, and portions of Exhibit 1005. As such, Patent Owner’s Motion to Exclude should be granted.

**I. Exhibits 1060 and 1063-1065 Should Be Excluded**

Apple asserts that VirnetX should have identified “specific statements in [these] exhibits alleged to be hearsay.” Paper No. 37 at 1. Apple misses that VirnetX asserted these exhibits were hearsay in their entirety. Paper 35 at 2-3, Paper 18 at 1. Moreover, there is no requirement to identify “specific statements,” *see* 37 C.F.R. 42.22, and Apple does not deny that Exhibits 1060, and 1063-1065 constitute hearsay.

Apple further argues that these exhibits should be admitted under the residual exception of Fed. R. Evid 807. Apple states that courts have “wide discretion” in applying the residual exception to the hearsay rule. *See* Paper 38 at 2 (citing *Doe v. United States*, 976 F.2d 1071, 1076-77 (7th Cir. 1992)). This is wrong. Apple’s reliance on *Doe*, which involves out of court statements made by a *child abuse victim against his abuser*, is misplaced. As provided by *Doe*:

Congress intended that the residual exceptions be *used sparingly*; although trial judges are given considerable discretion in evaluating hearsay offered thereunder, that discretion is “tempered by the *requirement that the exception be reserved for exceptional cases.*”

*Id.* at 1074 (emphasis added). Indeed, the Federal Circuit recently excluded a sworn declaration assumed to be trustworthy. *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”).

Ignoring the mandate that the residual hearsay exception is to be “used sparingly” for truly “exceptional cases,” Apple attempts to establish that the statements in these exhibits meet the five requirements of Rule 807. But they do not meet all of those requirements. Apple first argues that Ms. Ginoza’s statements in Exhibits 1060 and 1063 is corroborated by and corroborates Exhibits 1064 and 1065. *See* Paper 38 at 3, 4. That is incorrect. Ms. Ginoza’s statements and the statements in Exhibits 1064 and 1065 have no circumstantial guarantees of trustworthiness. There is no evidence corroborating Ms. Ginoza’s statements. She has *no personal knowledge* to support the assertions that RFC 2401 became publicly available in November 1998 and RFC 2543 became publicly available in March 1999. She was *not involved* with the RFC editor’s publication process until

June of 1999. (Ex. 1063 at 14 (page 50, lines 17-25).) She not only failed to produce the RFC Editor records that formed the basis of her statements, but she also could not even explain what existed in those records that were the basis of her statements with respect to RFC 2401. *See* Ex. 1060 at ¶ 107; Ex. 1063 at 11 (p. 40, ll. 2-5). Therefore, her blanket assertion that “RFC 2401 has been publicly available through the RFC editor’s web site or through other means since its publication in November 1998” (Ex. 1060 at ¶ 107) has no “circumstantial guarantee[] of trustworthiness.” Further, there is no evidence having “circumstantial guarantees of trustworthiness” for the statements in Exhibits 1064 and 1065 (Ex. 1064 at 9; Ex. 1065 at 3) relating to the availability of RFCs from the IETF website that Apple relies on for their truth.<sup>1</sup> Reply, Paper No. 29 at 19-21.

In addition to lacking indicia of trustworthiness required by Rule 807, Ms. Ginoza’s statements and Exhibits 1064 and 1065 are not more probative than other evidence reasonably available to Petitioner, as required by FRE 807. As just one

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<sup>1</sup> Apple asserts that Exhibits 1064 and 1065 are being submitted for another purpose as well and should be admitted. *See* Paper No. 38 at 3 n.1. Patent Owner disagrees as these exhibits are being submitted for their truth. *See* Reply, Paper No. 29 at 19-21.

example, Petitioner could have contacted the authors of RFCs 2401 and 2543 to obtain declarations regarding their personal knowledge of the publication of RFCs 2401 and 2453. Petitioner's failure to submit such in court testimony not only shows that the evidence currently of record is not "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts" but also shows that admitting this evidence is not "in the interests of justice," as required by FRE 807. Indeed, this is simply not one of those "exceptional" cases where admitting hearsay evidence under the residual exception is warranted. *Conoco Inc. v. DOE*, 99 F.3d 387, 392 (Fed. Cir. 1996).

For at least the above reasons, the Board should exclude Exhibits 1060 and 1063-1065 because they constitute inadmissible hearsay and no exception applies.

## **II. Exhibits 1001, 1002, 1009-1035, 1037-1041, 1043-1048, 1068, and 1069 and Portions of Exhibit 1005 Should Be Excluded**

Apple asserts that Dr. Tamassia considered Exhibits 1001, 1002, 1009-1035, 1037-1041, and 1043-1048, and therefore, they are admissible. *See* Paper 37 at 7. However, these exhibits were not cited by Dr. Tamassia (in Ex. 1005) as forming the basis for his positions that are relevant to this proceeding. *See Actifio, Inc., v. Delphix Corp.*, IPR2015-00108, Paper No. 56 at 57 (Apr. 29, 2016) (excluding exhibits that were not relied upon). Thus, these exhibits should be excluded and

the unrelated portions of Dr. Tamassia's declaration to this proceeding should likewise be excluded.

As for Exhibit 1068 and 1069, Apple does not deny that it does not rely on them in any of its papers. They should, therefore, be excluded as irrelevant.

Respectfully submitted,

Dated: May 23, 2016

By: Joseph E. Palys/  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of May 2016, a copy of the foregoing Patent Owner's Reply in Support of Motion to Exclude was served electronically, pursuant to agreement, upon the following:

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