No. 2016-119

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

IN RE: VIRNETX INC.,

Petitioner.

On Petition for a Writ of Mandamus to the United States Patent and Trademark Office, Patent Trial and Appeal Board in Nos. IPR2015-01046 & IPR2015-01047

RESPONDENT MANGROVE PARTNERS MASTER FUND LTD.'S OPPOSITION TO VIRNETX'S COMBINED MOTION TO STAY PENDING THE CONSIDERATION OF ITS PETITION FOR A WRIT OF MANDAMUS AND FOR INTERIM ADMINISTRATIVE STAY

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March 14, 2016

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INTRODUCTION

VirnetX Inc. ("VirnetX") has shown no basis to stay two administrative proceedings that the Patent Trial and Appeal Board (the "Board") has determined were properly instituted and should go forward.

Mangrove Partners Master Fund Ltd. ("Mangrove") filed two petitions for *inter partes* review ("IPR") of VirnetX patents that were properly instituted by the Board. VirnetX has not sought mandamus to challenge either Mangrove's statutory right to file those petitions nor the appropriateness of the Board's decision to institute those petitions. The relief that VirnetX seeks *vis-à-vis* Apple, Inc. ("Apple") is irrelevant to Mangrove's petitions, which will proceed on the grounds that Mangrove has submitted to the Board regardless of this Court's decision on VirnetX's mandamus petition. VirnetX should not be allowed to further thwart "the just, speedy, and inexpensive resolution" of Mangrove's petitions. 37 C.F.R. § 42.1(b).

This Court should not interfere with the Board's decision to move forward with the Mangrove IPRs. VirnetX's stay motion should be denied.[1]

[1] This opposition addresses only VirnetX's stay motion. VirnetX's mandamus petition has no impact on Mangrove's IPRs and Mangrove has no need to respond to that petition.

BACKGROUND

VirnetX's motion for stay and mandamus petition contain many misstatements of fact regarding Mangrove that are irrelevant to the relief it seeks. Accordingly, this opposition does not attempt to respond to or correct all of VirnetX's misstatements. Instead, Mangrove proceeds directly to its limited arguments on the stay issue.

ARGUMENT

VirnetX recognizes that its request to stay the IPR proceedings must satisfy the test articulated in *Standard Havens Products, Inc. v. Gencor Industries, Inc.*, 897 F.2d 511 (Fed. Cir. 1990). Mot. 8. Under that test, this Court balances four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Standard Havens, 897 F.2d at 512 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Factor 1 is not relevant to Mangrove, whose petitions will proceed regardless. Indeed, VirnetX concedes it seeks no mandamus relief against Mangrove, and that alone should require denial of a stay. This opposition addresses Factors 2-4. VirnetX's motion falls short on each of these factors, and its request for a stay should be denied.

I. VirnetX Will Not Be Irreparably Harmed Absent A Stay Because Mangrove's IPRs Will Proceed Regardless of This Court's Decision on Mandamus

It is undisputed that Mangrove's IPR petitions challenging VirnetX's '135 and '151 patents were timely. Indeed, VirnetX's motion acknowledges that "VirnetX has never served Mangrove with a complaint alleging infringement of either patent." (Mot. 6) Accordingly, the issues raised in VirnetX mandamus petition regarding the time-bar of 35 U.S.C. § 315(b) have no relevance to Mangrove. VirnetX seeks only to rely only on vague speculation about supposed harms of allowing the Board to proceed forward on Mangrove's timely petitions, which is hardly a basis on which to obtain extraordinary relief from this Court.

While VirnetX's motion for stay and mandamus petition make clear that they are not happy with the Board's decision to institute Mangrove's IPRs, they cannot and do not challenge in this Court the appropriateness of any decision made by the Board regarding Mangrove. For example, VirnetX's motion laments that the Board "did not permit VirnetX even to file a motion for additional discovery" into alleged issues regarding RPX Corporation. (Pet. 9; Mot. 6-7) However, VirnetX made these same arguments in a conference call with the Board, which dismissed them as speculative:

> We deny Patent Owner's request because Patent Owner's request amount to no more than a mere allegation of some kind of general association between Petitioner and RPX. For example, Patent Owner argues that Petitioner has an equity stake in RPX, that counsel for

> Petitioner allegedly represents RPX, and that publicly available documents supposedly imply a connection between Petitioner and RPX. The alleged facts presented by Patent Owner during the conference call do not show more than a mere possibility that something useful will be discovered and are therefore insufficient to show beyond mere speculation that discovery would be in the interests of justice. *See Garmin Int'l, Inc. v. Cuozzo Speed Techs. LLC,* IPR 2012-00001, Paper 26 (Mar. 5, 2013).

Pet. Ex. 140 at 2. VirnetX's mandamus petition does not challenge the Board's application of the *Garmin* factors to this issue nor the *Garmin* factors themselves. Instead, it is merely one, among many, irrelevant side shows in VirnetX's papers.[2]

Mangrove's IPRs will go forward regardless of this Court's decision on VirnetX's mandamus petition and the substantive grounds they will go forward on – regardless of whether Apple is or is not joined as a party -- are those from Mangrove's petitions. Pet. Ex. 1 at 4-7. Further staying these IPRs only allows VirnetX to further delay responding on the merits to Mangrove's invalidity arguments, which the Board has found are likely to prevail.

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[2] VirnetX mandamus petition also includes false and irrelevant assertions regarding Mangrove Partners, the investment manager for Mangrove. For example, VirnetX's claims that "Mangrove Partners held VHC stock two months before the petitions were filed, yet had divested of that stock a month after filing." First, the SEC Form 13F filings cited were filed on behalf of Mangrove Partners Master Fund Ltd., the petitioner in both IPRs. Pet. Ex. 24; Pet. Ex. 26. The investment manager Mangrove Partners does not itself own stocks or other securities. Second, the Master Fund did not own VHC stock, instead it owned put options, *i.e.*, the right to sell to someone else a security at an agreed price. Pet. Ex. 25.

II. VIRNETX'S STAY MOTION IGNORES THE ADVERSE IMPACT ON MANGROVE

Mangrove filed its IPR petitions with an expectation of a "just, speedy, and inexpensive resolution of every proceeding." 37 C.F.R. § 42.1(b). By statute, the Board is required to enter a final decision on Mangrove's petitions within one year of institution – in this case by November 7, 2016. 35 U.S.C. §316(a)(11). There are significant trial events that must still occur including the Patent Owner Response, Mangrove's Reply, and objections to evidence, all of which must occur before the oral hearing, which is currently scheduled for June 30, 2016. Apple Exs. 15-18. VirnetX has already received multiple extensions, which have compressed the time that Mangrove has to prepare for these oral arguments by over two months. *Id.* Mangrove is prejudiced by these continuing delays, which attempt to thwart Mangrove's right to a "just, speedy, and inexpensive resolution" of its IPRs. 37 C.F.R. § 42.1(b). Mangrove has a legitimate interest in proving the invalidity of VirnetX's '135 and '151 patents and a stay harms these interests.

III. A STAY DOES NOT SERVE THE PUBLIC INTEREST

There is no public interest in a stay. A just and speedy resolution of Mangrove's validly instituted IPRs serves the public interest which favors the cancellation of invalid claims. *See, e.g.*, *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 851-852 (2014) ("[T]he 'public' … has a 'paramount interest in seeing that patent monopolies ... are kept within their

legitimate scope.'"); *Pregis Corp. v. Kappos*, 700 F.3d 1348, 1359 (Fed. Cir. 2012) ("Congress has protected the interests of competitors and the public through the mechanisms explicitly provided to them in the Patent Act to challenge the validity of issued patents.").

VirnetX's motion only seeks to protect its own private interests, and does so on inappropriate grounds.

CONCLUSION

VirnetX's motion to stay the Board's IPR proceedings should be denied.

Respectfully submitted,

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March 14, 2016

CERTIFICATE OF INTEREST

Counsel for Respondent Mangrove Partners Master Fund Ltd. certifies the following:

1. The full name of every party or *amicus* represented by us is:

   Mangrove Partners Master Fund Ltd

2. The names of the real party in interest represented by us is:

   Not applicable.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not and will not enter an appearance in this case) are:

   WIGGIN & DANA LLP: Abraham Kasdan, Michael J. Kasdan

   LAW OFFICE OF JAMES T. BAILEY: James T. Bailey.

Dated: March 14, 2016

/s/ Jonathan M. Freiman

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No. 2016-119

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DECLARATION OF JONATHAN M. FREIMAN

JONATHAN M. FREIMAN states as follows:

1. I am an attorney in the law firm of Wiggin and Dana LLP, counsel for respondent Mangrove Partners Master Fund Ltd. ("Mangrove").

2. This declaration is submitted pursuant to the Court's ECF Guidelines point 5(c), and it accompanies Mangrove's opposition to the pending motion for stay. The opposition was due at 12:00 noon on March 14, 2016.

3. Due to technical issues with the Java program, necessary for e-filing, the e-filing of the opposition was delayed until shortly after 12:00 noon. It had been prepared and finalized in time for the 12:00 deadline but for the technical issues. I am submitting this declaration pursuant to instructions obtained from the Case Manager at the Clerk's Office, James Alvino.

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

Executed in New Haven, Connecticut, on this 14th day of March, 2016.

s/Jonathan M. Freiman
Jonathan M. Freiman

FORM 30. Certificate of Service

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF SERVICE

I certify that I served a copy on counsel of record on 3/14/2016
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