

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  
Patent 7,490,151 B1

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Before MICHAEL P. TIERNEY, KARL D. EASTHOM, and STEPHEN C. SIU, *Administrative Patent Judges*.

SIU, *Administrative Patent Judge*.

ORDER  
Conduct of the Proceeding  
*37 C.F.R. § 42.5*

A telephone conference was conducted on April 14, 2016 with the parties and Judges Tierney, Easthom, and Siu. Patent Owner filed a Declaration of Dr. Robert Dunham Short III (“Declaration”), which Patent

Owner obtained from a prior related reexamination proceeding. Ex. 2050. The Mangrove Partners Master Fund, Ltd., Apple Inc., and Black Swamp IP, LLC (collectively, “Petitioner”) requested authorization to file a motion for additional discovery for cross examination of the declarant, Dr. Robert Dunham Short III.

Under 37 C.F.R. § 42.51(b)(1)(ii), cross examination of affidavit testimony prepared for an ongoing trial is authorized as routine discovery. As discussed during the telephone conference (which included a court reporter provided by the parties), Petitioner’s request for authorization to file a motion for additional discovery is denied. However, Petitioner may file a motion to exclude the Declaration (as hearsay or otherwise) with its Reply by Due Date 4, if desired. The parties are reminded that little to no weight is given to testimony of declarants who are not subject to cross-examination, even if the testimony is not excluded as hearsay.

ORDERED that Petitioner’s request for authorization to file a motion for additional discovery is denied;

FURTHER ORDERED that Patent Owner will submit a copy of the transcript of the conference as an Exhibit; and

FURTHER ORDERED that Petitioner may file a motion to exclude the Declaration by Due Date 4, with its Reply, at Petitioner’s discretion.

**PETITIONER:**

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