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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

VIRNETX, INC.)
DOCKET NO. 6:10cv417
-vs-)
Tyler, Texas
November 2, 2012
APPLE, INC.)
12:42 p.m.

TRANSCRIPT OF TRIAL
AFTERNOON SESSION
BEFORE THE HONORABLE LEONARD DAVIS,
UNITED STATES CHIEF DISTRICT JUDGE, AND A JURY

A P P E A R A N C E S

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1 So that's my -- that's my short answer, sir.
 2 THE COURT: All right. Thank you.
 3 Any follow-up questions from Plaintiff's
 4 counsel?
 5 MR. CASSADY: No, Your Honor.
 6 THE COURT: All right.
 7 From the Defendants' counsel?
 8 MR. ALBRITTON: Yes. Thank you, Your
 9 Honor.
 10 ROY WEINSTEIN, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN
 11 RE-CROSS-EXAMINATION
 12 BY MR. ALBRITTON:
 13 Q. The products that you just referred to are not
 14 VirnetX products; the products you're referring to are
 15 products that are made, manufactured, marketed, and sold
 16 by Microsoft or one of these other companies?
 17 A. Actually, what I was referring to is VirnetX
 18 patents, so I was referring to VirnetX products.
 19 Q. The products that you're referencing, those
 20 are not products that are manufactured and sold by
 21 VirnetX, correct?
 22 A. The products that are covered by the license
 23 agreements are made and manufactured by others, but I
 24 understood the question to involve VirnetX, and VirnetX
 25 has been licensing its patents.

1 PROCEEDINGS
 2 (Jury out.)
 3 COURT SECURITY OFFICER: All rise.
 4 THE COURT: You may be seated while we
 5 wait for the jury.
 6 (Pause in proceedings.)
 7 COURT SECURITY OFFICER: All rise for the
 8 jury.
 9 (Jury in.)
 10 THE COURT: Please be seated.
 11 All right. Ladies and Gentlemen, hope
 12 you had a good lunch, and we're ready to go for this
 13 afternoon.
 14 Before we go back with the previous
 15 witness, we have Dr. Weinstein back on the phone (sic).
 16 We had a question from the jury, Dr.
 17 Weinstein, for you that I'd like for you to answer at
 18 this time, and the question is: Why is VirnetX not
 19 selling this product?
 20 THE WITNESS: Yes, Your Honor. Thank
 21 you.
 22 My answer is: VirnetX is selling this
 23 product. It has sold this product. It licensed its
 24 product to Microsoft. It licensed its product to other
 25 entities. We saw all those license agreements.

1 Q. The products you're talking about right then
 2 are products that are made, manufactured, marketed, and
 3 sold by companies -- by Microsoft or Aastra, not by
 4 VirnetX. Correct?
 5 A. Right. And they are made and sold pursuant to
 6 the VirnetX license.
 7 Q. And the product that VirnetX has is called
 8 Gabriel. You heard that testimony?
 9 A. Yes, sir, I did.
 10 Q. And they have never sold Gabriel to anybody,
 11 correct?
 12 A. As far as I know, that's true.
 13 MR. ALBRITTON: Pass the witness, Your
 14 Honor.
 15 THE COURT: All right. Any follow-up?
 16 MR. CASSADY: Just a little bit, Your
 17 Honor.
 18 REDIRECT EXAMINATION
 19 BY MR. CASSADY:
 20 Q. Mr. Weinstein, why hasn't VirnetX sold
 21 Gabriel?
 22 A. Well, my understanding is that VirnetX has
 23 been heavily engaged in licensing its intellectual
 24 property to entities like Microsoft, and it's here to
 25 try and license its intellectual property to Apple, and

1 it's done so with respect to others.
 2 So that's my general understanding. That's a
 3 time-consuming process.
 4 Q. Okay. And what about others in the
 5 marketplace would affect whether or not Gabriel could be
 6 sold?
 7 A. Well, the ability to sell Gabriel depends, at
 8 least in part, on VirnetX's ability to protect its
 9 intellectual property. If others are using its
 10 intellectual property, it's going to make it difficult
 11 for VirnetX to sell Gabriel or any other product that
 12 involves that intellectual property until others have
 13 taken a license.
 14 Q. Okay.
 15 MR. CASSADY: Thank you, Mr. Weinstein.
 16 THE COURT: All right. Thank you.
 17 Anything further?
 18 MR. ALBRITTON: Yes, Your Honor.
 19 RE-CROSS-EXAMINATION
 20 BY MR. ALBRITTON:
 21 Q. Now, Mr. Weinstein, you gave an expert report
 22 in this case?
 23 A. Yes, sir.
 24 Q. And in that report, you said that VirnetX has
 25 met with representatives from Google, for instance, and

1 companies like Samsung and Motorola. Correct?
 2 A. I said that, yes.
 3 Q. Yes. Paragraph 139 on Page 47 of your report.
 4 A. Okay.
 5 Q. Those companies were approached by VirnetX
 6 about these patents in this case, correct?
 7 A. As far as I know.
 8 Q. And VirnetX's technology, correct?
 9 A. Yes, sir.
 10 Q. And those companies have not incorporated
 11 VirnetX's technology into any of its products, correct?
 12 A. I don't know the answer to that.
 13 Q. If they had, you would know that, wouldn't
 14 you?
 15 A. No. Actually, I don't think I would.
 16 Q. Okay.
 17 MR. ALBRITTON: Pass the witness.
 18 THE COURT: Anything further?
 19 MR. CASSADY: Nothing further.
 20 THE COURT: All right. Thank you.
 21 You may step down.
 22 THE WITNESS: Thank you, sir.
 23 THE COURT: All right, Mr. Williams. You
 24 may continue with your witness.
 25 MR. WILLIAMS: Thank you, Your Honor.

1 JOHN KELLY, Ph.D., DEFENDANT'S WITNESS, PREVIOUSLY SWORN
 2 DIRECT EXAMINATION (CONTINUED)
 3 BY MR. WILLIAMS:
 4 Q. Good afternoon, Dr. Kelly.
 5 A. Good afternoon, Mr. Williams.
 6 Q. Now, where we left off was at the end of VPN
 7 On Demand. Before we jump right into FaceTime, I have a
 8 couple of questions I want to follow up with you on.
 9 With Apple's VPN On Demand function, would it
 10 be fair to say that the user can actually provide
 11 security in situations where the VirnetX technology
 12 would not provide security?
 13 A. Yes, I think that is fair.
 14 Q. And with sort of a -- but in what situation
 15 would that be, for example?
 16 A. Well, if you want to initiate a VPN, a secure
 17 connection to an unsecure website, you can't do that
 18 with the VirnetX patents, because it only will initiate
 19 a VPN for secure websites.
 20 But if you wanted to protect the
 21 communications, the anonymity, the privacy of the
 22 communications, you could set up a VPN to an unsecure
 23 website. So that's increased security in that
 24 situation.
 25 Q. Now, earlier I asked you if there would be

1 reasons why someone, a user, would, in fact, put a
 2 non-secure website into their configuration file for VPN
 3 On Demand. Right?
 4 A. Yes.
 5 Q. And are you aware of, in fact, someone who has
 6 put a non-secure website in their VPN On Demand file?
 7 A. Yes, I am.
 8 Q. Now, this is some testimony from Mr.
 9 Christophe Allie. Do you know who he is?
 10 A. Yes. He's an Apple engineer.
 11 Q. And Mr. Allie was one who basically
 12 designed -- he and a team member designed VPN On Demand,
 13 right?
 14 A. That's correct.
 15 Q. And what does Mr. Allie say? And starting, if
 16 we could, about almost halfway -- a little over halfway
 17 down where it says: Why don't you configure...
 18 Can you read that for us, questions and
 19 answers?
 20 A. Sure. He's being asked: Why don't you
 21 configure your VPN On Demand to trigger a VPN based on
 22 the host name ebay.com instead of using, say,
 23 web.apple.com?
 24 And the answer is: Sometimes I do.
 25 And the lawyer asking the question said:

1 You do?

2 Answer: Uh-huh.

3 Question: And you actually configure
4 your VPN On Demand to trigger a VPN to Apple's private
5 network based on ebay.com?

6 And his answer is: Sometimes I do.

7 Q. Now, going beyond the unsecure name or
8 non-secure name in the file, in some of your examples --
9 one of your examples in particular, you used a made-up
10 name, the notarealdomain.com name?

11 A. I did.

12 Q. Now, are you saying users will actually set up
13 their files using a fake name?

14 A. Well, you can't say exactly what users would
15 do. Perhaps they would. But I'm not suggesting that
16 that would be a routine occurrence.

17 Q. Okay. Well, then what was the reason for
18 using that illustration?

19 A. Just to show how VPN On Demand actually works.
20 It doesn't determine whether or not the website being
21 requested is secure. A fake domain name can cause a VPN
22 to be initiated.

23 Q. Okay. Now, you're aware, aren't you,
24 Dr. Kelly, that Dr. Jones says that the -- there are a
25 number of different connection types that are used in

1 A. That's correct.

2 Q. You've heard that phrase batted around this
3 courtroom a fair amount the last couple of days?

4 A. I certainly have.

5 Q. Now, you understand, right, that VirnetX and
6 Dr. Jones say that Apple's FaceTime servers infringe two
7 of their patents, namely, the '504 and '211 patents.
8 Right?

9 A. Yes. I know that they have alleged that.

10 Q. Do you agree?

11 A. I do not agree.

12 Q. Now, I want to make sure that we're clear that
13 what they're saying is that it's the Apple FaceTime
14 servers that are infringing the patent. Is that
15 correct?

16 A. That's correct.

17 Q. And the operation of those servers?

18 A. Yes, that's correct.

19 Q. Now, Dr. Jones is not saying that it's the
20 Apple iPhones or the iPods or the iPads that themselves
21 are actually infringing these two patents. Isn't that
22 right?

23 A. That is correct.

24 Q. Nevertheless, you heard Mr. Weinstein, their
25 damages expert, on the stand yesterday. Right?

1 the VPN On Demand feature with the Apple products.

2 Right?

3 A. Yes, I am.

4 Q. And in particular, he lists -- listed on the
5 stand Cisco AnyConnect, Juniper SSL, F5 SSL, SonicWALL
6 Mobile Connect, and Aruba VIA as connections that are
7 used with the Apple iPhone that he says uses VirnetX
8 patents. Is that correct?

9 A. Yes.

10 Q. Do you agree with that?

11 A. I do not agree with that.

12 Q. Why not?

13 A. Well, for all the same reasons that I
14 discussed with respect to the Cisco IPsec, which was the
15 one we were talking about before. And those same
16 reasons apply to all of these other connection types as
17 well.

18 Q. Now, what I'd like to do is, I'd like to move
19 on to the FaceTime feature. All right?

20 Now, this is a different feature. It's
21 completely separate from VPN On Demand, right?

22 A. Yes, it is.

23 Q. Okay. Now, this is the feature in the Apple
24 products that -- when we discussed this notion of direct
25 communication, right?

1 A. I was here. I heard him.

2 Q. And you heard him calculate damages based on
3 iPhone and iPod and iPad, right, including for the
4 FaceTime patents. Right?

5 A. Yes, he did.

6 Q. Okay. So there's no misunderstanding, VirnetX
7 is actually not saying that those devices infringe;
8 they're saying it's the Apple servers that are back up
9 in the corner. Right?

10 A. That is correct.

11 Q. Now, why do you disagree with Dr. Jones'
12 opinion that the Apple FaceTime servers and their
13 operation infringe these two VirnetX patents?

14 A. The VirnetX patents require direct
15 communication, and there is no direct communication in
16 Apple's FaceTime.

17 Q. Now, Dr. Kelly, I want to use an analogy that
18 may help us understand what it means to have direct
19 communication.

20 And, by the way, the direct communication
21 language comes from His Honor, Judge Davis. Correct?

22 A. Yes, it does.

23 Q. Okay. So Judge Davis has told us -- and I
24 think we will see this shortly -- that the secure
25 communication link that the VirnetX technology is

1 supposed to support is this secure communication link,
2 and it must have a direct communication between the
3 devices. Right?

4 A. That is correct, yes.

5 Q. So the direct communication that we're looking
6 at in the FaceTime context is the communication between
7 the two FaceTiming devices, for example, two iPhones.
8 Is that correct?

9 A. That's correct.

10 Q. And I think we all agree in the courtroom that
11 the connections can be made in two -- at least two
12 different ways, right, the two ways we've talked about?

13 A. Right.

14 Q. One is referred to sometimes as a peer-to-peer
15 connection.

16 A. Correct.

17 Q. And the other is sometimes referred to as the
18 relay connection?

19 A. That's correct.

20 Q. And we all agree, I believe, as Dr. Jones told
21 us yesterday, that the connection through the relays,
22 when the -- when the FaceTime calls are routed through
23 the relays, that that's not infringing VirnetX's
24 patents. Correct?

25 A. Yes, that's correct.

1 So that's the scenario that's an analogy of
2 the indirect addressing.

3 Q. (By Mr. Williams) So because, although the
4 card was intended for the niece and ultimately got
5 there, but because it was actually in an envelope
6 addressed to the sister and it didn't even have the
7 niece's address, that's indirect communication. Is that
8 correct?

9 A. Correct.

10 Q. Now, how does the analogy apply to direct
11 communication?

12 A. Well, in that case, you'd have direct
13 addressing. So it's a direct communication from the man
14 to the niece.

15 Now, it may well be that the man sends an
16 envelope to the sister.

17 THE WITNESS: Let's proceed.

18 A. But then when you open this up, you see that
19 there is a letter inside it, and that letter is indeed
20 directly addressed to the niece. So it's got the
21 niece's address on it.

22 Q. (By Mr. Williams) So in this case, there was
23 direct communication with her, because he directly
24 addressed that to her, notwithstanding that it went
25 through some intermediary. Is that correct?

1 Q. So the fight that we have going on here is
2 about the connection -- the NAT-to-NAT or peer-to-peer
3 connection. Is that right?

4 A. Correct.

5 Q. Okay. Now, let's look at this analogy, and I
6 want to ask you, generally, can you describe this
7 analogy?

8 A. Certainly. The idea here is that there is a
9 man who wants to address a letter or a card to his
10 niece, wants to deliver something to his niece; and what
11 he's going to do is, he's going to send it first to his
12 sister. And there are two possible ways of doing this.

13 THE WITNESS: Let's back up just for a
14 moment.

15 A. The first way is what we'll call indirect
16 addressing. And in this scenario, the man addresses an
17 envelope to his sister.

18 THE WITNESS: Continue, please.

19 A. And then his sister opens this, and there is a
20 letter inside that for his niece, but there's no address
21 on that. It's not addressed to his niece.

22 So his sister is going to deliver it to the
23 niece. That's indirect. It's intended for the niece.
24 It's going to get to the niece. But the niece's address
25 is not on the letter.

1 A. Correct.

2 Q. Okay. Now, how does this analogy apply to the
3 FaceTime communications?

4 A. Well, we can consider simply that the man is
5 one iPhone, say, and the niece is the other iPhone.

6 And the question is: Does the -- does the
7 FaceTime call go -- is it a direct communication with
8 the niece, or does it go through some intermediary that
9 causes it to be indirect communication?

10 And we'll -- we'll -- in this example, the
11 sister is the NAT that we've been talking about.

12 Q. Now, before we go further, let me ask you,
13 have you seen anything from Dr. Jones where he's --
14 pardon me -- where he's commented on this direct
15 communication, what it refers to?

16 A. Yes. In his expert report --

17 MR. WILLIAMS: 39.

18 A. -- he told us that directly -- that's the
19 directly in direct communication -- refers to direct
20 addressability.

21 Q. (By Mr. Williams) Okay. And do you agree with
22 that?

23 A. I do.

24 Q. Well, let's look specifically at how
25 communications in the FaceTime situation are

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