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

VIRNETX, INC.,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**Civil Action No. 6:10-cv-417**
	§	
CISCO SYSTEMS, INC., et al.	§	
	§	**JURY TRIAL DEMANDED**
Defendants.	§	
	§	

VIRNETX'S REPLY CLAIM CONSTRUCTION BRIEF

I. ARGUMENT IN REPLY

1. "virtual private network"

"Anonymous." With respect to the Defendants' proposed "anonymity" construction, the issue is whether the Court was correct in requiring all claims to achieve both data security and anonymity based on the discussion in the Background of the Invention. Even though VirnetX squarely raised this issue in its Opening Brief, the Defendants avoided the issue. There is no reason—and the Defendants have offered none—that all claims must achieve anonymity. *Cf. PSN Ill., LLC v. Ivoclar Vivadent, Inc.*, 525 F.3d 1159, 1166 (Fed. Cir. 2008) ("[C]ourts must recognize that disclosed embodiments may be within the scope of other allowed but unasserted claims."). Moreover, VirnetX explained in its Opening Brief how it is just the unasserted "IP address hopping" dependent claims—as opposed to all claims—that achieve the anonymity discussed in the Background of the Invention.[1]

"Directly." VirnetX did not overcome Aventail by disclaiming the type of VPN taught by Aventail; rather, VirnetX demonstrated that Aventail did not teach a VPN at all. The Defendants assert that "[t]his is a difference without a distinction." They are wrong in this assertion. The very inquiry of prosecution disclaimer is whether the ordinary scope of a term was disclaimed. *See Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1324 (Fed. Cir. 2003) ("[W]here the patentee has unequivocally disavowed a certain meaning to obtain his patent, the doctrine of prosecution disclaimer attaches and narrows the ordinary meaning of the claim congruent with the scope of the surrender.") (emphasis added). And the Defendants have failed to establish that VirnetX's three arguments over Aventail departed from the ordinary meaning of VPN.

[1] Instead of addressing why the Background of the Invention discussion should limit all claims, the Defendants attempt to justify their construction by pointing out that VirnetX proved Microsoft's infringement under the Court's Markman Order in that case, which required anonymity. This argument completely misses the point. VirnetX preserved error for this construction, and VirnetX is specifically seeking reconsideration of this issue in this case.

Moreover, the Defendants failed to establish a "clear and unmistakable" disclaimer.[2] The Defendants assert—without any justification, analysis, or argument—that the three arguments that VirnetX made over the Aventail reference are "independent" of each other and therefore disclaim scope of the claim term. *See* Res. at 6-7. The Defendants are demonstrably wrong in this assertion. In re-examination, VirnetX explained the meaning of its third argument:

> Third, Aventail has not been shown to disclose a VPN because computers connected according to Aventail do not communicate directly with each other. Aventail discloses a system where a client on a public network transmits data to a SOCKS server via a singular, point-to-point SOCKS connection at the socket layer of the network architecture. The SOCKS server then relays that data to a target computer on a private network on which the SOCKS server also resides. All communications between the client and target stop and start at the intermediate SOCKS server. The client cannot open a connection with the target itself. Therefore, one skilled in the art would not have considered the client and target to be virtually on the same private network.

See Ex. B. at 14 (internal citations removed). In other words, because Aventail does not virtualize the physically direct communications of a private network,[3] one skilled in the art would not have considered computers in the Aventail system to be virtually on the same private

[2] Contrary to the Defendants' straw man attack, VirnetX never suggested that there cannot be unambiguous waiver anytime a patentee makes multiple distinctions over prior art. In its Opening Brief, VirnetX correctly cited the "clear and unmistakable" test for finding prosecution history estoppel and discussed the Federal Circuit's opinion in *Momentus Golf* to illustrate how, in cases involving multiple distinctions in the prosecution history, courts must be careful in determining whether a particular, isolated distinction rises to the level of clear and unmistakable disclaimer. *See* Opening Brief at 7-8.

[3] This also highlights the reason that VirnetX opposes the Defendants' construction. If the Court adopts this construction, then the Defendants will undoubtedly argue that "directly" requires computers in a VPN to be physically directly connected. But this is not what VirnetX argued in re-examination. Rather, VirnetX used the word "directly" to explain how a VPN virtualizes a direct connection between computers on a physical network. *See* Ex. B. at 14 ("Third, Aventail has not been shown to disclose a VPN because computers connected according to Aventail do not communicate directly with each other. . . . **Therefore, one skilled in the art would not have considered the client and target to be virtually on the same private network**.") (emphasis added). (Note that, in this brief, references to exhibits and Dr. Jones's declaration refer to the exhibits and declarations attached to VirnetX's Opening Brief.)

network. In this way, VirnetX's third argument over Aventail in re-examination is a corollary of its first argument over Aventail—that "Aventail has not been shown to demonstrate that computers connected via the Aventail system are able to **communicate with each other as though they were on the same network**." *See* Ex. B. at 12 (emphasis added). And because VirnetX's third argument over Aventail is a corollary of its first, it would be improper to impose the third argument onto the claims with no regard to the first.[4] For these reasons, the Defendants' proposed construction should be rejected.

2. *"virtual private link"*

The parties' respective constructions are very similar, but the Defendants' proposed construction requires the link to be a link in a network whereas VirnetX's proposed construction simply requires a link. The Defendants have cited no evidence that this is the ordinary meaning of "link," and there is no limiting language in the claims, written description, or prosecution history that would require the link to be in a network. Consequently, the Defendants' proposed construction includes an extraneous limitation and should be rejected. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1316–17 (Fed. Cir. 2005).

3. *"secure communication link"*

The Detailed Description of the Invention teaches a "One-click Secure" preferred embodiment. This preferred embodiment, which spans over four columns, teaches how a secure communication link can be augmented to create a virtual private network communication link. *See* '504::49:1-53:9. VirnetX discussed this preferred embodiment at length in its Opening Brief

[4] Moreover, VirnetX's proposed construction for this term would require computers in a VPN to be able to communicate as if they were on the same private network. *See* Opening Brief at 5-6 (explaining how "privately" in the Court's construction should refer to the ability of computers to communicate as though they were on the same private network and should not refer to anonymity). Under this construction, it would be redundant to exclude from the scope of VPN communications that do not virtualize the physically direct communications of a private network.

to demonstrate that a secure communication link is not always a virtual private network communication link. *See* Opening Brief at 11-12. In their response, the Defendants quote a few lines that describe how the secure communication link in this particular embodiment is also a virtual private network communication link, but the Defendants fail to explain why a secure communication link *must always* be a virtual private network communication link for *all* possible embodiments of the claims. This violates one of the most fundamental principles of claim construction. "[A]lthough the specification often describes very specific embodiments of the invention, [the Federal Circuit has] repeatedly warned against confining the claims to those embodiments." *Phillips*, 415 F.3d at 1323.

As VirnetX discussed in its Opening Brief, this preferred embodiment teaches how software module 3309 augments the secure communication link to create a virtual private network communication link. *See* '504::50:25-27 ("At step 3407, a secure VPN communications mode of operation has been enabled and **software module 3309 begins to establish a VPN communication link.**") (emphasis added); *see also* '504::50:40-52 (describing how the software module 3309 enables computer 3301 to communicate in the private network 3311 as though it were physically in that network). The Court should not follow the Defendants' misunderstanding of the preferred embodiment and should not restrict this term to the special case presented in the preferred embodiment.[5] For the foregoing reasons, the Court should reject the Defendants' proposed construction and adopt VirnetX's proposed construction.

[5] The Defendants also argue that VirnetX "conceded" that a secure communication link is a virtual private network communication link in the *Microsoft* litigation. Not so. The only patent in that case that contained the term "secure communication link" was the '759 patent. And as the Court recognized in its *Markman* order, the claims of '759 patent defined and limited the secure communication link to a virtual private network communication link. *See* Ex. A at 25.

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