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

VIRNETX, INC.)
) DOCKET NO. 6:10cv417
-vs-)
) Tyler, Texas
) 9:00 a.m.
APPLE, INC.) October 18, 2012

TRANSCRIPT OF PRETRIAL CONFERENCE
BEFORE THE HONORABLE LEONARD DAVIS,
UNITED STATES CHIEF DISTRICT JUDGE

A P P E A R A N C E S

(SEE SIGN-IN SHEETS DOCKETED IN THE MINUTES OF THE CASE.)

COURT REPORTER: MS. SHEA SLOAN
211 West Ferguson
Tyler, Texas 75702

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1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 All right. Ms. King, if you will call the case,
4 please.

5 THE CLERK: Court calls Case No. 6:10cv417, VirnetX,
6 Inc., v. Apple, Inc.

7 THE COURT: Announcements.

8 MR. CAWLEY: Good morning, Your Honor. Douglas
9 Cawley for the Plaintiff VirnetX. With me today to argue on
10 some motions, assuming the Court asks for argument on them,
11 Mr. Brad Caldwell, Mr. Jason Cassady, Mr. Austin Curry, and
12 Mr. Daniel Pearson. We also have with us Robert Parker and
13 Chris Bunt. We are ready to proceed.

14 THE COURT: Okay. Thank you.
15 Defendants?

16 MR. WILLIAMS: Your Honor, Danny Williams for Apple.
17 I have with me today Mr. Drew Kim, Matt Rodgers, Scott
18 Woloson, Mr. Chris Cravey, Mr. Steve Edwards; and I also have
19 with me Ms. Katie Prescott from Apple. We are ready to
20 proceed, Your Honor.

21 THE COURT: Thank you.

22 MR. JONES: Your Honor, for Cisco Systems, Mike
23 Jones. Lead Counsel, Mr. John Desmarais. Also arguing for us
24 will be Mr. Paul Bondor and Mr. Michael Stadnick. And also
25 representing Cisco Systems are John Bufe and Eric Findlay.

1 THE COURT: Anybody else?

2 MR. WARD: Good morning, Your Honor. Johnny Ward
3 for Siemens. I don't think you will hear much argument from
4 me, but you may on a very limited issue on one motion.

5 THE COURT: Okay.

6 MR. TINDEL: Your Honor, Andy Tindel here for SAIC.

7 THE COURT: Anyone else?

8 Okay. Very well. We have a lot to do this morning,
9 so let's move through it. The first thing, I have the
10 parties' joint motion to exceed limits for exhibit and
11 deposition designations for trial, and I don't have a problem
12 with that. So that is granted. I would encourage you to try
13 to limit your exhibits and depositions, but I know you will.

14 All right. Then we have various motions here. I
15 think I would like to take up, first, Defendant Cisco and
16 Apple's motion to stay, pending ongoing reexamination
17 proceedings, Docket No. 477.

18 MR. STADNICK: Good morning, Your Honor. Michael
19 Stadnick for Cisco Systems. Your Honor, we are preparing to
20 go to trial on scores of patent claims that currently stand
21 rejected in the Patent Office.

22 And it is not just an initial rejection. For 110
23 out of 136 claims that remain asserted in this case, we have
24 reached the stage, which is called an "action closing
25 prosecution." There are inter partes reexaminations. What

1 that means is we filed reexamination requests. The Patent
2 Office considered them. They rejected the patent claims.
3 Both VirnetX and the defendants had the opportunity to be
4 heard by the Patent Office. The Patent Office considered
5 those arguments, and then they rejected the claims again.

6 And for at least 110 out of the 136 claims of the
7 patents-in-suit that are asserted, we have now reached the
8 stage where we are essentially ready to go up on appeal,
9 barring some unsuspected circumstances in the Patent Office.
10 So the rejections of all but four of the 136 patents-in-suit
11 are not initial rejections.

12 They are also not narrow rejections. For most of
13 the rejected claims of the patents-in-suit, we are talking
14 about a situation where the individual-rejected claims are
15 rejected over numerous independent grounds, 10 separate
16 grounds of validity. In some cases 12, 15, up to 19 separate
17 grounds of invalidity for some of the patents-in-suit, some of
18 the asserted claims.

19 So what does that mean for the trial? If we move
20 forward with trial now, we know two things. First of all, it
21 is almost certain that at least some of the 136 claims that
22 are asserted in the case are going to be cancelled as a result
23 of the reexamination proceedings; so that we will potentially
24 waste time litigating claims that will ultimately be
25 cancelled.

1 Even if that doesn't take place, given the number
2 and nature -- the scope of the rejections in the Patent
3 Office, in order for VirnetX to manage to salvage some of
4 those claims to avoid invalidation, they are going to have to
5 either amend the claims or make some arguments to get around
6 the prior art, and those arguments are going to have
7 consequences on the scope of the claims.

8 That is not mere speculation. We know that is the
9 case because we have seen it actually with these very patents.
10 As Your Honor is aware, there was a previous case involving
11 some of these patents against Microsoft.

12 In that litigation Your Honor construed the claims
13 of at least two of the patents-in-suit in here. That case
14 went to trial, and VirnetX got a verdict of infringement
15 against Microsoft and ultimately settled.

16 Within months of that settlement, VirnetX is in the
17 Patent Office on a reexamination that was then pending. Their
18 claims were rejected. In order to salvage those claims, in
19 order to avoid invalidation, they had to make narrowing
20 arguments on very important claim allegations, including
21 "virtual private network."

22 We then moved forward into this litigation. VirnetX
23 came back at the Court, and they wanted to switch back and go
24 back to the broad construction that was applied in the
25 Microsoft case. And we had a claim construction, and Your

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