

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

4 VIRNETX, INC.)
5 -vs-) DOCKET NO. 6:10cv417
6 APPLE, INC.) Tyler, Texas
7) 8:49 a.m.
8) November 5, 2012

9 TRANSCRIPT OF TRIAL
10 MORNING SESSION
11 BEFORE THE HONORABLE LEONARD DAVIS,
12 UNITED STATES CHIEF DISTRICT JUDGE, AND A JURY

13 A P P E A R A N C E S

14 FOR THE PLAINTIFFS:

15 MR. DOUGLAS CAWLEY
16 MR. BRADLEY W. CALDWELL
17 MR. JASON D. CASSADY
18 MR. JOHN AUSTIN CURRY
19 McKOOL SMITH
20 300 Crescent Court, Ste. 1500
21 Dallas, TX 75201

22 COURT REPORTERS: MS. JUDITH WERLINGER
23 MS. SHEA SLOAN
24 shea_sloan@txed.uscourts.gov

25 Proceedings taken by Machine Stenotype; transcript was
produced by a Computer.

1 FOR THE PLAINTIFF:

2 MR. ROBERT M. PARKER
MR. ROBERT CHRISTOPHER BUNT
3 PARKER BUNT & AINSWORTH
100 East Ferguson, Ste. 1114
4 Tyler, TX 75702

5

6

7

8

FOR THE DEFENDANT:

9

MR. DANNY L. WILLIAMS
10 MR. TERRY D. MORGAN
MR. RUBEN S. BAINS
11 MR. CHRIS CRAVEY
MR. MATT RODGERS
12 MR. DREW KIM
MR. SCOTT WOLOSON
13 WILLIAMS, MORGAN & AMERSON, P.C.
10333 Richmond, Ste. 1100
14 Houston, TX 77042

15

MR. ERIC ALBRITTON
16 MR. STEPHEN E. EDWARDS
MS. DEBRA COLEMAN
17 MR. MATTHEW C. HARRIS
ALBRITTON LAW FIRM
18 P.O. Box 2649
Longview, TX 75606

19

20 MR. JOHN M. DESMARAIS
MR. MICHAEL P. STADNICK
21 DESMARAIS, LLP - NEW YORK
230 Park Avenue
22 New York, NY 10169

23

24

25

1 PROCEEDINGS

2 (Jury out.)

3 THE COURT: All right. I understand
4 there's a matter to take up before the jury comes in; is
5 that correct?

6 MR. DESMARAIS: Yes, Your Honor.

7 Good morning. John Desmarais for Apple.
8 Last night, VirnetX disclosed a new document that they
9 want to use in their direct testimony of their expert,
10 who's going to testify today, Mr. Jones -- or Dr. Jones.

11 It's a slide presentation, they say, was
12 given by Dr. Kiuchi back in 1996. Turns out VirnetX has
13 had this presentation in their possession since May of
14 this year, during discovery in this case, and two months
15 before they served their validity expert report.

16 Yet it's not discussed in their validity
17 expert report. Their expert never relied on it, and he
18 put forward no opinions about it in his report, and it's
19 not on their trial exhibit list.

20 So despite having it since May and during
21 discovery, they sent it to us for the first time
22 Saturday night, two days ago, right before the last day
23 of trial at 11:00 p.m.

24 I don't understand the set of circumstances that it
25 would be appropriate for them to now use that

1 affirmatively with their expert on direct when it's
2 not on their exhibit list, wasn't produced in discovery,
3 and he didn't rely on it in his expert report.

4 More than that, just going to the merits,
5 it's not relevant to any issue in the case. As Your
6 Honor is well-aware at this point, our invalidity theory
7 is anticipation over the Kiuchi publication. And Dr.
8 Alexander's entire direct testimony was about what that
9 published article discloses.

10 He wasn't reading in outside materials.
11 He wasn't combining references. So it's not relevant to
12 the issue of whether the Kiuchi publication anticipates
13 these patents, whether or not Dr. Kiuchi at some other
14 point gave a presentation about his specific
15 implementation.

16 It's prejudicial. It's not relevant to
17 the issues in this case. And it certainly shouldn't be
18 allowed to be used in VirnetX' direct case.

19 The document is -- on the evidentiary
20 issues, it's a hearsay document. It's not authentic.
21 There's no proof of it. No witness testified about it.
22 So anything the expert said about it would be hearsay
23 anyway.

24 But more importantly, the speculative
25 opinions that Dr. Jones would be offering, we would be