

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
8:52 a.m.
November 1, 2012

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

12 A P P E A R A N C E S

13
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24 Proceedings taken by Machine Stenotype; transcript was
25 produced by a Computer.

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

2 (Jury out.)

3 COURT SECURITY OFFICER: All rise.

4 THE COURT: Please be seated.

5 All right. I understand there's a matter
6 before we bring the jury in; is that correct?

7 MR. ALBRITTON: Your Honor, there may be
8 a couple. I have just one very minor housekeeping
9 matter I wanted to raise with you.

10 This offer of proof issue --

11 THE COURT: Uh-huh.

12 MR. ALBRITTON: -- what I would propose,
13 if it's okay with the Court, is that by tomorrow evening
14 we can actually file a written offer of proof with the
15 witnesses and the testimony and the exhibits, as opposed
16 to taking up the Court's time actually calling people
17 live, if that's --

18 THE COURT: And this is the offer of
19 proof regarding?

20 MR. ALBRITTON: On the re-exam issues,
21 Your Honor.

22 THE COURT: Okay. Any objection to that?

23 MR. CURRY: We have no objections to the
24 procedure.

25 THE COURT: All right.

1 MR. ALBRITTON: Thank you, Your Honor.

2 We also have some issues related to the
3 briefing on inducement. The briefs that the -- that
4 were filed, it's going to come up with Dr. Jones. Based
5 on one of his slides, we understand he's going to offer
6 some opinions in that regard, and so we thought it might
7 make sense for the Court to take those issues up.

8 THE COURT: All right. I've taken a look
9 at that, and I -- well, let me just hear from each side,
10 and then I'll tell what you I think.

11 Go ahead.

12 And I've read the briefs and the cases
13 and everything, so I don't need a whole lot of
14 discussion; but just sort of what your main point is
15 regarding the testimony.

16 MR. CRAVEY: Thank you, Your Honor. May
17 it please the Court. Chris Cravey, on behalf of Apple.

18 As Your Honor just stated, the basic
19 issue that we take with Dr. Jones' report and his
20 demonstratives now is that they articulate the wrong
21 standard for inducement.

22 Specifically with respect to the
23 knowledge prong of inducement, they have -- they want to
24 put forth a negligence standard, knew or should have
25 known of the acts that constitute infringement. And the

1 Supreme Court in the Global-Tech case has specifically
2 held that that standard no longer applies; and that with
3 respect to the knowledge prong, you either have to have
4 actual knowledge.

5 And the one exception the Supreme Court
6 now makes for that actual knowledge is willful
7 blindness.

8 And so respect to the negligence
9 standard, the Supreme Court specifically recognized that
10 negligence standard of being out there and rejected it
11 in favor of this willful blindness standard. And in
12 fact, the Supreme Court said in their opinion that the
13 willful blindness standard is one that surpasses. In
14 other words, it is above the negligence standard.

15 In fact, the Supreme Court said that the
16 willful blindness standard is one that surpasses
17 recklessness, which we know is above negligence.

18 THE COURT: Well, what -- what --
19 specifically what testimony and demonstratives are you
20 objecting to, or that you have filed your -- I guess
21 it's a motion in limine, right?

22 MR. CRAVEY: Yes, Your Honor. And I've
23 got two demonstratives here I can show the Court.

24 THE COURT: All right.

25 MR. CRAVEY: Okay. This is the first

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