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

VirnetX Inc.,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**CASE NO. 6:11-cv-18**
	§	
Mitel Networks Corporation,	§	**Jury Trial Demanded**
Mitel Networks, Inc.,	§	
Siemens Enterprise Communications	§	
GmbH & Co. KG,	§	
Siemens Enterprise Communications, Inc.,	§	
and Avaya Inc.	§	
	§	
Defendants.	§	

VIRNETX'S REPLY CLAIM CONSTRUCTION BRIEF

I. ARGUMENT IN REPLY

1. *"virtual private network"*

"Anonymous." Defendants appear to suggest that the Court should not reconsider its prior construction of this claim term, which requires communication to be both "secure and anonymous," because it is "long-settled." *See* Defendants' Responsive Claim Construction Brief ("Response") (Dkt. No. 165) at 8. Presumably, the Defendants do not want the Court to reconsider its construction for fear that the Court will agree that the ordinary meaning of VPN does not require anonymity.[1] VirnetX respectfully requests the Court revisit its rationale for importing this limitation. In its *Cisco* claim construction opinion, the Court incorporated by reference its rationale from its Microsoft claim construction opinion. The Court's opinion in the *Microsoft* case adopted "anonymity" as part of its construction for virtual private networks by noting that the '135 patent discloses a way to achieve anonymity, i.e., "preventing[ing] an eavesdropper from discovering that terminal 100 is in communication with terminal 110." However, this section does not define or describe VPNs in teaching these background concepts, and the detailed descriptions of the patent—which all involve IP address hopping—do not suggest that all VPNs require anonymity. Conversely, if all VPNs achieved anonymity, why would there be any need for or additional benefit to IP address hopping? For these reasons, VirnetX respectfully requests the Court revisit its construction for this term.

"In which a computer is able to address additional computers over the network without additional setup." Defendants point to statements made by VirnetX during reexamination of the

[1] Instead of addressing whether 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 ("*Microsoft* Order") in that case, which required anonymity. *See* Response at 7 n.8. This argument completely misses the point. VirnetX preserved error for this construction, as it did in *Cisco*, and VirnetX is specifically seeking reconsideration of this issue in this case.

'135 patent as support for their proposed requirement that the VPN be a network "in which a computer is able to address additional computers over the network without additional setup." *See* Response at 4–6. These statements in re-exam, however, explain how computers in Aventail do not form a VPN because the computers cannot communicate as if they are on the same private network because the computers cannot address data to each other directly as if they are on the same private network. VirnetX recognized in re-exam that Aventail does not ***prevent*** computers from directly addressing each other through other means, but Aventail, itself, does not enable computers to directly address each other; something else is needed. (Specifically, those computers would need to set up a VPN.) This is what was explained to the examiner, and this explanation is not separate from VirnetX's argument related to direct addressability, which the Court has already included in its construction. In sum, the Defendants proposed construction—which would only further complicate this case by inviting a dispute as to what is "additional setup"—should be rejected.

2. *"virtual private link"*

VirnetX does not dispute that "virtual private network" and "virtual private link" should be construed consistently. Indeed, VirnetX's proposed constructions for these claim terms are very similar. *See* Opening Brief at 3, 9. The issue, however, is whether these terms should be construed *identically*. As the patentee chose to use the word "link" rather than "network," that choice should be reflected in different constructions for the terms.[2]

3. *"secure communication link"*

"Encryption." VirnetX's prosecution statements regarding encryption are a consequence of timing: VirnetX's arguments regarding encryption were made before the Court had issued its

[2] Contrary to Defendants' assertion, VirnetX's reference to its discussion of "virtual private network" was not a reflection of VirnetX's proposed construction, but rather Defendants' attempt to interject the same extraneous limitations for both terms.

more precise construction for this term in the *Cisco* case. Had the timing been reversed—i.e., had the Court issued its construction for the term "secure communication link" before VirnetX's deadline to respond to the USPTO—VirnetX would have explained to the USPTO that the alleged prior art references do not teach or disclose data security as opposed to encryption. These arguments are entirely consistent; again, the only difference is that the Court's construction in the *Cisco* case is more precise.

Moreover, VirnetX's statements to the PTO regarding the ordinary meaning of "secure communication link" do not dictate that the Court should adopt Defendants' proposed construction. Indeed, VirnetX made the same claim construction statements to this Court during claim construction in the *Cisco* case, and the Court rejected VirnetX's proposed construction in favor of its better construction.

<u>"Insecure communication paths."</u> Simply put, the Court should reject the Defendants' *ipse dixit* argument regarding "the inherent nature" of the claimed invention. *See* Response at 11.

<u>"In which a computer is able to address additional computers over the network without additional setup."</u> The Court is familiar with Defendants' arguments regarding the prosecution of the '181 patent, as they were the subject of additional briefing submitted by the *Cisco* defendants and the basis for the Court's conclusion that the claims require "direct" communication in *Cisco*. *See VirnetX Inc. v. Cisco Sys., Inc.*, No. 6:10-cv-17 (E.D. Tex. Jan. 12, 2012) (Dkt. No. 202); *Cisco* Order at 11–12. However, as discussed above in the context of

"virtual private network," the statements made during the prosecution of the '181 patent do not support the Defendants' proposed construction.[3]

4. "an indication that the domain name service system supports establishing a secure communication link" / "indicate/indicating . . . whether the domain name service system supports establishing a secure communication link"

The Court never agreed that the '504 and '211 claims require that an "indication" be presented to the user as Defendants suggest. *See* Response at 15. Rather, the Court noted that the specification discloses "preferred embodiments [which] disclose user-visible indications." *Cisco* Order at 27. However, as this Court is well aware, "[t]he specification's disclosure or omission of examples does not create limitations on claims." Opening Brief, Ex. 4 at 14.

Furthermore, the Defendants are not arguing that the plain meaning of this claim term requires presentation to the user. Indeed, the plain meaning of "indication" could be to a user or a computer. Rather, Defendants spend nearly three pages discussing preferred embodiments of the specification where—according to the Defendants—the user receives an indication. Even if the Court were to accept the Defendants' characterizations of the preferred embodiments, the Court should still not import the "to the user" limitation. The Defendants do not (and cannot) demonstrate any disclaimer of the claims to these preferred embodiments. Consequently, such a construction would violate well established principles of claim construction. Moreover, the Federal Circuit recently reaffirmed these long-standing principles of claim construction in unequivocal terms:

> We do not read limitations from the specification into claims; we do not redefine words. Only the patentee can do that. To constitute disclaimer, there must be a clear and unmistakable disclaimer.

[3] Avaya's proposed construction is improper for the same reasons and as outlined in VirnetX's Opening Brief, and to avoid redundancy, will not be discussed separately here.

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