

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

VirnetX Inc. and Science Applications
International Corporation,

Plaintiffs,

v.

Cisco Systems, Inc., Apple Inc.,
NEC Corporation, and NEC Corporation of
America,

Defendants.

Civil Action No. 6:10-cv-00417-LED

JURY TRIAL DEMANDED

**DEFENDANTS' MOTION FOR RECONSIDERATION OF THE
CONSTRUCTION OF THE TERM "SECURE COMMUNICATION LINK"**

INTRODUCTION

Defendants Cisco Systems, Inc., Apple, Inc., NEC Corporation, and NEC Corporation of America (collectively, “Defendants”) respectfully move for reconsideration of the Court’s construction of the claim term “secure communication link.” In the April 25, 2012 Claim Construction Order, this Court construed “secure communication link” as “a direct communication link that provides data security.” D.I. 266, at 13. But just as VirnetX’s statements in earlier reexamination proceedings required this Court to revisit certain claim constructions reached in the *Microsoft* litigation, reconsideration of this Court’s construction of “secure communication link” is now warranted because VirnetX has once again made narrowing arguments in the United States Patent and Trademark Office (“PTO”).

Specifically, in reexamination proceedings following the *Markman* hearing in this action, VirnetX unequivocally disclaimed “secure communication links” that are not encrypted. In the absence of that intrinsic evidence, however, this Court adopted a construction that does not necessarily require encryption. D.I. 266, at 13 (Noting that “encryption is not the only means of addressing data security.”). To ensure that consistent constructions are applied in the PTO and this Court, Defendants asked VirnetX to stipulate to a construction of “secure communication link” that requires encryption. But VirnetX has failed to respond. The time has come for VirnetX to stop seeking to obtain the benefit of narrow constructions in the PTO that conflict with the Court’s constructions in this litigation. Consistent with VirnetX’s PTO admissions, the phrase “secure communication link” should be construed to mean “a direct communication link that provides data security *through encryption.*”

FACTUAL BACKGROUND

The claim term “secure communication link” appears in the independent claims of U.S. Patent Nos. 7,418,504 (“the ‘504 patent”), 7,921,211 (“the ‘211 patent”), and 6,839,759 (“the

'759 patent"). In the April 25, 2012 Claim Construction Order, because dependent claim 28 of both the '504 and '211 patents covers "[t]he system of claim 1, wherein the secure communication link uses encryption," this Court applied the doctrine of claim differentiation and ruled that the "secure communication link" of claim 1 could provide security without necessarily using encryption. *Id.* at 13. Accordingly the Court construed "secure communication link" as "a direct communication link that provides data security." *Id.*

After the January 5, 2012 *Markman* hearing, however, VirnetX unequivocally disclaimed "secure communication links" that do not require encryption. In a March 29, 2012 response to an office action regarding claim 1 of the '504 patent, VirnetX contended that the prior art "does not disclose establishing a secure communication link between the originating and terminating devices because [the prior art] *does not disclose that the communication between these two devices is encrypted.*" See Ex. A, File History of U.S. Patent No. 7,418,504, Patent Owners Response to Office Action at 25 (March 29, 2012). VirnetX argued that "*one of ordinary skill in the art would have understood a secure communication link to require encryption.*" *Id.* VirnetX also noted to the PTO that "in the ongoing litigation involving the '504 patent . . . *both Patent Owner and the Requester agree that a secure communication link requires encryption.*" *Id.* And VirnetX repeated those same statements in an April 18, 2012 response to an office action regarding the '211 patent. See Ex. B, File History of U.S. Patent No. 7,921,211, Patent Owners Response to Office Action at 28 (April 18, 2012).

ARGUMENT

The claim language "secure communication link" should be construed consistent with VirnetX's repeated and unambiguous disclaimers in PTO reexamination proceedings. Those statements disavowed secure communication links that are not encrypted and therefore forfeited

communication links that provide security in other ways. *See Am. Piledriving Equip. v. Geoquip, Inc.*, 637 F.3d 1324, 1336 (Fed. Cir. 2011). Moreover, the claim differentiation principles underlying this Court's original construction do not apply where a patent owner argues that the scope of an independent claim is the same as that of a dependent claim. *ERBE Elektromedizin gmbH v. Canady Tech. LLC.*, 97 USPQ2d 1048, 1054-55 (Fed. Cir. 2010). VirnetX should not be permitted to benefit from a narrow claim interpretation for the purposes of prosecution and a broader claim interpretation for the purposes of litigation. *See Am. Piledriving*, 637 F.3d at 1336. The construction of "secure communication link" should therefore be modified to specify that a "secure communication link" is "a direct communication link that provides data security *through encryption*."

VirnetX has ignored Defendants' invitation to join in this motion. On June 4, 2012, Defendants emailed VirnetX stating that they planned to move for reconsideration of the construction of "secure communication link" in light of VirnetX's statements to the PTO, and asked whether VirnetX would join in the motion. Ex. C, June 4, 2012 email from Karim Oussayef to Jason Cassady. But after two weeks and repeated emails and phone calls, VirnetX has refused even to respond to Defendants' emails. Oussayef Decl. ¶¶ 5-6. VirnetX's failure to respond, let alone articulate a basis for opposing this motion, further demonstrates that VirnetX is attempting to apply different claim interpretations in the PTO and this Court. Defendants' motion for reconsideration of the construction of "secure communication link" should be granted to prevent VirnetX from engaging in such tactics.

CONCLUSION

For the foregoing reasons, Defendants respectfully requests that this Court grant Defendants' Motion For Reconsideration Of The Court's Construction Order and construe

“secure communication link” to mean “a direct communication link that provides data security through encryption.”

Dated: June 21, 2012

Respectfully submitted,

By: /s/ William J. McCabe
William J. McCabe
Telephone: 212-596-9018
Facsimile: 646-728-2673
William.McCabe@ropesgray.com

By: /s/ Eric H. Findlay
Eric H. Findlay
efindlay@findlaycraft.com
Texas Bar No. 00789886
Brian Craft
bcraft@findlaycraft.com
Texas Bar No. 04972020
FINDLAY CRAFT, LLP
6760 Old Jacksonville Hwy
Suite 101
Tyler, TX 75703
Telephone: (903) 534-1100
Facsimile: (903) 534-1137

Stuart W. Yothers
Telephone: 212-596-9176
Facsimile: 646-728-2957
Stuart.Yothers@ropesgray.com
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10036

OF COUNSEL:

Maxwell A. Fox
Telephone: 81-3-6259-3508
Facsimile: 81-3-6259-3501
Maxwell.Fox@ropesgray.com
ROPES & GRAY LLP
Yusen Building 2F
3-2, Marunouchi 2-chome
Chiyoda-ku, Tokyo 100-0005 Japan

John M. Desmarais (*pro hac vice*)
jdesmarais@desmaraisllp.com
Michael P. Stadnick (*pro hac vice*)
mstadnick@desmaraisllp.com
DESMARAIS LLP
230 Park Avenue
New York, NY 10169
Telephone: (212) 351-3400
Facsimile: (212) 351-3401

R. Andrew Schwentker
Telephone: 202-508-4717
Facsimile: 202-383-9314
Andrew.Schwentker@ropesgray.com
ROPES & GRAY LLP
700 12th Street, NW, Suite 900
Washington, DC 20005

**ATTORNEYS FOR DEFENDANT
CISCO SYSTEMS, INC.**

Douglas R. McSwane, Jr.
Texas State Bar No. 13861300
dougmcswane@potterminton.com
POTTER MINTON
500 Plaza Tower
110 N. College Ave. (75702)

By: /s/ Danny L. Williams
Danny L. Williams - LEAD
ATTORNEY
State Bar No. 21518050
E-mail: danny@wmalaw.com
Ruben S. Bains
Texas Bar No. 24001678
E-mail: rbains@wmalaw.com

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.