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

VIRNETX * Civil Docket No.
* 6:07-CV-80.
VS. * Tyler, Texas
*
* March 15, 2010.
MICROSOFT CORPORATION * 9:00 A.M

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE JUDGE LEONARD DAVIS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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

08:04 22 (Jury out.)

08:04 23 COURT SECURITY OFFICER: All rise.

08:04 24 THE COURT: Please be seated.

08:04 25 All right. Do the parties have anything before we bring

08:04 1 the jury in?

08:04 2 MR. POWERS: A couple of matters, Your
08:04 3 Honor.

08:04 4 One is an issue that came up at the
08:04 5 pretrial conference, and it was VirnetX's motion in
08:04 6 limine regarding our evidence that they had earlier
08:04 7 accused of infringement, PPTP, which is now being
08:04 8 asserted to be prior art.

08:04 9 And Your Honor granted that motion in
08:04 10 limine. At Page 7, you said, I'll look at it closer
08:04 11 between now and then. Bring it back up with me prior to
08:04 12 trial. I think you're zeroing in on something that
08:04 13 would probably be an admission. So if you want to use
08:04 14 it to impeach their expert, to raise it now, and that's
08:04 15 what we're doing now.

08:04 16 So the basic --

08:05 17 THE COURT: So you want to raise -- oh,
08:05 18 yeah. Go ahead. Explain it to me a little further.

08:05 19 MR. POWERS: So the basic issue is this:
08:05 20 As Your Honor knows, we're relying on PPTP to be a piece
08:05 21 of prior art in the case. It's a Microsoft product that
08:05 22 was done in 1996.

08:05 23 We believe that the fact that VirnetX's
08:05 24 lawyers originally accused it of infringement and
08:05 25 withdrew it only when they learned of the date is

08:05 1 evidence that should be allowed to be used in
08:05 2 cross-examination of their validity expert on the
08:05 3 question of whether PPTP does, in fact, come within the
08:05 4 scope of the claims.

08:05 5 THE COURT: Response?

08:05 6 MR. McLEROY: Yes, Your Honor.

08:05 7 The short answer is, we never accused it
08:05 8 of infringement. PPTP is not mentioned in our
08:05 9 infringement contentions. I believe what Counsel is
08:05 10 referring to is a letter that VirnetX's lawyers --
08:05 11 former lawyers sent to Microsoft clarifying the
08:05 12 definition of accused features in an interrogatory we
08:06 13 propounded to Microsoft.

08:06 14 And as you can see from the context of the
08:06 15 letter, as well as the interrogatories themselves, it's
08:06 16 a broad definition of accused features that VirnetX used
08:06 17 at the very beginning of the case, in November of 2007,
08:06 18 to identify every possible infringing feature to do our
08:06 19 analysis to see which infringed and which did not.

08:06 20 THE COURT: Okay. Is there a document or
08:06 21 something that you would rely on, Mr. Powers?

08:06 22 MR. POWERS: There is, Your Honor. It's
08:06 23 Exhibit 3252. I can hand up my copy, if you'd like.

08:06 24 THE COURT: All right. Bring up a copy of
08:06 25 that.

08:06 1 And specifically --

08:06 2 MR. POWERS: The specific portion I
08:06 3 believe is highlighted in that copy, Your Honor. And it
08:06 4 is exactly as Counsel has characterized it. It's their
08:06 5 lawyers saying, yes, the accused functionality includes
08:07 6 PPTP and L2TP.

08:07 7 THE COURT: And let me see the
08:07 8 interrogatory.

08:07 9 MR. McLEROY: May I approach?

08:07 10 THE COURT: Okay. When do you need to get
08:07 11 into this with him?

08:07 12 MR. POWERS: It would be with their
08:07 13 invalidity expert, who will be on this morning.

08:07 14 THE COURT: Next or --

08:07 15 MR. POWERS: No. It will be in their
08:07 16 rebuttal case.

08:07 17 THE COURT: Right.

08:07 18 MR. POWERS: So we have -- it will be an
08:07 19 hour and a half at least.

08:07 20 THE COURT: All right. Let me study on it
08:07 21 a little bit.

08:07 22 What else?

08:07 23 MR. POWERS: Understood.

08:07 24 Your Honor, there were two offers of proof
08:07 25 filed late last night on issues that have been

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