

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

4 VIRNETX, INC.)
5) DOCKET NO. 6:10cv417
6 -vs-)
7 CISCO SYSTEMS, INC., ET AL) Tyler, Texas
8) 9:00 a.m.
9) January 5, 2012

10 TRANSCRIPT OF MARKMAN HEARING
11 BEFORE THE HONORABLE LEONARD DAVIS,
12 UNITED STATES DISTRICT JUDGE

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

14 (SEE SIGN-IN SHEETS DOCKETED IN THIS CASE.)
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17
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19
20

21 COURT REPORTER: MS. SHEA SLOAN
22 211 West Ferguson
23 Tyler, Texas 75702

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

1 What is next?

2 MR. DESMARAIS: Thank you, Your Honor, it is John
3 Desmarais for Cisco. We will handle the "secure domain name
4 service." Counsel's comments just then is actually a good
5 entree because he just said that the patent doesn't deal with
6 a conventional or standard DNS service, and that is one of the
7 grappling issues here because we want to actually put that in
8 the construction.

9 So if we look at Slide 84.

10 This is one of those situations that after your
11 prior Markman, in the reexam VirnetX told the Patent Office
12 that the prior construction was, in fact, a faulty position
13 because the "secure domain name service" is not a conventional
14 DNS server. You can see your construction versus what they
15 told the PTO right there on Slide 84.

16 So both sides here agree that the construction
17 should be redone, and you see that on Slide 85 right from
18 VirnetX's opening brief. Both of us are proposing a brand new
19 construction.

20 When you look at what the issue is on the next
21 slide, here are the two competing constructions, Your Honor,
22 presented on Slide 86. What I put in red-underline the
23 parties have both added, so we agree on that. And that was
24 added by both of us.

25 What is in yellow under defendants' proposed

1 construction are the two things we are still disputing. And
2 that first point is it needs to be a nonstandard look-up, as
3 Counsel for VirnetX just said, because the conventional is not
4 what this patent is about. I will show you why.

5 And then in the second part, "and performs its
6 services accordingly," are the exact words that VirnetX told
7 the Patent Office at the same time they told them that part
8 which is in red. So VirnetX changed their construction to add
9 what is in red-underlining, as we did, based on a sentence
10 they said to the Patent Office. But they left out the second
11 half of the sentence, which is what we show in yellow, and I
12 can show you that.

13 The first issue, the nonstandard, if you look on
14 Slide 88, time and time again through the reexam this was
15 highlighted to the Patent Examiner. This is excerpts from
16 VirnetX's response to the Patent Office. The specification of
17 the '180 patent clearly teaches that the claim "secure domain
18 name service" is unlike the conventional domain name service.
19 They go on. It is in contrast to a conventional. It is a
20 nonstandard domain name. It is not available with the
21 traditional systems. There are drawbacks to the conventional
22 system.

23 Every time they spoke about it, including just a few
24 moments ago, they said it is nonstandard. All we are doing is
25 trying to put that into the construction to differentiate it

1 from standard.

2 And if you look at the parties' construction of
3 "secure domain name," they have already agreed to that for
4 "secure domain name." Their proposed construction has
5 nonstandard domain name. Ours does too. This term is "secure
6 domain name service." It should be likewise.

7 The second part of what we wanted to add is the rest
8 of the statement that they left off. And this is on Slide 91.
9 To support the language that both parties have added, we both
10 cited to this excerpt here, which is Paragraph 12. That is
11 from what VirnetX told the Patent Office.

12 And you can see they said: A secure domain name
13 service of the '180 patent instead recognizes that a query
14 message is requesting a secure network address.

15 That first part they put into their construction,
16 and so did we. Then they left off the second part, "and
17 performs its services accordingly." We would submit that if
18 you are going to put in the first part, you need the second
19 part.

20 The omission that they took out puts ambiguity into
21 the construction, and they have got no basis for putting half
22 of the argument in and half out. They told the Patent Office
23 that this is what their domain name service was. That is what
24 they should be held to. The patent issued as a result of
25 this, and they need to take account of what they said to the

1 Patent Office to get the patent issued. They should not be
2 taking a different position here in Federal Court.

3 THE COURT: Okay.

4 Mr. McLeroy?

5 MR. McLEROY: Your Honor, first of all, I would like
6 to correct one thing Mr. Desmarais said. During reexamination
7 VirnetX never argued that this Court got a claim construction
8 incorrect. Instead, Your Honor, we simply explained to the
9 Examiner that his application of the construction was wrong,
10 and we clarified that.

11 On Slide 44 here, we see the parties' competing
12 constructions. And we submit, Your Honor, that the
13 defendants' additions of "nonstandard" and "performs its
14 services accordingly" are just unnecessary because we
15 explicitly state what makes the look-up service nonstandard,
16 and we explicitly state what services are performed by the
17 secure DNS.

18 So let's look at "nonstandard" a little bit closer.
19 We included, Your Honor, in the construction the two
20 characteristics of a "secure domain name service" that make it
21 nonstandard. First, we say that the "secure domain name
22 service" recognizes that a query message is requesting a
23 secure computer address. And, second, it returns a secure
24 computer network address for a requested secure domain name.

25 Rather than using the ambiguity of what is standard

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