

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 TYLER DIVISION
4) DOCKET NO. 6:10cv417
5) Tyler, Texas
6) 8:49 a.m.
7) November 5, 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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 produced by a Computer.

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1 PROCEEDINGS

2 (Jury out.)

3 THE COURT: All right. I understand
4 there's a matter to take up before the jury comes in; is
5 that correct?

6 MR. DESMARAIS: Yes, Your Honor.

7 Good morning. John Desmarais for Apple.
8 Last night, VirnetX disclosed a new document that they
9 want to use in their direct testimony of their expert,
10 who's going to testify today, Mr. Jones -- or Dr. Jones.

11 It's a slide presentation, they say, was
12 given by Dr. Kiuchi back in 1996. Turns out VirnetX has
13 had this presentation in their possession since May of
14 this year, during discovery in this case, and two months
15 before they served their validity expert report.

16 Yet it's not discussed in their validity
17 expert report. Their expert never relied on it, and he
18 put forward no opinions about it in his report, and it's
19 not on their trial exhibit list.

20 So despite having it since May and during
21 discovery, they sent it to us for the first time
22 Saturday night, two days ago, right before the last day
23 of trial at 11:00 p.m.

24 I don't understand the set of circumstances that it
25 would be appropriate for them to now use that

1 affirmatively with their expert on direct when it's
2 not on their exhibit list, wasn't produced in discovery,
3 and he didn't rely on it in his expert report.

4 More than that, just going to the merits,
5 it's not relevant to any issue in the case. As Your
6 Honor is well-aware at this point, our invalidity theory
7 is anticipation over the Kiuchi publication. And Dr.
8 Alexander's entire direct testimony was about what that
9 published article discloses.

10 He wasn't reading in outside materials.
11 He wasn't combining references. So it's not relevant to
12 the issue of whether the Kiuchi publication anticipates
13 these patents, whether or not Dr. Kiuchi at some other
14 point gave a presentation about his specific
15 implementation.

16 It's prejudicial. It's not relevant to
17 the issues in this case. And it certainly shouldn't be
18 allowed to be used in VirnetX' direct case.

19 The document is -- on the evidentiary
20 issues, it's a hearsay document. It's not authentic.
21 There's no proof of it. No witness testified about it.
22 So anything the expert said about it would be hearsay
23 anyway.

24 But more importantly, the speculative
25 opinions that Dr. Jones would be offering, we would be

1 hearing for the first time in the rebuttal case here in
2 open court, because it's not in his report, and he
3 wasn't deposed about it.

4 THE COURT: Okay. Thank you.

5 Response?

6 MR. CALDWELL: Good morning, Your Honor.

7 Okay. So a couple of facts to clear up.

8 One, it wasn't yesterday as Mr. Desmarais
9 said; and, two, when we disclosed it to him, we said
10 we'd like to use for cross of his expert.

11 So he came up here and gave you an
12 argument about use on an affirmative basis with our
13 expert. And let me tell you what actually has happened.

14 On Friday, we heard Dr. Alexander give
15 direct testimony, saying here's what happened at the
16 proceedings in San Diego in February of 2006. And he
17 said it over and over and over again. Even his slide
18 is, here's what Dr. Kiuchi presented at the symposium.
19 That was his slide.

20 These are the --

21 THE COURT: I'm sorry. Here is what he
22 presented?

23 MR. CALDWELL: Well, this is what

24 Dr. Alexander showed on the screen: Dr. Kiuchi

25 presented his idea at the symposium. This is one of

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