Paper No. _____
Filed: January 17, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

THE MANGROVE PARTNERS MASTER FUND, LTD., APPLE INC., and BLACK SWAMP IP, LLC,
Petitioner

v.

VIRNETX INC.,
Patent Owner

Case IPR2015-01047[1]
Patent 7,490,151

Patent Owner's Sur-Reply Brief

[1] Apple Inc. and Black Swamp IP, LLC, who filed petitions in IPR2016-00063 and IPR2016-00167, respectively, have been joined as a Petitioner in the instant proceeding.

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I. Introduction

As VirnetX previously demonstrated, Petitioners' grounds of unpatentability are deficient in a number of ways. Petitioners' reply brief tries to argue otherwise. As explained below, those arguments are without merit.

II. Claim Construction

A. "Client"

1. Petitioners' Proposed Construction Finds No Support in the Claim Language

Petitioners' claim construction argument is based on a faulty premise—that the term "client," in its "plain and ordinary meaning," denotes "'a device, computer, system, or program from which a data request to a server is generated.'" (Petitioner's Reply Remand Brief, Paper 106 ("Reply") at 1.) That argument is unsound. Petitioners' original basis for their proposed construction—as reflected in their opening brief on remand—was the assertion that this is how a skilled artisan would have understood the term "client computer." (Petitioners' Remand Brief, Paper 104 ("PRB") at 6-7.) In its opposition brief, VirnetX demonstrated that Petitioners' support for that assertion—a claim that both their and VirnetX's experts "agreed that a skilled person would have understood a conventional 'client' to be any application that generates a request for data from a server" (PRB at 7)—mischaracterized expert testimony. (*See* Patent Owner's Opposition Brief, Paper 105 ("Opp.") at 5-6.) Neither expert provided an opinion that would support

Petitioners' argument as to how a skilled artisan would have understood the term "client." And as VirnetX demonstrated, one of skill in the art, reading the claims in context of the specification—as required—would have understood "client" to mean a "user's computer." (*See* Opp. 2-5.)[2]

Petitioners' reply scarcely defends their arguments based on the purported understanding of a skilled artisan. Instead, they retreat to a different position, urging that a "client" is a "device, computer, system, or program from which a data request to a server is generated" because claim 1 recites that the client sends a "DNS request." (Reply at 2.) That argument is nonsensical. A claim term is not defined

[2] Petitioners are incorrect in contending that VirnetX's expert, Dr. Monrose, "admitted the '151 patent did not give '*client*' a special definition." (Reply at 1.) The portions of Dr. Monrose's deposition that Petitioners cite (Ex. 1036, 74:15-75:16, 95:1-5) contain no discussion of that issue, much less any "admission." Regardless, VirnetX's argument is not that the '151 patent advanced any "special definition" for the term "client," but that the language of the claims and the specification make clear that the term "client" means a "user's computer." (*See* Opp. 2-5.) Petitioners, moreover, do not even attempt to respond to VirnetX's detailed explanations of how Petitioners' brief mischaracterized the testimony of Dr. Guerin and Dr. Monrose. (*See* Reply at 9; Opp. 5-6.)

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