IN THE SUPREME COURT OF THE UNITED STATES

19A427

APPLE INC.,

Petitioner,

v.

VIRNETX INC., LEIDOS, INC.,

Respondents.

OPPOSITION TO AN APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the United States Court of Appeals for the Federal Circuit:

Applicant Apple Inc. ("Apple") seeks a 60-day extension of the time, to and including December 30, 2019, to file a certiorari petition seeking review of an unpublished summary affirmance issued by the court of appeals nine-and-a-half months ago on January 15, 2019. Respondents VirnetX Inc. ("VirnetX") and Leidos, Inc. ("Leidos") respectfully request that the Court limit any extension to 35 days, to and including December 6, 2019.

1. This case is nearly ten years old. It has been plagued by efforts to delay its resolution—efforts sufficiently problematic that the district court, citing

Apple's "gamesmanship," found this case "exceptional"; enhanced damages; and awarded attorney's fees. C.A. App. 64-65; see C.A. App. 57. As the district court observed, Apple "repeatedly sought to * * * stay the litigation" in favor of other "proceedings * * * even after receiving adverse rulings" from the district court and "even after few, if any, relevant facts had changed since its last request." C.A. App. 57. Apple also delayed proceedings through conflicts "it created" by hiring VirnetX's former appellate counsel and jury consultant. C.A. App. 64-65.

Even in the court of appeals, the pattern continued. The parties agreed that Apple would seek only one 60-day extension to file its opening brief (to which VirnetX would not object), and would seek no further extensions. See C.A. Dkt. 34, Ex. A. After seeking and obtaining the extension, Apple moved to stay the appeal so as to delay the filing of its opening brief indefinitely. See C.A. Dkt. 32; see also *Wilton Indus., Inc.* v. *United States*, 310 F. App'x 366, 367 (Fed. Cir. 2008) (a "motion for a stay is in essence another motion for an extension of time"). On the merits, the court of appeals eventually issued the decision below, summarily affirming without an opinion, just one week after hearing oral arguments. Apple then sought delay again: It used its rehearing petition as a sixth stay request, asking for the appeal to be stayed pending resolution of unspecified appeals from Patent Office proceedings. C.A. Dkt. 82, at 16-17; see also C.A. Dkt. 34, at 1 (collecting earlier requests). After that request was denied, Apple unsuccessfully moved to vacate the denial of rehearing, for leave to file a *second* rehearing

petition, and to stay the mandate indefinitely pending resolution of unspecified Patent Office proceedings and appeals therefrom. See C.A. Dkt. 105.

Apple seeks delay because—as it told the court of appeals—it hopes that proceedings in the Patent Office and any ensuing appeals will eventually result in invalidation of the asserted patent claims. Apple thus tells this Court that the "Patent Office has held all of the patent claims asserted against Apple to be unpatentable." Apple Application 2. Apple does not mention that the Federal Circuit has in three separate cases *overturned* Patent Office decisions purporting to invalidate patent claims undergirding the judgments in this case. See *VirnetX Inc.* v. *Apple Inc.*, 931 F.3d 1363, 1380 (Fed. Cir. 2019); *VirnetX Inc.* v. *Mangrove Partners Master Fund, Ltd.*, — F. App'x —, 2019 WL 2912776, at *1 (Fed. Cir. July 8, 2019); *VirnetX Inc.* v. *Cisco Sys., Inc.*, 776 F. App'x 698, 700 (Fed. Cir. 2019). Apple overlooks that the Federal Circuit long ago *upheld* the validity of the patents at issue in this case. See *VirnetX Inc.* v. *Cisco Sys., Inc.*, 767 F.3d 1308, 1323-1324 (Fed. Cir. 2014) (attached as Apple Application Ex. 1). Nor does Apple suggest that it will ask this Court to review the Federal Circuit's validity ruling. As a result, the entire judgment in this case remains supported by patent claims upheld by the Federal Circuit on appeal. C.A. Dkt. 101, at 19-21 & n.1; see C.A. Dkt. 92, at 4-10. Having had a decade to challenge patent validity, Apple is not entitled to further delay. In view of Apple's pattern of delay, and the outsized

effect of a longer extension, respondents respectfully request that Apple's extension of time be limited to 35 days.[1]

2. The absence of "good cause" for a 60-day extension is underscored by Apple's failure to identify any issue that plausibly warrants this Court's review. The sole issue Apple identifies concerns "the Federal Circuit's interpretation of this Court's requirement, set forth in *Garretson* v. *Clark*, 111 U.S. 120 (1884), that patent damages must always be apportioned to reflect the value of the patented invention." Apple Application 3. Apple overlooks that, when the Federal Circuit addressed apportionment in this case five years ago, it "agree[d] with Apple" concerning *Garretson*'s apportionment requirement. *VirnetX Inc.* v. *Cisco Sys., Inc.*, 767 F.3d 1308, 1327 (Fed. Cir. 2014); see also *id.* at 1328-1329, 1331-1334 ("agree[ing]" with additional Apple arguments).[2] Apple does not explain how it may seek review of an apportionment issue on which it prevailed.

The Federal Circuit's most recent decision—the only other one from which Apple may seek review—says nothing about apportionment. The Federal Circuit

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[1] January 8, 2020, is the last distribution date for paid petitions to be considered at a conference in January. The next conference is not until February 21. An extension much beyond December 6, 2019, would leave respondents with little time to prepare a brief in opposition and still have the petition considered at a January conference.

[2] The Federal Circuit disagreed with Apple's damages arguments only on a fact-bound issue unrelated to apportionment—whether the district court had "abused its discretion" in determining that six prior licenses were sufficiently "comparable" to be admitted into evidence. 767 F.3d at 1330-1331. Apple did not seek further review of that decision, either in the court of appeals or this Court.

affirmed without an opinion because the issues were so straightforward that "an opinion" addressing Apple's challenges "would have no precedential value." Fed. Cir. R. 36; see Apple Application Ex. 2 (citing Federal Circuit Rule 36). Despite the Federal Circuit's admonition against seeking rehearing en banc of unpublished decisions, Practice Note to Fed. Cir. R. 35, Apple sought rehearing en banc. The full court denied Apple's request, with no judge requesting a vote on whether to grant rehearing en banc. Compare Apple Application Ex. 3, with Fed. Cir. IOP 14.1(f) (order denying rehearing must state if vote is requested). Apple does not explain how the unpublished decision below presents any issue warranting this Court's review. See Sup. Ct. R. 10. Given that the Federal Circuit's earlier decision in this case "agree[d] with" Apple's apportionment arguments, and that the Federal Circuit's most recent decision affirmed without an opinion, it is hard to see how Apple's petition could present any apportionment issue with any significance beyond this case. That further weighs against Apple's request for a 60-day extension in this already much-delayed case.

3. Rehearing was denied on August 1, 2019. Neither of the two counsel listed on Apple's application mentions other commitments for two-thirds of the standard 90-day period for seeking this Court's review. See Apple Application 2-3.[3] The underlying decision, moreover, was issued more than nine months ago. Apple Application Ex. 2. That decision was a summary affirmance. Because the issues

[3] Mr. Davies mentions no commitments in October either. See Apple Application 2.

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