

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

VirnetX Inc. and Science Applications
International Corporation,

Plaintiffs,

v.

Cisco Systems, Inc., Apple Inc.,
NEC Corporation, and NEC Corporation of
America,

Defendants.

Civil Action No. 6:10-cv-00417-LED

JURY TRIAL DEMANDED

**DEFENDANTS' MOTION FOR RECONSIDERATION OF THE
CONSTRUCTION OF THE TERM "SECURE COMMUNICATION LINK"**

INTRODUCTION

Defendants Cisco Systems, Inc., Apple, Inc., NEC Corporation, and NEC Corporation of America (collectively, “Defendants”) respectfully move for reconsideration of the Court’s construction of the claim term “secure communication link.” In the April 25, 2012 Claim Construction Order, this Court construed “secure communication link” as “a direct communication link that provides data security.” D.I. 266, at 13. But just as VirnetX’s statements in earlier reexamination proceedings required this Court to revisit certain claim constructions reached in the *Microsoft* litigation, reconsideration of this Court’s construction of “secure communication link” is now warranted because VirnetX has once again made narrowing arguments in the United States Patent and Trademark Office (“PTO”).

Specifically, in reexamination proceedings following the *Markman* hearing in this action, VirnetX unequivocally disclaimed “secure communication links” that are not encrypted. In the absence of that intrinsic evidence, however, this Court adopted a construction that does not necessarily require encryption. D.I. 266, at 13 (Noting that “encryption is not the only means of addressing data security.”). To ensure that consistent constructions are applied in the PTO and this Court, Defendants asked VirnetX to stipulate to a construction of “secure communication link” that requires encryption. But VirnetX has failed to respond. The time has come for VirnetX to stop seeking to obtain the benefit of narrow constructions in the PTO that conflict with the Court’s constructions in this litigation. Consistent with VirnetX’s PTO admissions, the phrase “secure communication link” should be construed to mean “a direct communication link that provides data security *through encryption*.”

FACTUAL BACKGROUND

The claim term “secure communication link” appears in the independent claims of U.S. Patent Nos. 7,418,504 (“the ‘504 patent”), 7,921,211 (“the ‘211 patent”), and 6,839,759 (“the

‘759 patent”). In the April 25, 2012 Claim Construction Order, because dependent claim 28 of both the ‘504 and ‘211 patents covers “[t]he system of claim 1, wherein the secure communication link uses encryption,” this Court applied the doctrine of claim differentiation and ruled that the “secure communication link” of claim 1 could provide security without necessarily using encryption. *Id.* at 13. Accordingly the Court construed “secure communication link” as “a direct communication link that provides data security.” *Id.*

After the January 5, 2012 *Markman* hearing, however, VirnetX unequivocally disclaimed “secure communication links” that do not require encryption. In a March 29, 2012 response to an office action regarding claim 1 of the ‘504 patent, VirnetX contended that the prior art “does not disclose establishing a secure communication link between the originating and terminating devices because [the prior art] **does not disclose that the communication between these two devices is encrypted.**” See Ex. A, File History of U.S. Patent No. 7,418,504, Patent Owners Response to Office Action at 25 (March 29, 2012). VirnetX argued that “**one of ordinary skill in the art would have understood a secure communication link to require encryption.**” *Id.* VirnetX also noted to the PTO that “in the ongoing litigation involving the ‘504 patent . . . **both Patent Owner and the Requester agree that a secure communication link requires encryption.**” *Id.* And VirnetX repeated those same statements in an April 18, 2012 response to an office action regarding the ‘211 patent. See Ex. B, File History of U.S. Patent No. 7,921,211, Patent Owners Response to Office Action at 28 (April 18, 2012).

ARGUMENT

The claim language “secure communication link” should be construed consistent with VirnetX’s repeated and unambiguous disclaimers in PTO reexamination proceedings. Those statements disavowed secure communication links that are not encrypted and therefore forfeited

communication links that provide security in other ways. *See Am. Piledriving Equip. v. Geoquip, Inc.*, 637 F.3d 1324, 1336 (Fed. Cir. 2011). Moreover, the claim differentiation principles underlying this Court’s original construction do not apply where a patent owner argues that the scope of an independent claim is the same as that of a dependent claim. *ERBE Elektromedizin gmbH v. Canady Tech. LLC.*, 97 USPQ2d 1048, 1054-55 (Fed. Cir. 2010). VirnetX should not be permitted to benefit from a narrow claim interpretation for the purposes of prosecution and a broader claim interpretation for the purposes of litigation. *See Am. Piledriving*, 637 F.3d at 1336. The construction of “secure communication link” should therefore be modified to specify that a “secure communication link” is “a direct communication link that provides data security *through encryption*.”

VirnetX has ignored Defendants’ invitation to join in this motion. On June 4, 2012, Defendants emailed VirnetX stating that they planned to move for reconsideration of the construction of “secure communication link” in light of VirnetX’s statements to the PTO, and asked whether VirnetX would join in the motion. Ex. C, June 4, 2012 email from Karim Oussayef to Jason Cassidy. But after two weeks and repeated emails and phone calls, VirnetX has refused even to respond to Defendants’ emails. Oussayef Decl. ¶¶ 5-6. VirnetX’s failure to respond, let alone articulate a basis for opposing this motion, further demonstrates that VirnetX is attempting to apply different claim interpretations in the PTO and this Court. Defendants’ motion for reconsideration of the construction of “secure communication link” should be granted to prevent VirnetX from engaging in such tactics.

CONCLUSION

For the foregoing reasons, Defendants respectfully requests that this Court grant Defendants’ Motion For Reconsideration Of The Court’s Construction Order and construe

“secure communication link” to mean “a direct communication link that provides data security through encryption.”

Dated: June 21, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that counsel of record who are deemed to have consented to electronic service are being served with a copy of DEFENDANTS' MOTION FOR RECONSIDERATION OF THE CONSTRUCTION OF THE TERM "SECURE COMMUNICATION LINK," *via* the Court's CM/ECF system per Local Rule CV-5(a)(3) on this the 21st day of June 2012.

/s/ Eric H. Findlay
Eric H. Findlay

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that on June 20, 2012 and June 21, 2012, counsel for Defendant Cisco Systems, Inc. conferred *via* e-mail with counsel for Plaintiff VirnetX Inc. regarding the relief sought in this motion. Plaintiff indicated through those emails that they oppose this motion. In addition, on at least two occasions counsel for Cisco called to talk to counsel for Plaintiff about the motion, but counsel has refused to call him back. Accordingly, Cisco in good faith believes that Virnet X continues to be opposed to the relief sought in this motion and that, therefore, Court intervention is required.

/s/ Eric H. Findlay
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