

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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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. Your 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

1 or not standard, we explicitly point out what makes a secure
2 DNS a secure DNS and not a conventional domain name server.

3 I think, Your Honor, we make a very similar argument
4 as to why you shouldn't include the language "perform its
5 services accordingly." Rather than ambiguously referencing
6 what its services may or may not be and maybe it is something
7 beyond what is in the construction, we explicitly state what
8 service the secure domain name service provides; and that is
9 returning a secure -- excuse me, secure computer network
10 address for a requested secure domain name.

11 If we adopt the defendants' construction with the
12 language "performs its services accordingly," that leaves the
13 defendants with leeway down the road to argue what other
14 services may be required by a secure DNS, and it is going to
15 leave the jury confused as to what services the Court's
16 construction refers to that aren't explicitly stated in the
17 construction.

18 THE COURT: Thank you.

19 MR. DESMARAIS: Slide 84, please.

20 Your Honor, just two brief points in response to
21 that. On Slide 84, Counsel said that they did not tell the
22 Patent Office that the Court's construction was wrong. I
23 think we can look at what the Court said in the prior Markman
24 is on the first cut-out.

25 The Court construes "secure domain name service" as

1 "a look-up service that returns a secure network address for a
2 requested secure domain name." That was this Court's
3 construction.

4 Subsequent to that in the reexam, VirnetX said what
5 is in the second cut-out, which is, similarly the request and
6 office action rely on the faulty position that a secure domain
7 name service is nothing more than a conventional DNS server
8 that happens to resolve the domain names of the secure
9 computers.

10 The words speak for themselves. They said what this
11 Court construed was a faulty position. Whether they
12 attributed that position to the Court or not is a
13 hypertechnical understanding of what actually happened there.

14 Secondly, what Counsel is trying to do yet again is
15 run away from the things that they told the Patent Office to
16 get these patents issued. We can't lose focus on the fact
17 that we wouldn't be here today if they didn't say these things
18 to the Patent Office.

19 When we look on Slide 88 they told the Patent Office
20 time and time again their system is not a conventional
21 system. Their system is not the standard DNS. Their system
22 is not the traditional DNS. Those are their words. And now
23 they are telling this Court that they can say that in the
24 Patent Office but come here to Federal Court litigation and
25 all bets are off, these are broad claims. That is just not

1 fair, and it is not how the system works.

2 It is exactly the same for the next issue, which is
3 on Slide 91. They have taken -- this is the statement they
4 made to the Patent Office to get this patent issued. They
5 have taken half of it and stuffed it into their construction.
6 All we are saying is in for a penny, in for a pound. If you
7 are talking half, put the whole thing in. They haven't given
8 you a reason why only half of it is relevant. They didn't say
9 they shouldn't have said all of it. They said all of it. The
10 Patent Office relied on that and issued the patent. You can't
11 have it both ways.

12 The patent issued because of it. We are here
13 because the patent issued. The patent means what they told
14 the Patent Office the patent means.

15 Thank you, Your Honor.

16 THE COURT: All right. Thank you.

17 MR. McLEROY: Brief response?

18 THE COURT: Yes.

19 MR. McLEROY: Your Honor, we believe we have
20 captured everything that "secure domain name service" is in
21 our proposed construction. The defendants say we need these
22 additional words added to the construction because we said
23 them in the prosecution. But they haven't told us what those
24 additional words mean beyond what is in VirnetX's proposed
25 construction.

1 We are very concerned that down the road at a trial
2 later in this case, the defendants will add additional
3 meanings into nonstandard, into its services, and we will have
4 to deal with those at that point. Your Honor, VirnetX's
5 construction captures everything that we argued to the Patent
6 Office in reexamination.

7 THE COURT: Okay. Thank you.

8 What is next?

9 MR. CREMEN: Your Honor, we have "DNS proxy" and
10 "domain name service system" left under the DNS terms group.
11 Depending on how much you would like -- at what time you would
12 like to get out of here, we can just go directly to
13 "indicating" now, if both sides want to argue that and just
14 leave the rest for briefs or we can do a really short talk
15 about "DNS proxy" and "domain name service system."

16 THE COURT: Your choice, whichever you would rather
17 do.

18 MR. CREMEN: Okay. How about I just point out one
19 thing about domain name -- or, I'm sorry, "DNS proxy server."

20 The biggest disagreement -- or the only disagreement
21 between the parties on this term is the added portion in
22 defendants' proposed construction of "preventing destination
23 servers from determining the identity of the entity sending
24 the domain name inquiry."

25 Now, Your Honor, you construed this term in the

1 with respect to SAIC, an issue that was filed some time ago
2 that it would probably be a good idea at some point to put at
3 the top of your list.

4 THE COURT: I will try to work it up there.
5 Anything further?

6 MR. CAWLEY: No, Your Honor.

7 THE COURT: Okay. Y'all have a good day. Hearing
8 is adjourned.

9 (Hearing concluded.)

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C E R T I F I C A T I O N

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15 I certify that the foregoing is a correct transcript from the
16 record of proceedings in the above-entitled matter.

17

18

19 /s/ Shea Sloan

20 SHEA SLOAN, CSR, RPR
21 OFFICIAL COURT REPORTER
22 STATE OF TEXAS NO. 3081

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