

No. 2018-1197

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

VIRNETX INC., LEIDOS, INC.,

Plaintiffs-Appellees,

v.

CISCO SYSTEMS, INC.,

Defendant,

APPLE INC.,

Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Texas,
No. 6:10-cv-00417-RWS, Judge Robert Schroeder, III

**REPLY IN SUPPORT OF DEFENDANT-APPELLANT APPLE INC.'S
MOTION TO VACATE DENIAL OF REHEARING AND FOR LEAVE TO
FILE A SECOND PETITION FOR REHEARING AND REHEARING *EN
BANC* AND/OR A SUPPLEMENTAL BRIEF**

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CERTIFICATE OF INTEREST

Counsel for Appellant Apple Inc. certifies the following:

1. The full name of every party or *amicus* represented by me is:

Apple Inc.

2. The name of the real party in interest represented by me is:

Not applicable.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by me are:

None.

4. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

- *VirnetX Inc. v. Apple Inc.*, Nos. 17-1591, -1592, -1593 (Fed. Cir.) (VirnetX's appeals from Apple and Cisco reexaminations holding unpatentable claims of U.S. Patent Nos. 7,418,504 ("the '504 patent") and 7,921,211 ("the '211 patent"))
- *VirnetX Inc. v. Iancu*, Nos. 17-2593, -2594 (Fed. Cir.) (VirnetX's appeals from IPRs holding unpatentable claims of '504 and '211 patents) (stayed pending resolution of Appeal Nos. 17-1591, -1592, -1593)
- *VirnetX Inc. v. Cisco Systems, Inc.*, No. 18-1751 (Fed. Cir.) (VirnetX's appeal from Cisco reexamination holding unpatentable claims of '504 patent)
- *VirnetX Inc. v. Apple Inc.*, No. 19-1050 (Fed. Cir.) (Apple's appeal from district court judgment awarding damages in related case involving '504 and '211 patents and U.S. Patent Nos. 6,502,135 ("the '135 patent") and 7,490,151 ("the '151 patent"))
- *VirnetX Inc. v. Cisco Systems, Inc.*, No. 19-1671 (Fed. Cir.) (VirnetX's appeal from Cisco reexamination holding unpatentable claims of '135 patent)
- *VirnetX Inc. v. The Mangrove Partners Master Fund, Ltd.*, Nos. IPR2015-01046, IPR2015-01047 (P.T.A.B.) (IPRs regarding claims of '135 and '151 patents, on remand from Nos. 17-1368, -1383 (Fed. Cir.))
- *Inter Partes* Reexamination No. 95/001,682 (PTO) (Apple reexamination of '135 patent)

- *Inter Partes* Reexamination No. 95/001,697 (PTO) (Cisco reexamination of '151 patent)
- *Inter Partes* Reexamination No. 95/001,714 (PTO) (Apple reexamination of '151 patent)

Dated: August 19, 2019

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Apple respectfully submits this reply in support of its motion to vacate the denial of rehearing and for leave to file a second petition for rehearing and rehearing *en banc* and/or a supplemental brief, ECF No. 99-1 (“Motion”). This relief is necessary to ensure that a judgment worth hundreds of millions of dollars is not affirmed based on patent claims that, under this Court’s own decisions, either stand invalidated or soon will be.

ARGUMENT

THE COURT SHOULD VACATE THE DENIAL OF REHEARING AND CONSIDER APPLE’S SECOND PETITION FOR REHEARING AND/OR SUPPLEMENTAL BRIEF.

A. VirnetX Does Not Defend The Substantive Patentability Of Any Patent Claims Asserted Against FaceTime, Nor Does It Deny That Those Claims’ Unpatentability Requires Vacatur Of The Infringement And Damages Judgments.

VirnetX’s 21-page opposition (“Opp.”) is notable for what it does *not* say. VirnetX does not deny that, under this Court’s decisions in the last two months, none of the patent claims asserted against FaceTime is actually patentable. It also does not deny that it is estopped from arguing patentability of those claims in at least two other appeals currently before this Court. And it does not deny that the unpatentability of the claims asserted against FaceTime, if given effect in this appeal, requires vacatur and remand of the infringement and damages judgments.

1. VirnetX nowhere argues that *any* of the claims asserted against FaceTime is actually patentable. This Court's recent decisions now show the following:

- Asserted claims 36, 47, and 51 of the '211 patent were affirmed as unpatentable on August 1. *VirnetX Inc. v. Apple Inc.*, ___ F.3d ___, 2019 WL 3483194, at *13 (Fed. Cir. Aug. 1, 2019) ("17-1591 Decision").
- Asserted claim 5 of the '504 patent is unpatentable because it is indistinguishable from claim 5 of the '211 patent, which was also affirmed as unpatentable on August 1. *Id.*; Motion 11-12.
- Asserted claims 1, 2, and 27 of the '504 patent were affirmed as unpatentable in a separate decision issued June 28. *VirnetX Inc. v. Cisco Sys., Inc.*, No. 18-1751, 2019 WL 2714615, at *4 (Fed. Cir. June 28, 2019) ("18-1751 Decision").¹

VirnetX does not offer any argument that these claims are actually patentable over the prior art as a matter of substance.

2. VirnetX also does not dispute Apple's showing (Motion 11-17) that the 17-1591 Decision bars VirnetX from defending the patentability of claim 5 of the

¹ VirnetX did not petition for rehearing of the 18-1751 Decision, despite suggesting in this case that it would (VirnetX Supp. Br., ECF No. 92, at 5, 7) and receiving an extension of time for doing so.

'504 patent in two other appeals in which that claim's patentability is directly at issue:

First, Cisco petitioned for rehearing from the 18-1751 Decision itself, making just that point regarding claim 5 of the '504 patent. ECF No. 66 at 6-10, 13-16 (No. 18-1751). The panel in the 18-1751 appeal called for a response from VirnetX, which is due August 28. ECF No. 70 (No. 18-1751). Should that panel accept Cisco's argument and affirm the Board's finding that claim 5 of the '504 patent is unpatentable—as this Court's precedents indicate it should—every claim asserted against FaceTime will have been affirmed as unpatentable.

Second, the Court is also reviewing a separate agency decision holding unpatentable claim 5 of the '504 patent (among others)—a case in which briefing was stayed pending issuance of the 17-1591 Decision. *VirnetX Inc. v. Iancu*, Nos. 17-2593, -2594 (Fed. Cir.). The 17-1591 Decision estops VirnetX from challenging the Board's unpatentability finding regarding claim 5 of the '504 patent in that appeal as well.²

3. VirnetX also does not deny that the unpatentability of the asserted claims of the '504 and '211 patents makes affirmance of the district court's infringement and damages judgments impossible. That is because the judgments

² Apple also intends to seek rehearing of the aspect of the 17-1591 Decision that divided this panel regarding the Board's authority to find claim 5 of the '504 patent unpatentable in the reexamination requested by Apple. Motion 15.

include millions of Mac and OS X units that were accused of infringing those patents only, not the '135 and '151 patents asserted against VPN On Demand (which the Mac and OS X products do not contain). *See* Motion 18; Appx2009(74:17-25).

Accordingly, this Court's recent decisions in related cases compel the conclusion that none of the claims asserted against FaceTime is patentable, and that affirmance of a \$439 million judgment based on such claims would be contrary to settled precedent. The Court should therefore vacate the denial of rehearing, consider Apple's second petition for rehearing and/or supplemental brief—warranted by this Court's recent 17-1591 decision—and vacate and remand the district court's infringement and damages judgments.

B. VirnetX's Procedural Arguments Do Not Justify Ignoring This Court's Substantive Findings That The Asserted '504 and '211 Claims (Or Claims Indistinguishable Therefrom) Are Unpatentable.

Unable to suggest any *substantive* reason why the asserted '504 and '211 claims are patentable over the prior art, VirnetX advances a collection of procedural arguments that it believes warrant ignoring the Court's unpatentability findings in co-pending appeals. None justifies VirnetX's desired outcome.

1. Apple showed ample basis for supplemental briefing or rehearing.

Apple offered the Court two avenues for considering the effect of the 17-1591 Decision in this appeal: either through a second petition for rehearing, or through a

further supplemental brief. Motion 8-9. VirnetX does not address the second option at all, thus implicitly conceding that it is procedurally proper. Accordingly, the Court can and should vacate the prior denial of rehearing and consider Apple's proposed second petition as a supplemental brief supporting Apple's original petition for rehearing.

In any event, Apple presented a "legitimate basis" for a second rehearing petition. Opp. 9. VirnetX does not deny that the Court retains jurisdiction and can grant a second petition for rehearing. *See Gaia Techs., Inc. v. Reconversion Techs., Inc.*, 104 F.3d 1298 (Fed. Cir. 1997) (granting leave to file second petition for rehearing to address intervening authority). The standard for panel rehearing is met because the panel's Rule 36 affirmance, issued January 15, 2019, could not possibly have taken account of the results of the 17-1591 Decision issued on August 1, 2019. The Court thus necessarily "overlooked or misapprehended" the legal effects of the 17-1591 Decision, which was not available to the panel when it rendered its decision. Fed. Cir. R. 40(a)(4). VirnetX's assertion that Apple cites no "change in law here that renders this Court's summary affirmance ... incorrect" (Opp. 10-11) is likewise wrong. A precedential opinion of this Court is indisputably a binding "change in law," and Apple explained at length—and VirnetX does not deny—that, after the 17-1591 Decision issued on August 1, 2019, all asserted claims of the '211 and '504 patents (or claims indistinguishable therefrom) are unpatentable. Motion 9-17. This

result bars affirmance here, because the accused Mac and OS X products do not infringe any patentable claim. That is most certainly a cognizable development warranting panel rehearing.

If panel rehearing is not granted, rehearing *en banc* is needed to decide whether the Court may in fact affirm infringement and damages judgments when it has held unpatentable asserted claims of the patents-in-suit or claims indistinguishable therefrom. As Apple explained, such a holding would directly contradict the Supreme Court's and this Court's precedent. ECF 99-2 at 1. Contrary to VirnetX's assertion (Opp. 10), *Fresenius USA, Inc. v. Baxter Int'l Inc.*, 721 F.3d 1330 (Fed. Cir. 2013), did not permit such an outcome (*see* Motion 13-14, 17-18; *see also infra* pp. 8-11), and VirnetX points to no case that did. At a minimum, VirnetX's protestations should be assessed when considering Apple's petition/supplemental brief on the merits; they are not a reason to refuse leave to even file it.

2. The Court did not previously “reject[]” the argument Apple presents now.

VirnetX suggests (Opp. 11) that this Court “already rejected” on August 1, 2019, an argument that Apple could not have made before August 1, 2019. VirnetX's assertion is illogical and inconsistent with the record.

At oral argument on January 8, 2019, Apple was clear that the three appeals argued that day created “a variety of different possible results.” Oral Arg. 03:00-

03:50. The Court’s questioning indicated that it was interested at the time only in the effect of affirmance of the Cisco reexamination decision regarding the ’211 appeal *alone* (38:40-41:20 (Apple)), not in the combined effect of the future 17-1591 Decision and the separate 18-1751 appeal. Apple was certainly not asked what would happen if this Court affirmed the unpatentability of all but one of the asserted ’504 and ’211 claims and a claim of the ’211 patent that VirnetX does not deny is indistinguishable from the remaining claim of the ’504 patent.

After the 18-1751 Decision issued, Apple filed a supplemental brief in the 17-1591 case explaining the collateral estoppel effect of the 18-1751 Decision *alone*. ECF No. 95 (No. 17-1591). VirnetX responded by asserting *inter alia* that collateral estoppel did not apply in the 17-1591 case for reasons that VirnetX conspicuously does *not* assert here—namely that 35 U.S.C. § 317(b) barred the Board from conducting Apple’s reexaminations at all (ECF No. 105 at 5-9), the claims at issue were patentably distinct across the patents (*id.* at 10-14), and VirnetX lacked the incentive to fully litigate the claims at issue (*id.* at 14-18). Thus, when this Court stated in a footnote in the 17-1591 Decision that Apple “failed to show why collateral estoppel is appropriate *under these circumstances*,” 17-1591 Decision, 2019 WL 3483194, at *11 n.15,³ it was not referring to “circumstances” that apply here. 35

³ All emphases are added.

U.S.C. § 317(b) has no effect in this appeal, and VirnetX does not dispute Apple’s showing (Motion 11-17) that claim 5 of the ’504 patent is indistinguishable from claim 5 of the ’211 patent, which VirnetX had every incentive to—and in fact did—litigate capably. Accordingly, whatever “circumstances” the Court held made collateral estoppel inappropriate in the 17-1591 Decision do not apply here.

The Court has not previously decided, and could not have decided, the combined effect of the 18-1751 and 17-1591 Decisions in this case. That issue first became ripe on August 1, 2019. It could not have been presented sooner and should be decided now.

3. The 17-1591 Decision affects this co-pending case, regardless of whether this current appeal involves validity.

VirnetX argues that it can escape its claims’ unpatentability “because VirnetX is not relitigating validity in this appeal.” Opp. 14. Again, VirnetX’s argument defies both logic and precedent.

Although this Court previously affirmed the jury’s no-invalidity determination, *VirnetX, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1323-1324 (Fed. Cir. 2014), this Court must “apply intervening legal developments affecting the asserted patent’s validity, *even if the court of appeals already decided the validity issue the other way*,” *Fresenius*, 721 F.3d at 1342. Contrary to VirnetX’s argument, this Court’s “precedent holds that the defense of collateral estoppel based on a final judgment of patent invalidity in another suit can be timely made at *any stage* of the

affected proceedings.” *Mendenhall v. Barber-Greene Co.*, 26 F.3d 1573, 1579 (Fed. Cir. 1994) (internal quotation marks omitted).

VirnetX does not even cite *Mendenhall*, much less seek to distinguish it. And its attempt to carve out of *XY, LLC v. Trans Ova Genetics, L.C.*, 890 F.3d 1282 (Fed. Cir. 2018), situations in which validity was addressed in a prior appeal (Opp. 14-15) is meritless. *XY* explained that “affirmance [of the Board’s unpatentability determination] ... has an immediate issue-preclusive effect on ***any pending or co-pending actions*** involving the patent.” 890 F.3d at 1294; see *Fresenius*, 721 F.3d at 1343-1344 (holding that even though “there had been an appellate decision entirely resolving” the invalidity claims, “[t]he intervening decision invalidating the patents unquestionably applies in the present litigation, because the judgment in this litigation was not final”).⁴

Nor should the Court wait until the PTO formally cancels the claims. Opp. 15-16. This Court regularly vacates or reverses judgments upon this Court’s affirmance of an unpatentability determination, before the claims found unpatentable are formally cancelled. See, e.g., *Imperium IP Holdings (Cayman), Ltd. v. Samsung*

⁴ VirnetX’s argument that *Fresenius* involves not collateral estoppel, but “extinguish[ing]” the cause of action (Opp. 15), is self-defeating. Whether through estoppel or extinguishment, the asserted claims of the ’504 and ’211 patents can no longer sustain VirnetX’s cause of action. The infringement and damages judgments against FaceTime can thus no longer stand.

Elecs. Co., 757 F. App'x 974, 980 (Fed. Cir. 2019) (nonprecedential) (holding that liability was precluded based on panel affirming claims as unpatentable); *Translogic Tech., Inc. v. Hitachi, Ltd.*, 250 F. App'x 988 (Fed. Cir. 2017) (nonprecedential) (vacating district court judgment based on panel decision affirming Board's rejection of asserted claims); *see also Prism Techs. LLC v. Sprint Spectrum L.P.*, 757 F. App'x 980, 987 (Fed. Cir. 2019) (nonprecedential) (district court properly vacated judgment after panel affirmed unpatentability). And whether the PTO has formally cancelled claim 5 of the '504 patent does not matter, because VirnetX does not deny that it is indistinguishable from claim 5 of the '211 patent, which will be cancelled. *See supra* pp. 1-3.

VirnetX has shown no reason for treating claim 5 of the '504 patent as patentable where indistinguishable claim 5 of the '211 patent is not. *See* Motion 11-17. Accordingly, this Court should grant Apple's Motion.

4. Deciding this case in a manner consistent with co-pending proceedings is basic due process, not “indefinite delay.”

Finally, VirnetX repeatedly complains that resolving this appeal in a manner consistent with co-pending proceedings regarding the asserted claims' unpatentability amounts to “indefinite delay.” Opp. 18. VirnetX's arguments make clear that it is hoping to take advantage of the very “happenstance of docket management” (*id.*) that it rails against. Specifically, VirnetX seeks to benefit from the fact that this Court (A) issued a Rule 36 affirmance in this case months before it

decided the co-pending unpatentability appeals, and (B) denied Apple’s petition for rehearing 30 minutes after issuing an opinion that—as Apple has explained without contradiction from VirnetX—now makes plain that all claims asserted against FaceTime are unpatentable.⁵

Apple has moved quickly to inform the Court of the consequences of the decisions in these multiple intertwined cases. VirnetX should not be able to reap an advantage from the fact that this one appeal, which was noticed months *after* the 17-1591 and 17-1368 appeals, was put on a faster track for argument and decision. This case should be decided based on the law—including this Court’s opinions regarding the claims’ unpatentability and settled precedent regarding the effect of co-pending decisions—and not based on VirnetX’s desire to preserve its windfall. *County of Sacramento v. Lewis*, 523 U.S. 833, 845-846 (1998) (“[T]he touchstone of due process is protection of the individual against arbitrary action of government[.]”). Therefore, even if this Court does not vacate the district court judgment now, it should at least vacate the denial of rehearing and grant the motion for leave to file a second petition for rehearing and rehearing *en banc* or a supplemental brief, and hold

⁵ VirnetX did not complain when this Court *sua sponte* delayed holding oral argument in the 17-1591 and 17-1368 appeals for months in order to hear them in conjunction with this case. *See* ECF No. 78 at 6, 16.

the case open pending resolution of unpatentability proceedings concerning the patents-in-suit.

CONCLUSION

The Court should vacate the denial of rehearing and grant Apple leave to file a second petition for rehearing and rehearing *en banc* and/or supplemental brief.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of August, 2019, I filed the foregoing with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2).

1. Exclusive of the exempted portions of the motion, as provided in Fed. Cir. Rule 27(d), the motion contains 2,600 words.

2. The petition has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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