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

VIRNETX INC. and SCIENCE APPLICATIONS INTERNATIONAL CORPORATION,	§	
Plaintiffs,	§	**CAUSE NO. 6:10-CV-417**
	§	SEALED
vs.	§	
	§	UNSEALED 10-13-2017
APPLE INC.,	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are the following motions:

- Defendant Apple Inc.'s ("Apple") Rule 50(a) Motion for Judgment as a Matter of Law on Damages (Docket No. 1018); [1]
- Apple's Rule 50(a) Motion for Judgment as a Matter of Law of No Infringement (Docket No. 1019);
- Plaintiff VirnetX, Inc.'s ("VirnetX") Post-Trial Brief Regarding Willfulness (Docket No. 1047);
- Apple's Omnibus Motion for Judgment as a Matter of Law Under Rule 50(b) (Docket No. 1062); and
- VirnetX's Motion for Entry of Judgment and Equitable Relief (Docket No. 1063).

Having considered the parties' written submissions and argument at the November 22, 2016 post-trial hearing, and for the reasons stated below, the Court rules as follows:

- Apple's Rule 50(a) Motion for Judgment as a Matter of Law on Damages (Docket No. 1018) is **DENIED-AS-MOOT**;
- Apple's Rule 50(a) Motion for Judgment as a Matter of Law of No Infringement (Docket No. 1019) is **DENIED-AS-MOOT**;
- VirnetX's request in its Post-Trial Brief Regarding Willfulness that the Court find that willful infringement (Docket No. 1047) is **GRANTED**;
- Apple's Omnibus Motion for Judgment as a Matter of Law Under Rule 50(b) (Docket No. 1062) is **DENIED**; and
- VirnetX's Motion for Entry of Judgment and Equitable Relief (Docket No. 1063) is **GRANTED**.

[1] Unless noted otherwise, all references to the docket refer to Case No. 6:10-cv-417.

BACKGROUND

On August 11, 2010, VirnetX filed this action against Apple alleging that Apple infringed U.S. Patent Nos. 6,502,135 ("the '135 Patent"), 7,418,504 ("the '504 Patent"), 7,490,151 ("the '151 Patent"), and 7,921,211 ("the '211 Patent") (collectively, "the asserted patents"). The '135 and '151 Patents generally describe a method of transparently creating a virtual private network ("VPN") between a client computer and a target computer, while the '504 and '211 Patents disclose a secure domain name service. On November 6, 2012, a jury found that Apple's accused VPN on Demand and FaceTime features infringed the asserted patents and that the asserted patents were not invalid ("2012 jury verdict"). Docket No. 790.

Apple appealed the 2012 verdict to the Federal Circuit on multiple grounds. *See VirnetX, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1313–14 (Fed. Cir. 2014). The Federal Circuit affirmed the jury's finding of infringement by VPN on Demand and affirmed this Court's denial of Apple's motion for judgment as a matter of law on invalidity. *Id.* The Federal Circuit reversed the Court's claim construction, holding that the term "secure communication link" requires both "security and anonymity" and vacated the infringement finding for FaceTime. *Id.* The Federal Circuit also vacated the damages award for both VPN on Demand and FaceTime because it found that the jury relied on a flawed damages model. *Id.* at 1314.

On remand, this case was consolidated with Case No. 6:12-cv-855 and retried between January 25 and February 2, 2016. Docket No. 425 in Case No. 6:12-cv-855. Because of the consolidation and repeated references to the prior jury's verdict in front of the jury, the Court granted a new trial and unconsolidated the cases. Docket No. 500 in Case No. 6:12-cv-855. The Court conducted another jury trial September 26 to 30, 2016 on infringement for FaceTime and damages for both FaceTime and VPN on Demand.

At trial, VirnetX asserted that FaceTime met the "anonymity" requirement of the "secure communication link" limitation by allowing participants to communicate behind third-party network address translators ("NATs"). Docket No. 1036 ("Trial Tr. 9/30/16 PM") at 37:17–40:41. VirnetX's technical expert, Dr. Mark Jones, testified that NATs hide the private IP addresses of the persons or devices participating in a FaceTime call and therefore prevent eavesdroppers on the public internet from being able to correlate specific persons or devices behind the NAT routers participating in the call. Docket No. 1030 ("Trial Tr. 9/27/16 AM") at 48:10–51:18. VirnetX further asserted that it was entitled to a reasonable royalty of $1.20 per unit, for a total of $302,427,950, for the infringement of its patents by FaceTime and VPN on Demand.[2] Trial Tr. 9/30/16 PM at 50:16–20. VirnetX's damages expert, Roy Weinstein, testified that, based on his analysis of comparable licenses, a reasonable royalty for Apple to pay for use of the asserted patents would be between $1.20 and $1.67 per unit. Docket No. 1032 ("Trial Tr. 9/28/16 PM") at 7:15–11:25.

Apple denied that FaceTime met the "anonymity" requirement of the "secure communication link" limitation. Trial Tr. 9/30/16 PM at 53:8–15. Apple's technical expert, Dr. Matthew Blaze, testified that FaceTime is not anonymous because eavesdroppers are able to obtain the public IP addresses of the devices participating in a FaceTime call. Docket No. 1035 ("Trial Tr. 9/30/16 AM") at 20:20–21:1, 114:17–21. Dr. Blaze further testified that the private IP addresses hidden by the NATs do not provide any meaningful anonymity. Trial Tr. 9/30/16 AM at 68:10–69:8. Apple also asserted that, based on an analysis of the comparable licenses by its damages expert, Christopher Bakewell, VirnetX was entitled to a royalty rate of no more than

[2] The jury was instructed that infringement by VPN on Demand was previously determined. Docket No 1021 at 4.

$0.10 per unit, for a total of $25,202,329, for the infringement of VPN on Demand and FaceTime. Docket No. 1033 ("Trial Tr. 9/29/16 AM") 63:11–16, 115:2–20.

On September 30, 2016, the jury returned a unanimous verdict. The jury found that FaceTime infringed the '211 and '504 patents and awarded $302,427,950 in damages for the collective infringement by the VPN on Demand and FaceTime features in the accused Apple products. Docket No. 1025.

I. APPLE'S OMNIBUS MOTION FOR JUDGMENT AS A MATTER OF LAW UNDER RULE 50(b) AND FOR A NEW TRIAL

Apple moves for judgment as a matter of law, or, alternatively, for a new trial, on non-infringement and damages. Docket No 1062 at 1. During the September 2016 trial, Apple filed two Rule 50(a) motions before the case was submitted to the jury. Docket No. 1018; Docket No. 1019. In light of Apple's Rule 50(b) motions, Apple's Rule 50(a) motions (Docket Nos. 1018 and 1019) are **DENIED-AS-MOOT**. The Court therefore turns to Apple's Rule 50(b) Motion for Judgment as a Matter of Law and for a New Trial (Docket No. 1062).

A. Applicable Law Regarding Rule 50

Judgment as a matter of law is only appropriate when "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a). "The grant or denial of a motion for judgment as a matter of law is a procedural issue not unique to patent law, reviewed under the law of the regional circuit in which the appeal from the district court would usually lie." *Finisar Corp. v. DirecTV Group, Inc.*, 523 F.3d 1323, 1332 (Fed. Cir. 2008). The Fifth Circuit "uses the same standard to review the verdict that the district court used in first passing on the motion." *Hiltgen v. Sumrall*, 47 F.3d 695, 699 (5th Cir. 1995). Thus, a jury verdict must be upheld, and judgment as a matter of law may not be granted, unless "there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did." *Id.* at 700. "A

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