

No. 2019-1050

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

VIRNETX INC., LEIDOS, INC., fka Science Applications International Corporation,
Plaintiffs-Appellees,

v.

APPLE INC.,

Defendant-Appellant.

VIRNETX INC.,

Plaintiff-Appellee,

v.

APPLE INC.,

Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Texas,
Nos. 6:12-cv-00855-RWS and 6:11-cv-00563-RWS, Judge Robert Schroeder, III

**SUPPLEMENTAL BRIEF FOR
DEFENDANT-APPELLANT APPLE INC.**

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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. Cisco Systems, Inc.*, No. 18-1197 (Fed. Cir.) (Apple's appeal from district court judgment awarding damages in related case involving U.S. Patent Nos. 6,502,135 ("the '135 patent"), 7,490,151 ("the '151 patent"), 7,418,504 ("the '504 patent"), and 7,921,211 ("the '211 patent"))
- *VirnetX Inc. v. Apple Inc.*, Nos. 17-1591, -1592, -1593 (Fed. Cir.) (VirnetX's appeals from Apple and Cisco reexaminations holding unpatentable claims of the '504 patent and 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. 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)

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INTRODUCTION

In this case, Apple appeals a district court judgment of infringement, no-invalidity, and damages based on four patents: U.S. Patent Nos. 7,418,504 (“’504 patent”), 7,921,211 (“’211 patent”), 6,502,135 (“’135 patent”), and 7,490,151 (“’151 patent”). In the past two months, this Court has issued two decisions in reexamination appeals that make plain that all asserted claims for two of those patents—the ’504 and ’211 patents—are unpatentable. *VirnetX Inc. v. Cisco Systems, Inc.*, No. 18-1751, 2019 WL 2714615, at *4 (Fed. Cir. June 28, 2019) (“18-1751 Decision”); *VirnetX Inc. v. Apple Inc.*, 931 F.3d 1363, 1380 (Fed. Cir. Aug. 1, 2019) (“17-1591 Decision”). As a result, and as Apple has explained (Opening Br. 62), no cause of action may now persist based on those two patents, which were the only ones found infringed by Apple’s FaceTime feature. *See Fresenius USA, Inc. v. Baxter Int’l, Inc.*, 721 F.3d 1330, 1340 (Fed. Cir. 2013) (“[W]hen a claim is cancelled, the patentee loses any cause of action based on that claim, and any pending litigation in which the claims are asserted becomes moot.”).

Accordingly, the infringement judgment for the ’504 and ’211 patents should be vacated, the damages judgment vacated in its entirety, and the case

remanded for a redetermination of damages, prejudgment interest, and ongoing royalties without regard to FaceTime.¹

ARGUMENT

I. THE 17-1591 AND 18-1751 DECISIONS MEAN THAT THE ASSERTED CLAIMS OF THE '504 AND '211 PATENTS ARE UNPATENTABLE AND CAN NO LONGER SUSTAIN VIRNETX'S CAUSE OF ACTION.

A. All Asserted Claims Of The '504 And '211 Patents Are Unpatentable.

“Collateral estoppel protects a party from having to litigate issues that have been fully and fairly tried in a previous action and adversely resolved against a party-opponent.” *Ohio Willow Wood Co. v. Alps South, LLC*, 735 F.3d 1333, 1342 (Fed. Cir. 2013). “[A]s a result of collateral estoppel, a judgment of invalidity in one patent action renders the patent invalid in any later actions based on the same patent.” *MaxLinear, Inc. v. CF CRESPE LLC*, 880 F.3d 1373, 1376 (Fed. Cir. 2018) (internal quotation marks omitted); see *XY, LLC v. Trans Ova Genetics, L.C.*, 890 F.3d 1282, 1294 (Fed. Cir. 2018) (“[A]ffirmance [of the Board’s unpatentability determination] ... has an immediate issue-preclusive effect on any pending or co-pending actions involving the patent.”).

This Court “does not limit collateral estoppel to patent claims that are identical” to those affirmed as unpatentable. *Ohio Willow Wood*, 735 F.3d at 1342.

¹ This brief addresses only the impact of the 17-1591 and 18-1751 Decisions. Apple also maintains the arguments made in its opening and reply briefs, including that the entire judgment should be reversed because Apple’s redesigned products do not infringe any asserted patent.

Rather, where “the differences between the unadjudicated patent claims and adjudicated patent claims do not materially alter the question of invalidity, collateral estoppel applies.” *Id.*; *see MaxLinear*, 880 F.3d at 1377 (“[T]he collateral-estoppel effect of an administrative decision of unpatentability generally requires the invalidation of related claims that present identical issues of patentability.”); *In re Arunachalam*, 709 F. App’x 699, 703 (Fed. Cir. 2017) (applying collateral estoppel where “any differences between the two sets of claims are not material such that those differences would affect the patentability of the challenged claims”); *Allergan, Inc. v. Sandoz, Inc.*, 681 F. App’x 955, 960 (Fed. Cir. 2017) (affirming application of collateral estoppel where asserted claims “are substantially similar to the invalidated claims”); *Bourns, Inc. v. United States*, 537 F.2d 486, 497 (Ct. Cl. 1976) (applying collateral estoppel where “substance of the adjudicated and unadjudicated claims must be viewed as the same”).

Here, VirnetX is estopped from maintaining its cause of action with respect to the ’211 and ’504 patents. In the 17-1591 and 18-1751 Decisions, this Court affirmed as unpatentable all asserted claims of the ’211 patent (claims 36, 47, and 51) and three of the four asserted claims of the ’504 patent (claims 1, 2, and 27). 18-1751 Decision, 2019 WL 2714615, at *4; 17-1591 Decision, 931 F.3d at 1380. Of the ’504 patent’s asserted claims, only claim 5 has yet to be affirmed as unpatentable by this Court. But the 17-1591 Decision makes plain that claim 5 of

the '504 patent is unpatentable as well, because it is indistinguishable from claim 5 of the '211 patent, which the 17-1591 Decision also affirmed as unpatentable. *See* 17-1591 Decision, 931 F.3d at 1380.

Claim 5 of both patents depends from claim 2, which depends from claim 1:

<p>'211 Patent—Claims 1, 2, And 5 Affirmed As Unpatentable (No. 17-1591)</p>	<p>'504 Patent—Claims 1 And 2 Affirmed As Unpatentable (No. 18-1751)</p>
<p>1. A system for providing a domain name service for establishing a secure communication link, the system comprising:</p> <p>a domain name service system configured <i>and arranged</i> to be connected to a communication network, store a plurality of domain names and corresponding network addresses, receive a query for a network address, and <i>indicate in response to the query whether</i> the domain name service system supports establishing a secure communication link.</p>	<p>1. A system for providing a domain name service for establishing a secure communication link, the system comprising:</p> <p>a domain name service system configured to be connected to a communication network, to store a plurality of domain names and corresponding network addresses, to receive a query for a network address, and to <i>comprise an indication that</i> the domain name service system supports establishing a secure communication link.</p>
<p>2. The system of claim 1 wherein at least one of the plurality of domain names comprises a top-level domain name.</p>	<p>2. The system of claim 1 wherein at least one of the plurality of domain names comprises a top-level domain name.</p>
<p>5. The system of claim 2, wherein the domain name service system is configured to authenticate the query using a cryptographic technique.</p>	<p>5. The system of claim 2, wherein the domain name service system is configured to authenticate the query using a cryptographic technique.</p>

Appx262; Appx401 (emphases added).

Dependent claims 2 and 5 are identical in both patents, and while there are very minor differences in language between independent claim 1 of the '504 and '211 patents, they do not carry patentable weight—and VirnetX has never argued otherwise. First, whereas claim 1 of the '504 patent requires “a domain name service system configured to be connected,” claim 1 of the '211 patent requires “a domain name service system configured *and arranged* to be connected.” *Compare* Appx262, *with* Appx 401 (emphasis added). Second, whereas claim 1 of the '504 patent requires the claimed system “to *comprise an indication that* the domain name service system supports establishing a secure communication link,” claim 1 of the '211 patent requires the system to “*indicate in response to the query whether* the domain name service system supports establishing a secure communication link.” *Compare* Appx262 (emphasis added), *with* Appx401 (emphasis added). Neither of those differences “materially alter[s] the question of invalidity.” *See Ohio Willow Wood*, 735 F.3d at 1342. If anything, the minor differences between claim 1 of the '504 and '211 patents *broaden* the '504 patent—as VirnetX itself has recognized. *See* VirnetX Suppl. Br. 12-13, ECF No. 105 (No. 17-1591); *see also AstraZeneca LP v. Breath Ltd.*, 542 F. App'x 971, 982 n.2 (Fed. Cir. 2013) (“[B]roader claims are necessarily invalid where narrower claims have been found to be obvious.”); *Ormco Corp. v. Align Tech., Inc.*, 498

F.3d 1307, 1319 (Fed. Cir. 2007) (where narrower claims “were found to have been obvious, the broader claims ... must also have been obvious”).

Moreover, claims 1 and 2 of the ’504 patent *and* claims 1 and 2 of the ’211 patent have all been affirmed as unpatentable. 17-1591 Decision, 931 F.3d at 1380; 18-1751 Decision, 2019 WL 2714615, at *4. Accordingly, there is no basis for treating dependent claim 5 of the ’504 patent as anything but unpatentable.²

Although the district court entered a judgment of no-invalidity,³ that does not alter the application of collateral estoppel here. This Court “must apply intervening legal developments affecting the asserted patent’s validity.” *Fresenius*, 721 F.3d at 1342. And 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*

² VirnetX filed a terminal disclaimer, limiting the term of the ’211 patent to that of the ’504 patent, to overcome an obviousness-type double patenting rejection during prosecution, further suggesting that the two patents’ claims are commensurate in scope. See ’211 Patent File History Excerpts, *available at* Supplemental Appendix, ECF No. 87 (No. 18-1197); Apple Suppl. Br. 8-9, ECF No. 86 (No. 18-1197). That provides “a strong clue that a patent examiner and, by concession, the applicant, thought the claims in the continuation lacked a patentable distinction over the parent.” *SimpleAir, Inc. v. Google LLC*, 884 F.3d 1160, 1168 (Fed. Cir. 2018); *see Indivior Inc. v. Dr. Reddy’s Labs., S.A.*, 752 F. App’x 1024, 1035 (Fed. Cir. 2018) (“While not dispositive, the filing of a terminal disclaimer here is a ‘strong clue’ that the claims of the ’305 patent are patentably indistinct from those of the ’514 patent.”).

³ As Apple explained, the district court erred by barring Apple’s invalidity defenses and counterclaims in this case. Opening Br. 29, 55-58; Reply Br. 25-30.

Co., 26 F.3d 1573, 1579 (Fed. Cir. 1994) (internal quotation marks omitted); *see Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313, 350 (1971) (permitting estoppel argument by “one facing a charge of infringement of a patent that has once been declared invalid”); *Prism Techs. LLC v. Spring Spectrum L.P.*, 757 F. App’x 980, 987 (Fed. Cir. 2019) (affirming district court’s decision to vacate damages judgment after this Court found underlying patents invalid in another action even though defendant had not pressed invalidity challenges at trial or on appeal), *cert. denied*, 2019 WL 2009843 (U.S. June 10, 2019); *XY*, 890 F.3d at 1294-1295 (applying collateral “estoppel *sua sponte* to avoid ‘unnecessary judicial waste’ from remanding an issue that has a clear estoppel effect”). Apple has “raised [collateral estoppel] during [this] pending litigation at virtually the earliest possible date.” *Mendenhall*, 26 F.3d at 1580.

Under these circumstances, this Court should apply collateral estoppel and invalidate claim 5 of the ’504 patent in this appeal, because it is not patentably distinct from claim 5 of the ’211 patent that this Court affirmed as unpatentable in the 17-1591 Decision. Accordingly, this Court’s 17-1591 and 18-1751 Decisions now estop VirnetX from asserting the patentability of claims 1, 2, 5, and 27 of the ’504 patent and claims 36, 47, and 51 of the ’211 patent in this proceeding—or any proceeding.

B. Claim 5 Will Likely Be Affirmed As Unpatentable In Another Proceeding.

Moreover, if not invalidated here first, it is highly likely that claim 5 of the '504 patent will be affirmed as unpatentable in at least one of three separate proceedings where the PTO directly held that claim unpatentable.

First, in the 18-1751 Decision, a panel of this Court remanded asserted claim 5 of the '504 patent to the Board for further proceedings on a narrow question. Following this Court's 17-1591 Decision, however, Cisco petitioned for rehearing on the ground that this Court's decision affirming the unpatentability of claim 5 of the '211 patent likewise requires affirming the unpatentability of claim 5 of the '504 patent—which is substantially the same. ECF No. 66 at 6-10, 13-16 (No. 18-1751). In response, VirnetX does not offer any argument for why claim 5 of the '504 patent is actually patentable; it instead relies on procedural arguments in the hope of avoiding application of collateral estoppel in that appeal. *See* ECF No. 71 (No. 18-1751). If Cisco's petition for rehearing is granted—as this Court's precedents indicate it should be—claim 5 of the '504 patent will be affirmed as unpatentable in that proceeding.

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

unpatentability determination regarding claim 5 of the '504 patent in that appeal as well.

Third, Apple has filed a petition for rehearing in the 17-1591 case because, as Judge Reyna correctly recognized in dissent, the panel majority erred in applying 35 U.S.C. § 317(b) estoppel to vacate the Board's unpatentability determination for claim 5 of the '504 patent. 17-1591 Decision, 931 F.3d at 1380 (Reyna, J., dissenting-in-part); *see* ECF No. 116 (No. 17-1591). Notably, no member of the panel suggested that the Board's factual finding that the prior art rendered claim 5 of the '504 patent unpatentable was substantively incorrect.

Accordingly, this Court is highly likely to affirm that claim 5 of the '504 patent is unpatentable in one of these parallel proceedings.

C. VirnetX Cannot Escape The Application Of Collateral Estoppel In This Case.

VirnetX cannot reasonably defend claim 5 of the '504 patent at this point. Indeed, despite having three opportunities to do so, VirnetX has not offered a single substantive argument explaining how that claim is patentable now that this Court has affirmed the unpatentability of the indistinguishable claim 5 of the '211 patent. In responding to two motions by Apple in the 18-1197 Appeal from another district court judgment and Cisco's petition for rehearing in the 18-1751 Appeal that all raise the unpatentability of claim 5 of the '504 patent, VirnetX has not argued—nor could it—that claim 5 of the '504 patent is patentably distinct

from unpatentable claim 5 of the '211 patent. *See* ECF No. 101 (No. 18-1197); ECF No. 103 (No. 18-1197); ECF No. 71 (No. 18-1751).

Moreover, despite having challenged separate decisions of the Board rejecting claims 1-60 of the '211 patent and claims 1-60 of the '504 patent, VirnetX has never made any arguments suggesting that claim 5 of the '504 patent should be assessed differently from now-invalidated claim 5 of the '211 patent. On the contrary, VirnetX treated the “authentication” limitations identically across claim 5 of both patents. *See* VirnetX Opening Br. 63-66, ECF No. 38 (No. 17-1591) (equating “authentication” limitation in '504 and '211 patents).

VirnetX had a full and fair opportunity to litigate claim 5 of the '211 patent, which was addressed in the same briefing as claim 5 of the '504 patent. VirnetX defended claim 5 of the '211 patent (along with claim 5 of the '504 patent) before the Board and appealed the Board’s rejection through this Court’s 17-1591 Decision, relying on identical arguments for both patents. And VirnetX cannot assert that it had “inadequate representation or an impaired opportunity to litigate in” the 17-1591 case. *See Papst Licensing GMBH & Co. KG v. Samsung Elecs. Am., Inc.*, 924 F.3d 1243, 1251 (Fed. Cir. 2019); *see also Soverain Software LLC v. Victoria’s Secret Direct Brand Mgmt., LLC*, 778 F.3d 1311, 1316 (Fed. Cir. 2015). VirnetX was capably represented in the 17-1591 Appeal, and it briefed and presented arguments as to claim 5 of both patents equally. Nor can VirnetX argue

that it did not have adequate incentive to litigate in the 17-1591 Appeal; VirnetX “litigated all the way through to final written decisions” and to an appellate decision by this Court. *See Papst Licensing*, 924 F.3d at 1252 (applying issue preclusion where patentee “litigated all the way through to final written decisions” and dropped appeal on “eve of oral argument”). Indeed, VirnetX has indicated that it plans to seek rehearing in the 17-1591 Appeal as to claim 5 of the ’211 patent. ECF No. 71 at 6 (No. 18-1751). Any suggestion by VirnetX that it lacked incentive to litigate the validity of claim 5 of the ’211 patent in the 17-1591 Appeal is implausible, given that it is indistinguishable from one of the claims asserted against Apple in this case and the 18-1197 district court appeal.

VirnetX has elsewhere argued that this Court’s refusal to apply collateral estoppel in the 17-1591 Decision itself (*see* 17-1591 Decision, 931 F.3d at 1378 n.15) somehow forecloses application of the combined collateral estoppel effects of the 17-1591 and 18-1751 Decisions together in other cases. *E.g.*, ECF No. 101 at 11-13 (No. 18-1197). That is incorrect. The issue of the combined effect of the 18-1751 and 17-1591 Decisions first became ripe on August 1, 2019. Prior to the 17-1591 Decision, Apple raised the collateral estoppel effect of the 18-1751 Decision *alone* in the 17-1591 Appeal. 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 cannot 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 (No. 17-1591)), that the claims at issue were patentably distinct across the patents (*id.* at 10-14), and that 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, 931 F.3d at 1378 n.15 (emphasis added), it was not referring to “circumstances” that apply here. 35 U.S.C. § 317(b) has no effect in this appeal, and VirnetX cannot dispute Apple’s showing 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.

In the 18-1197 appeal from a separate district court judgment, VirnetX also argued that collateral estoppel did not apply because validity was not at issue in that appeal. ECF No. 101 at 14 (No. 18-1197). That argument is without merit (*see* ECF No. 102 at 8-10 (No. 18-1197)) and, in any event, cannot apply here because Apple has appealed the district court’s no-invalidity judgment in this case. *See* Opening Br. 29, 55-58; Reply Br. 25-30.

* * *

In sum, there is no reason to continue to treat claim 5 of the '504 patent as patentable where the indistinguishable claim 5 of the '211 patent is not. As a result, all asserted '504 and '211 patent claims are unpatentable. Allowing VirnetX to maintain infringement and damages judgments based on those patents would be manifestly unjust. If the Court is not inclined to vacate the judgment now, it should at least await disposition of the other proceedings implicating the patentability of the asserted claims.

II. THE UNPATENTABILITY DETERMINATIONS FOR THE '504 AND '211 PATENTS REQUIRE VACATUR OF THE INFRINGEMENT AND DAMAGES JUDGMENTS AND A REMAND TO REDETERMINE DAMAGES.

“[W]hen a claim is cancelled, the patentee loses any cause of action based on that claim, and any pending litigation in which the claims are asserted becomes moot.” *Fresenius*, 721 F.3d at 1340. This Court regularly vacates or reverses judgments upon this Court’s affirmance of an unpatentability determination, even before the claims found unpatentable are formally cancelled. *E.g.*, *XY*, 890 F.3d at 1294 (holding that affirmance of Board’s unpatentability determination “renders final a judgment on the invalidity of the [asserted] [p]atent, and has an immediate issue-preclusive effect on any pending or co-pending actions involving the patent”); *Imperium IP Holdings (Cayman), Ltd. v. Samsung Elecs. Co.*, 757 F. App’x 974, 980 (Fed. Cir. 2019) (holding that liability was precluded based on Court affirming claims as unpatentable); *Translogic Tech., Inc. v. Hitachi, Ltd.*,

250 F. App'x 988 (Fed. Cir. 2007) (vacating district court judgment based on this Court's decision affirming Board's rejection of asserted claims); *see also Prism*, 757 F. App'x at 987 (district court properly vacated judgment after this Court affirmed unpatentability).

As Apple explained in its opening brief, the jury's damages award was predicated on the assumption that Apple infringed *four* valid patents; it did not differentiate on a patent-by-patent basis. Opening Br. 62. And the asserted patents cover different accused products: the accused Mac products contain FaceTime but not VPN On Demand, and were found to infringe the '504 and '211 patents but not the '135 and '151 patents. Appx50-51; Appx1427; Appx1853-1855; Appx2571-2573. Now that VirnetX no longer has a cause of action based on the '504 and '211 patents, the Mac products no longer infringe and no damages can be awarded for them. As a result, the damages judgement should be vacated and remanded so that damages can be redetermined without regard to FaceTime. *See XY*, 890 F.3d at 1294 & n.7 (remanding for district court to consider impact on damages award of this Court's *sua sponte* application of collateral estoppel based on patent affirmed as unpatentable).

CONCLUSION

For the foregoing reasons, this Court should—at a minimum—vacate the infringement judgment for the '211 and '504 patents, vacate the damages judgment

in its entirety, and remand for redetermination of damages without regard to FaceTime.

Respectfully submitted,

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August 30, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of August, 2019, I filed the foregoing Supplemental Brief for Defendant-Appellant Apple Inc. 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 brief complies with the type-volume limitation of Federal Circuit Rule 32(a).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b), the brief contains 3,494 words.

2. The brief 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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