

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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EXTREME NETWORKS, INC.,

ORDER

Plaintiff,

07-cv-229-bbc

v.

ENTERASYS NETWORKS, INC.,

Defendant.

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Although the final pretrial conference in this case was held last week and the trial begins on Monday, the parties continue to raise new disputes. This order addresses three pending motions: (1) plaintiff Extreme Networks, Inc.’s motion to “strike” depositions defendant Enterasys Networks, Inc. filed with the court on October 21, dkt. #698; (2) defendant’s motion to “strike” portions of an October 21 expert report prepared by Nathaniel Davis, dkt. #692; and (3) plaintiff’s motion to preclude defendant’s damages expert Bruce McFarlane from relying on a declaration prepared by liability expert Kevin Jeffay. Dkt. #696.

With respect to the depositions, plaintiff argues that defendant should not be

permitted to rely on them for any purpose at trial, primarily because they were not disclosed earlier. I will grant this motion with the important exception that defendant may use the depositions for impeachment. “In accordance with Fed. R. Civ. P. 26(a)(1)(A) & (3), evidence offered ‘solely for impeachment purposes’ does not have to be disclosed prior to trial.” Hammel v. Eau Galle Cheese Factory, 407 F.3d 852, 869 (7th Cir. 2005) (upholding decision to admit impeachment evidence not disclosed earlier).

Plaintiff says it is “unfair” to consider the depositions even for impeachment purposes because the depositions are from a different case, but that argument has no merit. The Federal Rules of Evidence do not limit impeachment to documents from the same case. If defendant attempts to impeach a witness with deposition testimony that is not actually inconsistent with that witness’s trial testimony, plaintiff may object at that time.

The second motion relates to an updated expert report by Nathaniel Davis that the court allowed plaintiff to file to incorporate “Requests for Comments” that defendant produced to plaintiff on the last day of discovery. I agree with defendant that Davis may not testify about anything in his updated report that goes beyond what I permitted in the order on the motion for sanctions, with one exception. Davis may rely on those aspects of the report in which he updated his opinion on obviousness to take into account my ruling at the final pretrial conference prohibiting Davis from citing the ‘631, ‘977 and ‘039 patents as invalidating prior art.

I am denying the third motion. Plaintiff cites no authority for prohibiting McFarlane from relying on Jeffay's report and it identifies no unfair prejudice it will suffer as a result.

#### ORDER

IT IS ORDERED that

1. Defendant Enterasys Networks, Inc.'s motion to preclude plaintiff Extreme Networks, Inc. from relying on any opinions in Nathaniel Davis's October 21, 2011 report not authorized by this court in granting plaintiff's motion for sanctions, dkt. #692, is GRANTED with one exception. Davis may testify about those aspects of the report in which he updated his opinion on obviousness to take into account my ruling at the final pretrial conference prohibiting Davis from citing the '631, '977 and '039 patents as invalidating prior art.

2. Plaintiff's motion to preclude Bruce McFarlane from relying on Kevin Jeffay's March 2008 declaration, dkt. #696, is DENIED.

3. Plaintiff's motion to preclude defendant from relying on the depositions filed on October 21, 2011, dkt. #697, is GRANTED with the exception that defendant may rely on

those depositions for the purpose of impeachment.

Entered this 28th day of October, 2011.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge