IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EXTREME NETWORKS, INC.,

Plaintiff,

v.

ENTERASYS NETWORKS, INC.

Defendant.

ORDER

07-cv-229-bbc

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A final pretrial conference was held in this case on May 15, 2008, before United States District Judge Barbara B. Crabb. Plaintiff Extreme Networks, Inc. by James Peterson, Margaret Duncan, Terrence McMahon and David Larson. Defendant Enterasys Networks, Inc. appeared by Stephen Coco, Christopher Sullivan, Marla Butler, Alan McKenna, Lester Pines and Rebecca MacDowell.

I began the conference by warning counsel that if they did not do a more effective job of explaining the technology and the parties' positions at trial than they had done in their briefing, they would be wasting their own, the court's and the jury's time. Counsel should follow the example of the national news magazines and imagine that they are presenting their cases to seventh graders (and not seventh graders who have grown up on technology).

Counsel predicted that the case would take 6 days to try. They understand that trial days will begin at 9:00 and will run until 5:30, with at least an hour for lunch, a short break in the morning and another in the afternoon.

The trial will not be bifurcated. Plaintiff will go first on its claims of infringement and damages. Defendant will then proceed with its defenses to the infringement claims, its invalidity claims of anticipation and obviousness and damages. Plaintiff will then have an opportunity to defend the invalidity claims and rebut any infringement defenses. Defendant will have an opportunity for rebuttal on the invalidity claims.

Counsel agreed that with the exception of experts, all witnesses would be sequestered. Counsel are either familiar with the court's visual presentation system or will make arrangements with the clerk for some instruction on the system.

No later than noon on Tuesday, May 20, plaintiff's counsel will advise defendant's counsel of the witnesses plaintiff will be calling on the first day of trial and the order in which they will be called. Counsel should give similar advice at the end of each trial day; defendant's counsel shall have the same responsibility in advance of defendant's case. Also, no later than noon on May 20, counsel shall meet to agree on any exhibits that either side wishes to use in opening statements. Any disputes over the use of exhibits are to be raised with the court before the start of opening statements.

Counsel are working together to decide which demonstrative exhibits they will use in

their openings. If they are unable to resolve the issues in full, they will raise them to the court before jury selection. They are also working on deposition designations. Objections to the designations will be taken up during a break in trial or at the end of the day on Wednesday.

Counsel are to provide the court with copies of documentary evidence before the start of the first day of trial.

Counsel should use the microphones at all times and address the bench with all objections. If counsel need to consult with one another, they should ask for permission to do so. Only the lawyer questioning a particular witness may raise objections to questions put to the witness by the opposing party and argue the objection at any bench conference.

Counsel agreed to the voir dire questions in the form distributed to them at the conference. The jury will consist of eight jurors to be selected from a qualified panel of fourteen. Counsel agreed that the magistrate judge could preside over jury selection. Each side will exercise three peremptory challenges against the panel. Before counsel give their opening statements, the court will give the jury the introductory instructions on the way in which the trial will proceed and their responsibilities during the trial and will also show the patent video prepared by the Federal Judicial Center.

Counsel discussed the form of the verdict and the instructions on liability. Final decisions on the instructions and form of verdict will be made at the instruction conference.

The following rulings were made on the parties' motions in limine.

1. Plaintiff's motion to exclude the testimony of Barbara Frederiksen is GRANTED. At the time defendant submitted Frederiksen's expert report, it included only her curriculum vitae as putative evidence of her expert qualifications. Nothing in this document supported defendant's contention that Frederiksen was qualified as an expert in the field of designing switches or routers or that she was knowledgeable about the systems at issue. Her description of her previous work experience did not identify any specific work with queuing, switches, traffic shaping, routers or quality of service; her list of presentations did not include any on computer traffic systems but focused on her forensic computer work. Oddly enough, Fredericksen would not qualify as a person of ordinary skill in the relevant art under her own proposed definition of such a person.

An expert's report is supposed to be complete so that the opposing party does not have to depose her to avoid surprises at trial. Salgado v. General Motors Corp., 150 F.3d 735, 742 (7th Cir. 1998). Fredericksen's did not meet this requirement and defendant did nothing to try to correct the problem until plaintiff moved to preclude Fredericksen from testifying at trial. On May 13, two days before the final pretrial conference and eight days before the start of trial, defendant filed Fredericksen's declaration, in which she spoke of work she had done for Nike and another company on their computer systems in the mid-nineties. This declaration is weak on specifics but even if it were not, it was filed far too late

to correct the problems in the earlier curriculum vitae.

Moreover, even if I were to find that defendant had given plaintiff adequate notice of Fredericksen's credentials, I would not allow her to testify on obviousness. Her report on that subject is nothing more than testimony by ipse dixit. She has taken chunks of prior patents and set them alongside provisions of the patents in issue without explaining why the information in the previous patents makes the patent in issue obvious. No lay juror could infer anything from her testimony, much less that plaintiff's patents are obvious.

2. Plaintiff's motion to prohibit defendant from asserting invalidity defenses under 35 U.S.C. § 101 and 112 was GRANTED as unopposed.

3. Plaintiff's motion to exclude the book, *TCP/IP Over ATM* and Lightstream 1010 Switch as prior art was GRANTED as unopposed with respect to the book and GRANTED with respect to the switch (unless defendant wants to use the reference manual as prior art and not the switch itself). Defendant is not to make any reference to the manuals until and unless it can persuade the court outside the jury's presence that the manuals would not be hearsay.

4. Plaintiff's motion to exclude references to other litigation was GRANTED.

5. Plaintiff's motion to exclude reference to defendant's patents was GRANTED, with the exception that defendant may discuss them briefly in general background.

6. Defendant's motion to exclude Nathaniel Davis's opinions relating to infringement

by Matrix X router was DENIED. Although defendant's witness testified that the router does not perform weighted fair queuing or traffic shaping, defendant's documents show that it is capable of doing so. The facts are disputed and must be developed at trial.

7. Defendant's motions to exclude Davis's second and third supplemental expert reports are GRANTED because the reports were untimely. Although plaintiff made a good showing that the lateness was occasioned by defendant's late production of discovery, plaintiff did not avail itself of the court's assistance in either requiring faster compliance with plaintiff's discovery requests or in obtaining an agreement from defendant to allow a late filing of the Davis's supplemental reports.

8. Defendant's motion to exclude documents relating to non-accused devices is GRANTED, with an exception. If defendant discusses the desirability or lack of desirability of Quality of Service in general, it may open the door to allowing plaintiff to put in evidence defendant's sales documents touting Quality of Service features as useful.

Plaintiff's motion to sanction defendant for its alleged efforts to impede plaintiff from eliciting relevant evidence is a matter it may take up with the magistrate judge. I declined to decide it at the final pretrial conference.

As to plaintiff's motion for a determination of the sufficiency of defendant's objections to plaintiff's request for admissions, I am not willing to decide each contested request. For the good of their respective cases, counsel would be well advised to work

cooperatively to narrow the matters that require proof at trial.

Entered this 16th day of May, 2008.

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