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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Defendant Enterasys Networks, Inc. has filed a motion to strike a supplemental expert report filed by plaintiff Extreme Networks, Inc. on the ground that the report is untimely and prejudicial. Dkt. #546. I am granting the motion.

Trial is scheduled for October 31, 2011 on defendant's counterclaim that plaintiff is infringing U.S. Patent No. 5,195,181, which discloses a system on a computer for streamlining the transmitting and receiving of messages between processors. Defendant initially filed its motion to strike on July 26, 2011 and plaintiff filed a response to it on August 2, but the next day, the parties asked the court not to rule on the motion because they had settled the case. Dkt. #555. After the settlement fell apart, I asked the parties to inform the court whether they wanted the motion resolved. Dkt. #563. Only defendant

responded to that order, stating that it is "imperative" that the court decide its motion to strike. Dkt. #565. In addition, defendant filed a motion for leave to file reply brief, dkt. #565, which I granted. Dkt. #568. Because plaintiff has not responded, I will assume that it agrees with defendant that the motion should be decided.

At issue is a supplemental report submitted by plaintiff's expert Nathaniel Davis regarding invalidity in which he discusses a prior art reference that he says he discovered after he submitted his report on June 2, 2011. Dkt. #548-2. Plaintiff does not argue that the supplemental report is permitted by the court's scheduling orders and it does not deny that the report includes new opinions. That should end the matter.

Plaintiff advances three arguments to save the supplemental report, but none are persuasive. First, plaintiff says that the reference was "not readily available," but it does not suggest that its failure to discover the reference earlier is defendant's fault. In any event, plaintiff does not identify any particular reason why it could not have found the reference in time to include in its main report. "We had to look hard" is not an adequate justification for advancing an untimely new opinion.

Second, plaintiff says that defendant will not be prejudiced by the new opinion, but it is difficult to see how this could be so. If I allow plaintiff to rely on the new opinion at trial, defendant will have to devote resources to rebutting that opinion when it otherwise could be preparing for other aspects of trial. Defendant's ability to prepare for trial should not be hampered in order to accommodate plaintiff's untimely supplemental opinion.

Finally, plaintiff says that defendant "has served numerous supplemental expert disclosures." However, "they did it too" is not a viable argument. If plaintiff believes that any of defendant's filings violate the Federal Rules or this court's orders, it is free to file its own motion to strike.

ORDER

IT IS ORDERED that defendant Enterasys Networks, Inc.'s motion to strike the supplemental expert report of Nathaniel Davis, dkt. #546, is GRANTED.

Entered this 7th day of September, 2011.

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