

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

EXTREME NETWORKS, INC.

Plaintiff,

FINAL PRETRIAL CONFERENCE
ORDER

07-cv-229-bbc

v.

ENTERASYS NETWORKS, INC.,

Defendant.

A final pretrial conference was held in this case on October 16, 2011, before United States District Judge Barbara B. Crabb. Plaintiff appeared by David Dallaks, Margaret Duncan, James Larson and James Peterson. Defendants appeared by Marla Butler, Lester Pines, William Rocha and Christopher Sullivan.

Counsel predicted that the case would take 5 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.

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. Each side will exercise three peremptory challenges against the panel. Before counsel give their opening statements, the court will give the jury introductory instructions on the way in which the trial will proceed and their responsibilities as jurors. In addition, the court will play the patent video produced by the Federal Judicial Center.

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 instruction on the system.

No later than noon on the Friday before trial, defendant's counsel will advise plaintiff's counsel of the witnesses defendant will be calling on Monday and the order in which they will be called. Counsel should give similar advice at the end of each trial day; plaintiff's counsel shall have the same responsibility in advance of its case. Also, no later than noon on the Friday before trial, 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 should keep in mind that opening statements are just that. Arguments are to be reserved for the end of the 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 are to provide copies of documentary evidence to the court before the start of the first day of trial. They should prepare jury notebooks for the jury, with a copy of the patent in issue, curriculum vitae and pictures of the expert witnesses and a stipulated glossary of technical terms that will be used at trial. After I read the introductory instructions to the jurors, I will give each of them a copy to add to their notebooks.

Counsel know that matters that have been kept under seal during the pendency of this case, including exhibits, will be disclosed to the public to the extent they are the subject of testimony. The jury will see all of the exhibits that are received in evidence but the exhibits themselves will not be part of this court's record; counsel are responsible for their own exhibits.

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 at the end of the liability phase of trial.

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

A. Extreme's Motions

1. Motion to exclude evidence of contributory infringement, inducement and willfulness - dkt. #580

This motion is GRANTED as unopposed with respect to contributory infringement and inducement and GRANTED as to willfulness. At the final pretrial conference, Enterasys limited its argument on willfulness to the period after the case had been remanded from the court of appeals. I am persuaded that as a matter of law, Enterasys cannot show by clear and convincing evidence that when Extreme continued to sell its products after the court of appeals' opinion in this case, it was acting in the face of an objectively high likelihood that its actions constituted infringement of a valid patent. This court had found in favor of Extreme on this issue and, although the court of appeals reversed a critical finding, it did not foreclose the possibility that Extreme might still prevail. Enterasys never alleged pre-filing willfulness.

2. Motion to exclude evidence of conception or reduction to practice of the '181 patent before filing date and to preclude any witness from testifying about meaning of patent - dkt.#581

GRANTED as unopposed with respect to date the patent was conceived or reduced to practice and GRANTED as to testimony by experts on claim construction. If parties believe that any terms need construction, they should try to stipulate to meaning; otherwise, they may ask the court to resolve their dispute.

3. Motion to exclude evidence of embodiment of '181 patent - dkt. #582

Plaintiff has WITHDRAWN this motion.

4. Motion to exclude evidence of damages sustained before May 30, 2007 -
dkt. # 583

This motion is DENIED, subject to renewal if the evidence establishes that Enterasys did not give actual notice prior to filing suit or constructive notice by marking its products and license.

5. Motion to exclude evidence of infringement regarding certain products - #584

This motion is GRANTED as unopposed as to Summit 300-48 and GRANTED as to the other Summit products (200-24Fx; 200-24; 300-24; X250e-24t; X259e-240; X450a-24t, X450a-24tDC, X450a-24x; X450a-24xDC and X45e-24p) because Enterasys did not give Extreme sufficient notice that it would be asserting infringement by these models.

6. Motion to exclude evidence or argument on doctrine of equivalents - dkt. #585

This motion is GRANTED as unopposed.

7. Motion to exclude evidence or argument in support of a permanent
injunction - dkt. #586

This motion is GRANTED as unopposed.

8. Motion to exclude evidence or argument on secondary conditions of non-
obviousness - dkt. #587

This motion is GRANTED as unopposed.

9. Motion to limit testimony of Kevin Jeffay - dkt. #590

This motion is GRANTED with respect to the opinions on infringement that Jeffay gave *after* his December 2007 report; it is GRANTED as unopposed with respect to testimony by Jeffay regarding opinions on damages in the March 2008 declaration. Unless Enterasys objects, Extreme's damages expert (McFarlane) will be allowed to rely on Jeffay's opinions.

10. Motion to exclude evidence any reference to Dr. George Kesidis - dkt. #591

This motion is DENIED; Enterasys may use Kesidis's report to impeach the opinions of Extreme's new expert, Nathaniel Davis.

B. Enterasys's Motions

1. Motion to exclude testimony of Nathaniel Davis - dkt. #588

This motion is DENIED insofar as the motion is directed to limit Davis to Kesidis's opinions because no limitation of that sort was imposed on the persons preparing the updated reports. Davis may testify about obviousness, but he may not testify beyond what he disclosed in his report. Enterasys may cross-examine him about the allegedly conclusory nature of his opinion. The motion is GRANTED as it relates to claim construction, which Davis may not revisit, and as to prior art other than the Ichekawa patent and other prior art included in Kesidis's report. Finally, Davis is not bound by Kesidis's definition of a person of ordinary skill in the art.

2. Motion to exclude evidence of prior art not properly disclosed in expert reports - dkt. #592

This motion is GRANTED with the exception of the Ichikawa article.

3. Motion to preclude Extreme from claiming that digest must be separate and distinct from the message - dkt. #602

This motion is GRANTED tentatively; the parties may submit simultaneous briefs on the issue no later than 4:00 pm on October 27, 2011. However, my present inclination is to prohibit any discussion of the separateness of the digest and the message.

4. Motion to exclude evidence or argument relating to plaintiff's patents - dkt. #596

This motion is GRANTED. Neither side should introduce evidence on any patent other than the '181 patent unless the other patent is prior art. However, the parties may put in evidence of the fact that they both have a number of patents, without identifying any of them.

5. Motion to exclude evidence or argument regarding other litigation - dkt. #600

This motion is GRANTED as unopposed.

6. Motion to preclude Extreme from asserting a defense under 28 U.S.C. § 1498 - dkt. #606

This motion is GRANTED because Extreme has no evidence showing that it met the criteria for sales to federal government) and Enterasys would be unfairly prejudiced if this

defense is allowed.

7. Motion to exclude non-expert evidence that certain patent claim elements existed in prior art - dkt. #646

This motion is GRANTED. This is a subject for expert testimony.

Entered this 24th day of October, 2011.

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