

EXHIBIT P



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December 20, 2007

VIA EMAIL

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Re: ESN LLC v. Cisco Systems, Inc. and Cisco-Linksys LLC

Dear Vicki,

Thank you for your letter of December 19, 2007. We remain puzzled by Cisco's approach to what its lead litigator promised the court would be "earnest" settlement discussions. You have refused to discuss Cisco's potential damages exposure or even reveal Cisco's gross sales revenues for the accused products. You have refused to explain what differences you have with our claim charts, which demonstrate infringement of exemplary claims by Cisco. You have refused to provide a single piece of paper disclosing Cisco's alleged prior art defense, which we understand to be based upon an alleged prior invention under 35 U.S.C. § 102(g).

Instead, you demand that we fly people all over the country for the limited purpose of hearing Cisco "arguments regarding the invalidity of the '519 patent." As you know, however, "arguments" don't qualify as a category of prior art under 35 U.S.C. §§ 102-103. Cisco will be required to prove its alleged 102(g) prior art defense by clear and convincing *evidence*, not argument. Indeed, evidence of a § 102(g) defense is subject to the highest level of scrutiny by the courts.¹ As eloquent as your arguments may be, the

¹ See, e.g., *Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed-Wire Co.*, 143 U.S. 275, 284-285 (1892):

The very fact, which courts as well as the public have not failed to recognize, that almost every important patent, from the cotton gin of Whitney to the one under consideration, has been attacked by the testimony of witnesses who imagined they had made similar discoveries long before the patentee had claimed to have invented his device, has tended



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only reasonable and efficient way to evaluate Cisco's alleged defense would be for us to see your *evidence* of the alleged prior art. A teleconference or meeting, including argument, could then follow after ESN has had a chance to evaluate the evidence.

Your statement that ESN is somehow in bad faith is obviously contrary to the record. As you likely know, my co-counsel, Eric M. Albritton, had several discussions with Sam Baxter of McKool Smith about the proposed meeting. Mr. Albritton requested Mr. Baxter to forward the allegedly invalidating prior art or to otherwise describe it. To date, neither Mr. Albritton nor I have received such information. During my conversation with you two weeks ago and again in my letter to you of December 13, we reiterated this request. You have refused to do so without explanation.

We will ask one more time: **please send to us any written, or otherwise tangible, evidence of Cisco's alleged prior art defense.** If you would like to provide argument with the evidence, please provide that in a cover letter. If there is a good reason why some portion, or all of the evidence, cannot be sent to us, please explain why that is so. If there is no evidence to send, just say so.

At present, we must assume that you have refused to provide written or other tangible (e.g., drawings, photographs, video, etc.) evidence of the alleged § 102(g) defense, because there is none to provide. The mere fact of the lack of such evidence of an alleged § 102(g) defense strongly indicates that Cisco will not be able to meet its evidentiary burden. Uncorroborated oral testimony is no better than naked argument.²

As a final matter, your statements that ESN requested "detailed and difficult-to-collect revenue data" and "refused to compromise and unilaterally cancelled the parties'

to throw a certain amount of discredit upon all that class of evidence, and to demand that it be subjected to the closest scrutiny. Indeed, the frequency with which testimony is tortured, or fabricated outright, to build up the defense of a prior use of the thing patented, goes far to justify the popular impression that the inventor may be treated as the lawful prey of the infringer.

² See, e.g., *id.*:

In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, their proneness to recollect things as the party calling them would have them recollect them, aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory, and beyond a reasonable doubt.




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settlement meeting" cannot be genuine. The limited revenue information we requested is certainly tracked by Cisco and reported internally by quarter. Your statement indicates that you could not possibly have attempted to get the information from your client. We have offered compromise on many levels, including the offer in my previous letter, which "invite[d] you to disclose any defenses in writing, by phone or videoconference" and stated that "if Cisco will disclose [the requested limited revenue] information, we would be happy to reschedule an in-person meeting to discuss possible settlement of this matter."

We are comfortable that the current record shows our good faith and Cisco's lack thereof. Cisco's actions since the filing of ESN's complaint are just further evidence of Cisco's reckless disregard for ESN's patent rights and willful infringement.

Very truly yours,



Peter J. McAndrews

cc: George P. McAndrews
Eric M. Albritton