Exhibit E

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EMAIL & U.S. MAIL

Sayuri Sharper
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RE: ESN, LLC v. Cisco Systems, Inc., and Cisco-Linksys, LLC, Civil Action No. 5:08-cv-20

Dear Sayuri:

I am writing in response to your letter of August 14, 2008 regarding ESN, LLC's answer to Cisco's Interrogatory No. 7. We do not believe ESN's objections are improper. To the contrary, it is Cisco's interrogatory that is improper in light of Cisco's failure to specifically identify its invalidity position with respect to 35 U.S.C. § 112 ¶ 1. (We will address the deficiencies in Cisco's P.R. 3-3 and 3-4 disclosures in a separate letter tomorrow.)

Cisco's Interrogatory No. 7 seems to be seeking information relating to the written description and enablement requirements of § 112. However, in Cisco's P.R. 3-3 disclosures, Cisco failed to identify any basis for its claims that the provisional application and/or the non-provisional application failed to satisfy the enablement and/or written description requirements of 35 U.S.C. § 112 ¶ 1 as required by P.R. 3-3(d). Rather, Cisco made conclusory statements and merely quoted the language of the statute without any factual basis for its contentions. Since Cisco's P.R. 3-3 disclosures fail to sufficiently disclose any written description or enablement defenses, the information sought by Interrogatory No. 7 is not relevant to any claim or defense in this case.

Under 35 U.S.C. § 282 a patent is presumed valid. The burden is on the defendant to prove by clear and convincing evidence that the patent is invalid for lack of enablement or indefiniteness. *Morton International, Inc. v. Cardinal Chemical Co.*, 5 F.3d 1464, 1469-70 (Fed. Cir. 1993) ("At trial, Cardinal had the burden of proving by clear and convincing evidence facts establishing lack of enablement of the '881 and '845 patents.")

Additionally, 35 U.S.C. § 119(e)(1) states in relevant part:

> An application for patent... for an invention disclosed in the manner provided by the first paragraph of section 112 of this title in a provisional application..., by an inventor or inventors named in the provisional application, **shall have the same effect, as to such invention, as though filed on the date of the provisional application**... if the application for patent... is filed not later than 12 months after the date on which the provisional application was filed and if it contains or is amended to contain a specific reference to the provisional application.

(emphasis added). *See also E.I. DuPont De Nemours and Co. v. MacDermid Printing Solutions, LLC*, 525 F.3d 1353, 1358 (Fed. Cir. 2008) (The Federal Circuit reversed the district court and held that the non-provisional application was entitled to the filing date of the provisional application as a matter of law.) *Cf. Broadcast Innovation, LLC, et al. v. Charter Communications, Inc., et al.*, 420 F.3d 1364, 1368 (Fed. Cir. 2005) (The Federal Circuit held that the patent holder was entitled to the benefit of the filing date plaintiff's PCT application for claiming priority under 35 U.S.C. § 120.)

Contrary to the assertion in your letter, ESN does not need to provide Cisco with the basis to support its claim that the provisional application meets 35 U.S.C. § 112 ¶ 1 because the '519 Patent is presumptively valid and enforceable and, since the patent applicant complied with § 119(e)(1), the patent is entitled to the filing date of the provisional application for purposes of priority. 35 U.S.C. § 282; 35 U.S.C. § 119(e)(1); *DuPont Demours,* 525 F.3d at 1358. Cisco bears the burden of proving invalidity by clear and convincing evidence, including any claim that the '519 Patent is not entitled to the filing date of the provisional application for purposes of priority. *Gamma-Metrics, Inc. v. Scantech Ltd.*, 1998 U.S. Dist. LEXIS 22188, *5 (S. Dist. Cal. Dec. 10, 1998) citing *Innovative Scuba Concepts v. Feder Industries*, 26 F.3d 1112, 1115 (Fed. Cir. 1994):

> Under 35 U.S.C. § 282, a patent is presumed valid and one challenging its validity bears the burden of proving invalidity by clear and convincing evidence. While a patentee may have the burden of going forward with rebuttal evidence once a challenger has presented a *prima facie* case of invalidity, the presumption remains intact and the ultimate burden of proving invalidity remains with the challenger throughout the litigation.

Id. In *Scuba*, the Federal Circuit held that the district court committed legal error in shifting the ultimate burden of proof to the plaintiff to prove that the plaintiff was entitled to an earlier date of invention. *Id.*

Based upon the relevant cases and statutes, ESN is entitled to a presumption that the provisional application satisfied the requirements of 35 U.S.C. § 112. Therefore, ESN is entitled to claim the filing date of the provisional application for purposes of priority. ESN is not obligated to provide Cisco with ESN's basis for claiming the priority date of the provisional application unless and until Cisco presents facts that establish a *prima facie* case that ESN is not entitled to that priority date.

Finally, ESN disagrees with your claim that Interrogatory No. 7 is not prematurely seeking ESN's claim construction. Interrogatory No. 7 is clearly seeking ESN's identification of the intrinsic evidence relating to the proper construction "for each element of each claim in the '519 Patent."

Very truly yours,

Gerald C. Willis

c: T. John Ward
Eric M. Albritton
Vicki Maroulis