

Exhibit E



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May 15, 2008

VIA EMAIL and U.S. MAIL

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

Dear Vicki,

This responds to your letter of May 8, 2008 addressing ESN's P.R. 3-1 Disclosure of Asserted Claims and Infringement Contentions. We disagree with your allegation that ESN's P.R. 3-1 Disclosures are deficient.

As an initial matter, we note that ESN provided preliminary infringement contentions to Cisco almost a year ago and, at that time, ESN asked Cisco to point out any deficiencies in ESN's analysis. Since that time Cisco has purposefully avoided any substantive dialogue regarding ESN's infringement contentions. Before your current letter, Cisco had never alleged that it did not understand ESN's contentions, never alleged that it needed greater specificity and refused to disclose or discuss any pertinent details of the accused products. Indeed, to-date, Cisco has not even hinted at any theories of non-infringement. The case law you cite that discusses "gamesmanship" is most pertinent to Cisco's actions.

Your letter of May 8, 2008 continues Cisco's theme of avoiding meaningful dialogue regarding the parties' respective contentions on the issue of infringement. Your letter, while including vague accusations and citing to inapplicable law/dicta (addressed below), does not give any hint as to what specific infringement contentions Cisco does not understand. Cisco obviously has greater knowledge of its own products than ESN, so this should not be a burdensome task. P.R. 3-1 Disclosures are intended to provide fair notice to the defendant of the plaintiff's infringement contentions and do not require the



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plaintiff to provide all possible supporting evidence, including evidence exclusively in the possession of the defendant. We believe Cisco is very much on notice of what features and functions of the accused products are implicated.

The case law in the Eastern District of Texas addressing P.R. 3-1 Disclosures suggests that ESN's disclosures are more than sufficient, given the early stage of discovery and the technology involved. The cases recognize that where the accused features and functions are found in the details of the defendant's confidential software (as is the case with Cisco's accused products) highly detailed P.R. 3-1 Disclosures cannot be expected without the benefit of discovery.

Your letter cites *STMicroelectronics, Inc. v. Motorola, Inc.*, 308 F. Supp. 2d 754 (E.D. Tex. 2005) for the proposition that ESN's P.R. 3-1 Disclosures lack the requisite specificity. The holding of *STMicroelectronics* does not support your allegation. The case actually holds that the patent owner, Motorola, met the P.R. 3-1 disclosure standard, particularly in light of the early stage of those proceedings. *Id.* at 756. *STMicroelectronics* had alleged that Motorola's contentions were inadequate because they "(1) do not show how each of the elements of Motorola's claims compare to specific [STM] products and (2) do not identify specifically by name either the allegedly infringing processes or the products made by these processes." *Id.* at 755. In denying *STMicroelectronics'* motion, the Court held:

Based on the information available to the Court at this early stage of the proceedings, it appears that Motorola has met the Patent Rule 3-1 disclosure standard. Additionally, the Court is unwilling to pre-try the case at this procedural stage by conducting a highly detailed and rigorous analysis of the preliminary claim infringement contentions. The Court would see discovery progress in this case. If, after reasonable discovery, Motorola's contentions are legally deficient, the Court will entertain the appropriate motions for supplementation or dismissal.

Id. at 756 (emphasis added). The Court's holding relied on the logical notion that preliminary infringement contentions "are not meant to provide a forum for litigation of the substantive issues; they are merely designed to streamline the discovery process." *Id.* at 755 (quoting *Network Caching Technology, LLC v. Novell, Inc.*, 2003 U.S. Dist. LEXIS 9881, 2003 WL 21699799, *4-5 (N.D. Cal. 2003)).

The other case you cite, *Connectel, LLC v. Cisco Sys.*, 391 F. Supp. 2d 526 (E.D. Tex. 2005), consistent with *STMicroelectronics*, merely stands for the proposition that the P.R.

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3-1 Disclosures should streamline the discovery process, particularly when the plaintiff alleges that over 100 Cisco products infringe the 120 claims contained in the four patents-at-issue. *Connectel, LLC v. Cisco Sys.*, 391 F. Supp. 2d 526 (E.D. Tex. 2005). The Court's concern was that "when parties accuse hundreds of products of infringing hundreds of claims, and only narrow those accusations after discovery, the case staggers for months without clear direction." *Id.* This concern is not applicable to the present case since there are only nine products and 16 claims of one patent at issue.

The more relevant cases in the Eastern District addressing P.R. 3-1 recognize that, where features and functions of software are involved, detailed infringement contentions are generally not expected at the early stages of litigation.

In non-software patent cases, plaintiffs are usually able to purchase defendants' products and ascertain the mechanics of how those products infringe before plaintiffs bring suit. But, there are times when plaintiffs' preparation is restricted by defendants' sole possession of the information plaintiffs need. Software cases present unique challenges for the parties and the courts because, prior to discovery, plaintiffs usually only have access to the manifestation of the defendants' allegedly infringing source code and not the code itself. From this manifestation, plaintiffs must somehow divine whether the defendants' code infringes. Although defendants vigorously and rightly guard their source code, until plaintiffs have access to it, plaintiffs are typically unable to give highly specified infringement contentions. To the extent defendants are given vague infringement contentions, they are hampered in their ability to prepare their defense. In these situations, through Rules 3-6 and 3-7, the Patent Rules recognize the preliminary nature of plaintiff's preliminary contentions accommodate plaintiffs' need to supplement their initial contentions.

Am. Video Graphics, L.P. v. Elec. Arts, Inc., 359 F. Supp. 2d 558, 560-561 (E.D. Tex. 2005) (emphasis added). The Court found that the plaintiff had "complied with Rule 3-1(c) to the best of its current ability" (*id.* at 561) despite the fact that the plaintiff's infringement contentions largely repeated the language of the claims (see *id.* at 559).

The details of Cisco's infringement are largely found in the operation of its software (e.g., Unified Communications Manager Express, etc.) and, presumptively, you will not take the position that the source code for the accused products is in the public domain. Thus, to the extent ESN's current P.R. 3-1 Disclosures fail to identify all specific details of the relevant software, consistent with Eastern District practice, ESN will supplement after it



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has had a fair opportunity to inspect and analyze Cisco's source code. See *id.* at 561 ("Once AVG has access to the code, it will be able to supplement its 3-1(c) disclosures and better inform Defendants as to its infringement contentions.").

For each of the stated reasons, Cisco's complaints are without merit and ESN's preliminary infringement contentions comply with P.R. 3-1. Nevertheless, if you can articulate specific alleged deficiencies regarding specific claim elements for which you believe ESN should be able to provide more detailed contentions from public domain information, we will gladly reconsider an early supplementation.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Peter J. McAndrews', with a long horizontal flourish extending to the right.

Peter J. McAndrews

cc: George P. McAndrews
Eric M. Albritton
T. John Ward