EXHIBIT C

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

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ALCATEL USA RESOURCES, INC., a Delaware corporation, and ALCATEL INTERNETWORKING, INC., A California corporation,	:	CIVIL ACTION
Plaintiffs	:	
vs.	:	
FOUNDRY NETWORKS, INC., A Delaware corporation	:	
Defendant	:	NO. 05-418 (SLR)

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Wilmington, Delaware
Tuedsay, August 8, 2006
5:07 o'clock, p.m.

- - -

BEFORE: HONORABLE SUE L. ROBINSON, Chief Judge

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APPEARANCES:

YOUNG, CONAWAY, STARGATT & TAYLOR, LLP
BY: JOSY W. INGERSOLL, ESQ.

-and-

Valerie J. Gunning
Official Court Reporter

APPEARANCES (Continued):

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P R O C E E D I N G S

(Proceedings commenced in the courtroom, beginning at 5:07 p.m.)

THE COURT: Good afternoon, counsel.

I don't know how best to do this. I was thinking we should all just be sitting around a table, but empty tables are hard to come by in my chambers these days, so what we're trying to do is compare the claim charts provided by plaintiff with the products to see whether discovery has been appropriately brought to closure. Is that correct?

MS. INGERSOLL: That's correct, your Honor.

THE COURT: Okay. And just because of the madness of this particular trial, it's a shame we didn't get together sooner and use the parties' Elmo because it's too complicated to set up our old Elmo with all this that's going on.

MS. INGERSOLL: Since we couldn't figure out what to do about the Elmo, we just prepared little notebooks which will work just as well. If you don't want to keep them, you can give them back, but at least you'll have our interrogatories and claim charts.

THE COURT: All right. Well, why don't we get

started, then.

MS. INGERSOLL: Okay.

THE COURT: And see if we can't get through this fairly expeditiously.

MR. GREENSPOON: Good afternoon, your Honor. This is Robert Greenspoon, for the Alcatel parties. I will approach to hand up a notebook.

THE COURT: Thank you.

MR. GREENSPOON: Thank you (handing notebook to the Court).

Well, the notebook sets forth just a number of demonstrations, and I think I will be pointing to about one or two pages out of each one of the ten tabs, and so it may look like it's an inch thick, but it's going to be very quick and easy to go through.

THE COURT: It does look like an inch thick.

MR. GREENSPOON: Right. Well, this is a discovery dispute where we, the Alcatel parties as the plaintiff, have defined what we believe are the feature sets that impact, implicate, each of the patents in suit. And right now in Phase 1, there are four Phase 1 patents.

And the purpose of the notebook here is to demonstrate to your Honor the effort that we as the plaintiff have undertaken to provide to Foundry Networks our basis for

concluding that a whole raft of model numbers contain the feature sets that cause them to infringe the various ones of the patents.

So what I would like to do is first point out to you in the first tab our supplemental interrogatory answer, which, based on our current information, is the best repository, if you will, of all of the model numbers for which we have a basis to believe infringes these various patents.

And starting on Page 2, your Honor will find a, really, a 15-page, single-spaced table which contains these different columns. We identify the model number. We identify the patent. We identify the production number, the first page of a Foundry document which we are relying on, at least at this stage, for a basis to conclude infringement, and then the document title, and then, of course, the date of the revision of the document.

This was an interrogatory supplement that we provided to Foundry Networks in June of this year, so approximately two, two and a half months ago.

And this was responsive to their request, if you look on the top of Page 2, that we identify all Foundry products that we believe -- or that we believe contend infringe the patents in suit, including which specific claims are infringed by each Foundry product identified.

So what we do in this supplemental response is we are not pretending that this is an infringement, claim, comparison claim chart, but this is more the identification of the product answer. The actual claim comparison claim chart, where we take the patent claims on one side of the chart and we compare it to the features and the product on the other side, those had already been prepared by the time we served this interrogatory, this answer.

And, by the way, the supplemental answer, I have to tell you, if your Honor will take the liberty of paging through it, it's a lengthy table and, in fact, we have an in-house consulting expert that assisted us with this. Our consulting expert is a Ph.D. He has 30 years of experience in the telecommunications field. He spent three weeks doing nothing but helping us fill in this chart so that we could communicate to Foundry Networks the basis.

THE COURT: Do you mind -- I've been in court since 8:30 and my back is killing me. Do you mind if I just stand?

MR. GREENSPOON: I have that privilege, so, of course, your Honor, as well.

THE COURT: Thank you.

MR. GREENSPOON: The second tab in the book actually contains the infringement claim charts that we were incorporating by reference in the first tab, and I've marked

with a little blue tab where those start.

Again, these are the claim comparison claim charts, where we take direct quotes from Foundry Networks documents, and we show these quotes in the documents, and sometimes we give our little commentary there, indicate practice of the claim element indicated on the left side. I'm sure your Honor has seen a million claim charts like these.

And, again, these claim charts take up the rest of the entire document.

And our intention here, when one reads Tab 1 and reads Tab 2 in conjunction, is we're attempting to show our current infringement contentions on a claim-by-claim basis with what part or what feature in the products caused the infringement and at the same time convey the breadth of the contentions by showing the basis we have to conclude that all of these model numbers contain the features identified in the claim charts.

Those are the efforts we undertook to communicate to Foundry Networks our basis for naming all those models.

The next tab starts my presentation on what we've asked for. What are those specific feature sets that we've identified?

THE COURT: But before you go on, I certainly understand identifying all the products. I guess I am not

sure how your claim chart relates feature sets to the claim, so maybe you can explain that to me.

MR. GREENSPOON: Right. I definitely will.

Let me start that explanation by pointing you to Tab 3.

THE COURT: Oh, okay. You're headed in that direction.

MR. GREENSPOON: Right.

THE COURT: All right.

MR. GREENSPOON: I've flagged for you Page 4 of that tab. This was a February 23rd document request that we served on Foundry Networks, and on Page 4, your Honor will see where we have defined the term, accused products. And we're not trying to be controversial here. We're using Foundry Networks' own verbiage for what features we've identified. And we're talking about, in Item A, port authentication, conforming to 802.1X standards.

Let me skip to Tab D because I think I will use that as an example. VLAN broadcasts, where one or more of the destination ports of the VLAN is part of a trump group.

I'm not asking for the Court to appreciate the complexities just yet, but we're identifying the features that we're pointing to which give us the basis for concluding infringement. In fact, these are the features that ended up

being treated at length in our claim charts themselves.

So what we did in that giant list that we prepared in Tab 1 is in each of those products, specifically cited product -- not product -- I'm sorry -- document numbers that you see in the third column of those tables, each one of those documents will contain sufficient information for us to conclude that, just to take Example D here, that that product contains VLANs, and that product contains VLANs in the context of what are known as trump groups. That's just an example of what we've done.

With the document in hand, once you see that a particular product model number contains VLANs and trump groups and that we've contended it infringes the '840 patent, then it's a simple matter to turn to our actual infringement claim chart to peruse the various theories and the deeper details of our infringement contentions.

So we asked for discovery, document discovery and interrogatory discovery on that range of feature sets.

Tab 4 is --

THE COURT: The feature sets being what?

MR. GREENSPOON: In Tab 3, those items demarcated A through E.

THE COURT: Oh, okay. These are the feature sets?

MR. GREENSPOON: That's right.

THE COURT: All right.

MR. GREENSPOON: That was long ago. That was in February. In fact, that was the very first day that document discovery was permitted to be served at least for the case in chief rather than the previous microdiscovery, if you will, on picking the four patents for Phase 1.

Tab 4 is an example of Foundry's response to this discovery. Tab 4 is a supplemental document response.

And what I've flagged for you is Page 5, which is their supplemental response to Request No. 1, and what you will see here is that they are referring to a number of exhibits, A through E, to demonstrate, I suppose, be transparent to Alcatel about what model numbers they are agreeing are fairly within the scope of discovery. And then the next blue tab within the same document is Exhibit A itself. You will see a handful of model numbers are presented there.

Exhibit B, the same and so on, through Exhibit E.

Well, when we received this, this was in the middle of June that we received this particular supplement, we thought we smelled a rat, but we weren't entirely sure, because the format of this objection was to say these are the items that we're voluntarily producing discovery on, rather voluntarily in response to your document requests.

It did not contain an absolute statement, and, by the way, anything beyond this list, we're not producing anything. In fact, by that point in time, whatever filters they had put on the discovery process to keep documents from Alcatel were incomplete filters. By this point in time, we actually had a number of documents that did relate to product model designations beyond that list.

So we were a little bit confused. We were under the impression they were giving us full discovery. At least we weren't sure why there seemed to be gaps, and then we get this objection.

Tab 5 is a letter that I sent to Mr. Poppe, counsel for Foundry, where I'm really just raising the issue about nine days after the service of those objections. And I'm telling Mr. Poppe I understand what your exhibits are, and it seems to us that, based on what they're supposed to represent, maybe you left off these model numbers.

So this could have been just an innocent mistake in drafting the exhibits. I wasn't really able to know.

And what I'm indicating in this Tab 5 are the specific model numbers where, if we remember what we did in Tab 1, the specific model numbers where we thought we had a basis to say, well, this model number is also an accused product under this patent, but that were omitted from the exhibits in the previous tab.

A month passed, and if your Honor turns to Tab 6, you will find Mr. Poppe's response, which is -- it's a two-page, single-spaced letter, and I believe Mr. Poppe is conceding some points, very few points, that perhaps we were right, that there are some items that should have been included, but, by and large, he's saying for the very first time, and I'm quoting from the middle of the second paragraph, Foundry is not required to produce documents related to products as to which Alcatel has failed to demonstrate that its infringement allegations are supported by an initial Rule 11 analysis.

This is July 20th. By July 24th, I believe, we filed our e-mail request for emergency relief.

If your Honor moves onto the next tab, this is just to close the loop on the efforts that we took.

Oh, and by did way, your Honor, we're about to begin deposition discovery, so right now we're waiting on a resolution to this dispute before we are able to actually take the depositions of the Foundry personnel that we need to before the mid-October discovery closed.

The next tab, actually, it's two tabs, 7 and 8, are responses to another interrogatory where we're trying to get discovery through a different angle.

We think we have enough to provide a basis for alleging infringement as we have, but it never hurts to try

to get the same information by asking for it in a slightly different way.

So what we did, if your Honor turns to Interrogatory No. 27, we were specifically asking Foundry to take our definition of accused products, where we're really just naming feature sets, really in Foundry's own words. We're not trying to put words in their mouth or trying to get them to admit infringement of claim elements or anything like that, and we're asking them to identify by model designation, et cetera, what are the model numbers that contain these feature sets.

If you see the response, it has been an objection on Tab 8. There is the June 15th letter that came with the objections. And there was a promise we will supplement soon, an acknowledgment that these are merely objections only, and that has been almost two months. We've received no such supplement.

So at this moment in time we're dealing with a situation where we've identified a number of documents that set forth the basis for our contentions.

We were just informed on July 20th that, even though we found some documents that filtered through, we now know that there has been actually a concerted effort to withhold entire categories of documents that are within the scope of the accused products.

The last tabs are -- Tab 9 is a group exhibit, really, of a collection of cases. I think I will just flip to the last blue tab that I made for your Honor. This is a 1990 District of Delaware decision, which says this was a patent case in which there's a very, very similar dispute where a defendant wanted to create his or her own definition of accused products. And the quote, the ruling in the case, is on the bottom of what's Page 6 on the printout, and for Foundry, it's about four cases in. It's the --

THE COURT: What is the case name?

MR. GREENSPOON: Rohm & Haas company.

Quote, Under the principles of notice pleading and liberal discovery, I regard plaintiff's interrogatories and document requests as germane and proper. Therefore, defendant cannot simply claim infringement and limit discovery according to its view of the case.

And I will note, your Honor, that that is a decision from yourself from 1990.

So the very last tab, which is Tab 10, is a far more detailed technical presentation that our consulting expert helped us put together. In the event your Honor wants to go into any more detail about why we find a common thread of feature sets across all these different model numbers, I can go through that right now. Okay. I can simply leave it with your Honor to peruse it.

THE COURT: All right. Thank you very much.

MR. GREENSPOON: Thank you.

THE COURT: Let's hear from counsel for Foundry.

Specifically, I'm a practical person. What is it that you find objectionable or confusing? And let's get to the bottom of this and get this resolved.

MR. POPPE: Your Honor, we have approached -- this is Matt Poppe, with Orrick.

We have approached this issue from the perspective that the Court indicated at the telephone hearing it was interested in, which is to look at the claim construction by the plaintiff and to use that as the basis for forming the parameters of what discovery should be in this case.

And there has not been formal claim construction yet in this case. Claim construction under the scheduling order will be starting around the close of discovery. However, what we have on a related subject is the interrogatory responses from Alcatel, where they present the asserted claims and the features in the Foundry products that they accuse of infringement. And those would be, I believe, behind Tab 2 of the binder that Mr. Greenspoon presented to you.

And I should note there are two patents that are the subject of the discovery dispute here. Those are the

'192 patent and the '840 patent.

The other two patents, as we understand it, are directed solely towards software features, and we've produced documents related to those software features regardless of what product they appear in.

So we're not aware that there's any discovery dispute related to those two patents, but for the '192 patent and the '840 patent, as we understand the contentions, those are directed, in large part, to hardware features of the Foundry products.

As we've explained on multiple occasions dating back to last October, Foundry has introduced many different products with many different hardware architectures that differ from each other in relevant and substantial ways. And we've submitted a letter yesterday, your Honor, that details the different architectures.

There are three architectures which, for each architecture, there's a group of products that share that particular architecture, which have been discussed in the past before your Honor. There's the Ironcore architecture, which was the second phase of products that Foundry introduced back in the 90's, the Jetcore architecture, which was the next generation, and the Terathon architecture.

Alcatel has presented its arguments as if those

three architectures apply to all of the accused Foundry products, but that is not the case.

There is an Access Iron series of products with its own architecture, an Edge Iron series of products with its own architecture. The Big Iron RX has a different architecture, and Fast Iron Edge Switch, Fast Iron Edge Switch X series, et cetera, et cetera. And I've provided a list of these.

And not only do they have a different hardware architecture, but we specified that they specifically lack hardware features that have been listed in these interrogatory responses as being features that Alcatel is relying on for their infringement claims.

So if I can refer your Honor to Tab 2 of Alcatel's binder, you go generally toward the back. There are a series of charts, one for each patent. Each chart is numbered separately, so I can't refer your Honor -- I can't refer your Honor to an overall page number, but there is a seven-page chart for the '192 patent, which is one of the two that we're concerned with, and specifically the first three pages of this chart relates to Claim 1 of the '192 patent.

And there's information where they identify the features. There are numerous, separate elements in this claim. It requires a buffer memory. It requires a data

block and outlet Selection Q Management Logic, a plurality of cues, a data block selection means, and then first, second and third means in addition to that.

And your Honor is familiar with means-plus-function claims. Those claims do not cover any products that accomplishes the stated function, but you have to refer to the specific structures identified in the specification of the packet -- of the patent that perform that function.

So in some instances -- well, first of all, all of the evidence referred to here in this claim chart relates solely to Jetcore and Ironcore. There's no information provided for any other architecture.

For some of these elements, there is no feature identified. So, for example, they appear to identify a buffer manager as the data block and outlet selection cue management logic. But that comprises a number of other structures for which they simply refer back to the buffer manager, without identifying the structure in the buffer manager that relates to that feature.

So we don't know whether other hardware architectures contain those features or not, because they have not been identified.

In addition, there is a particular feature in this. It is on Page 3 of the '192 chart, if your

Honor chooses to look at it at some point later, and it refers to a first means for identifying a specific said cue, et cetera, et cetera. And the corresponding feature that Alcatel identifies is a pair of memory devices, called a CAM, which is a content addressable memory, and a PRAM. I forget exactly what that stands for.

These memory devices are not in the other hardware architectures other than the Ironcore, Jetcore and Terathon, with one exception, which, in turn, does not have some of the other features identified as being infringing elements.

So we have produced documents in line with the specific features that they've identified as being infringing. We have not agreed to produce documents related to architecture that do not have these exhibits.

Mr. Greenspoon also referred you to Tab 3 of his binder, which is the document requests, and specifically to Page 4 of Tab 3, where Alcatel provided their definition of accused products for purposes of the document production. But their definition here is far, far broader than what they've actually defined as being accused features in their infringement charts.

For example, the portion of this that, presumably, relates to the '192 patent, which we've been discussing, is No. Or Subsection B on Page 4 of Tab 3, where

it says, Storage of packet contents within a buffer pool at a location corresponding to a buffer number, where the buffer number is assigned to the appropriate cue of the destination ports.

That's technical lingo, but the '192 patent specifically describes these features as comprising part of the prior art, and that it's another component of the claims that is the actually inventive feature. Specifically, and, again, it's one of the terms in the patent, but the patent describes the inventive feature as being the data block and outlet selection cue management logic and the features thereof.

So for them to identify two of the many elements of the claim, which are identified as being parts of the prior art, and saying we have to produce anything that contains those features, which, frankly, probably includes any switch product made by anybody anywhere given how broad these are defined, that's not how discovery is supposed to work.

THE COURT: Before you go any further, I feel like you all are talking apples and oranges and I don't understand either.

You have said, I think, Mr. Poppe, that the most appropriate way to identify products at issue in this case is by their architecture.

MR. POPPE: Correct.

THE COURT: Plaintiff's counsel, based on Tab 3, Page 4, has basically said, no, we disagree. We are looking for certain features regardless of architecture.

So it would appear as though -- and I guess it's my job at this point to decide which of you is the most reasonable when we're talking about four patents in a case presented to a jury. See, so that's my job, I guess, at this point.

I've at least identified the dispute?

MR. POPPE: Yes.

THE COURT: You are not identifying things the same way.

MR. POPPE: Yes. It's the level of specificity at which the hardware architecture has to be defined that describes the scope of appropriate discovery.

The level of specificity should be what's in the infringement charts. And the support for that is, first of all, a series of Rule 11 cases decided by the Federal Circuit in patent cases that talk about what information a plaintiff has to have for each accused product, and specifically I would refer your Honor to the case of Antionius versus Spalding and Evenflo Companies, which is 275 F.3d, 1066, and which is cited in the case, in the letter we provided.

THE COURT: I can find a Federal Circuit case that says just about anything. Truly, I'm not so interested in that. I gave up writing about discovery when I became a Magistrate Judge and came to this position.

Let's start over.

MR. POPPE: Sure.

THE COURT: Mr. Poppe, why don't you sit down. I am going to have a discussion with you both.

MR. POPPE: Okay.

THE COURT: Now, Mr. Greenspoon --

MR. GREENSPOON: Yes, Judge?

THE COURT: -- when you go through all the lists of your -- and you don't even have to stand up. I just want to do it this way.

When I'm looking at all the products that you listed in Tab 1, many of them are listed by these architectures. Some are not. I see Edge Iron, I see Big Iron. I see Fast Iron. I see -- I don't know -- some other things. There's another Iron in here, Net Iron.

Tell me why, when you are talking about actually trying a case, why is it that you don't believe using the primary architectures isn't an appropriate and the most reasonable way, not that you can't do it a bunch of different ways in discovery, I'm not saying you can't, but in terms of managing a great deal of information that you

are ultimately going to have to present to eight citizens, why is it that the architecture isn't the best way of doing it as opposed to what you have done, which is to come up with a couple of different features that may or may not be -- well, tell me why you've come up with features as opposed to architecture.

MR. GREENSPOON: In trying the case, we are called upon to provide the jury evidence of the architectures and the features, so we don't say that the architecture is the best or the features are the best. I think we're going to be called on at trial to meet our burden of proof by showing that they have, that the products have certain functions, and those functions are on top of certain structures.

We're not running away from that at all. Actually, at trial, what we hope to be able to do is prepare our expert witness to try representative products. Hopefully, we'll get some kind of stipulation by that point in time that. Let's say if the XYZ product infringes, then the ABC and the MKO also infringes.

So we intend to build a presentation for the jury that's as simple as possible.

The problem with the premise in my mind is that we're at the discovery stage, and what we've determined is that when you identify the feature set as present in the

products, we also have a basis for saying that the structure is there as well.

So I have an example, Edge Iron document, that I could show your Honor. I only have one copy of it at the time.

The Edge Iron document is cited in our Tab 1 chart. And the Edge Iron document shows for the '192 patent that this product has a buffer memory and that it operates with output cues. Those are actually structures, by the way, not just features.

So because we know that the Edge Iron product line has buffers and cues, and because we know that there is infringement by every other Foundry product that we've seen that has buffers and cues, we conclude there's a basis for saying that this one does, too. We want all the discovery that's relevant to allow us to prove our case to a jury.

The same document, different patent, the '840 patent. This particular document that I'm holding shows that this Edge Iron -- actually, it's a set of five different model numbers, contains VLANs and it contains trump groups. These are sort of a blend of structure and function, as I'm presenting it right now to your Honor.

Because we see that they present, that this product line -- we're concluding there's a basis to say that

it infringes the '840 patent because every other Foundry product that we have more detailed information about is consistent with infringement of the '840 patent for the same reasons.

THE COURT: And the specific discovery you're looking for is just all the information there is about all of the products that you've listed in Tab 1?

MR. GREENSPOON: That's probably overstating it. We don't want to be flooded by information any more than they want to produce too much information. We want representative -- well, it's hard to say what I want because I don't know exactly what is being withheld from me. I definitely want documentation which informs us in Foundry's own documents of the complete structure, function and operation of all of these products that they've so far not given us that information.

It could be in in principle, it could be a thousand more pages that would get this job done. I do not know that. In principle, it could be 50,000 more pages that would give us the complete document production that we need.

That's information that's only in the hands of Mr. Poppe.

THE COURT: All right. Mr. Poppe, back to you again.

MR. POPPE: Sure.

THE COURT: And Foundry's objection is that --

MR. POPPE: Foundry's objection is that Alcatel, based on a conclusion that certain limited product groups infringe, is arbitrarilty attempting to broaden that conclusion to other products for which it has performed no infringement analysis.

And, your Honor, Alcatel has to date demanded all technical documents related to that entire 14-page, single-spaced list of products that Mr. Greenspoon discussed with your Honor under Tab 1 of his binder.

So to say now that they are asking for a limited set of documents is incorrect, but we would object even to producing a limited set, because document discovery is only fair to the extent it relates to documents as to which the plaintiff has formed some initial reasonable basis to believe in infringement.

And for Mr. Greenspoon to say, as he did, that because, for example, the Edge Iron product has a buffer memory and cues, it must, therefore, infringe, as I noted to your Honor earlier, the patent in question specifically refers to the fact that prior art technology has included buffer memories and cues. So identifying those two features is no indication after infringement.

They're essentially inherent features of a switch

product. So what we're asking is that if Alcatel is, indeed, contending that additional products outside of the three Ironcore, Jetcore and Terathon architectures infringe, before engaging in discovery for those other products and other architectures, they should identify in an infringement chart what the basis is for believing in infringement and showing that they have a reasonable belief in infringement.

THE COURT: And -- like which came first, the chicken or the egg here.

MR. GREENSPOON: Judge, I was about to say the very same thing.

THE COURT: So if I'm looking at Tab 4 and the exhibits attached to Tab 4, these are the products to which Foundry has provided information. Is that correct?

MR. POPPE: That is correct, your Honor. There are probably one or two additional products.

Mr. Greenspoon noted that in our subsequent letter exchange, he identified a few additional products as to which we had already produced documents and we will supplement to indicate those. But the products that we will supplement to indicate are simply additional, I believe in all cases, Terathon products.

So, yes, these lists, these lists are the documents as to which Foundry has produced documents.

THE COURT: And I don't suppose anyone thought it

was helpful to go through this huge list in Tab 1 and highlight it for me, which of these products Alcatel is still waiting for discovery, and then what I would ask --

MR. GREENSPOON: Judge, I'm sorry. I never interrupt, but that's Tab 3.

THE COURT: That's Tab 3?

MR. GREENSPOON: I'm sorry.

MS. INGERSOLL: No. Five.

THE COURT: Which is it? Tab 5?

MR. GREENSPOON: Five.

MR. HALLER: Sorry.

MR. GREENSPOON: Five.

THE COURT: So why am I seeing Big Iron and Edge Iron? I thought all of those architectures had been --

MR. POPPE: The names such as Big Iron, Fast Iron, Net Iron and Server Iron are generic names that have been given over time to products with different core architectures. But, for example, the Big Iron RX has completely different chips, computer chips in it than the ones that are in Jetcore, Ironcore and Terathon.

In some cases, components of it aren't even made by the same companies as the ones that are in the Big Iron -- I'm sorry -- in the Jetcore and Ironcore. So that's why the discussion has been primarily in terms of architectures rather than the generic Big Iron or Net Iron

names.

MR. GREENSPOON: Judge, if I may, the chip sets are not the discovery question before your Honor. At the end of the day, maybe in summary judgment practice or at trial, the chip sets may impact things, but at this point we've identified our basis for concluding that these additional model numbers contain the infringing features.

If the chip sets are so different that they completely negate infringement even under our Alcatel's claim interpretation, we're open-minded. We'd love to see the discovery. If we conclude that as well, we'll walk away from that. But we have every inference. We have every basis for concluding that a Big Iron XYZ has the same hardware structure as a Big Iron ABC.

THE COURT: So, Mr. Greenspoon, what you are saying is that all of the products you've listed in Tab 5 have each of the elements of your definition of the accused products and that you have proof of that? In other words, you satisfy your Rule 11 obligation. Is that right?

MR. GREENSPOON: That's right. And we always want more information. We will need more information, because we're not satisfied that we have enough documentation to do our best job in front of a jury that we ought to be doing.

MR. POPPE: And, your Honor, if I may?

THE COURT: Yes, you may.

MR. POPPE: If Alcatel had that proof for each product, for each element, then my question is: Why was that not identified in response to our interrogatories served months ago that asked for that specific information? And as I noted to your Honor, certain of those specific hardware features that they identified as being necessary to their infringement analysis are not contained in the other architectures.

So I don't understand what their basis is for making that statement, and if they believe that they can meet that obligation, then they should be required, as your Honor ordered with the Terathon products, to provide an infringement chart.

THE COURT: Well, when you say an infringement chart, I mean, I have to say, with all the patent cases I have had, and I've had a few, I've never been faced, I can't recall that I've been faced with this particular dilemma, where the plaintiff is being asked to come forward with proof of infringement in order to justify discovery. And I think that's basically what you are asking the plaintiff to do?

I mean, I'm all for being reasonable and I am not confident the plaintiff is being reasonable. You also, if you know me at all, know that what I will try to do is

find a middle ground here because I'm not confident either party is being particularly reasonable when it comes to going forward here. But I'm not quite sure how to find the middle ground.

I mean, the claim chart to me refers to certain documents, but, clearly, not to every document supporting every product, which I assume is what you are really looking for, Mr. Poppe.

MR. POPPE: That's correct. The information they provided is for a small subset of products, and since before alleging that something is an accused product, they have to have a factual basis for making the allegation in the first place. That's why we're saying they should come forward with the information that they have to see if it's reasonable to then jump to the conclusion that these should be accused products and further discovery should be permitted. It's an obligation that they are required to fulfill before proceeding with these allegations.

THE COURT: Well, I've certainly never seen anyone do that.

So let's take baby steps, which I'm very fond of.

Mr. Greenspoon, what I'm going to ask you to do is to, from these exhibits, Exhibits A, B C, D and E, kind of prioritize and tell me which -- give me two of the product

groups under those exhibits that are most important to in your case. I guess we're going to do it one of two ways: I'm either going to say, if you want all of these products, then you do need to go through each product and refer to at least a document that identifies the basis. One product, one document, or what?

The other option, I suppose, is to have you pick one group of products and we'll limit your discovery to that.

I don't know which is the fairest and which makes the most sense. Let's hear from Mr. Poppe before I start doing anything else.

I mean, is it the number at this point? Is there some --

MR. POPPE: Part of it, your Honor, is the number, and part of it is the principle that products as to which the plaintiff cannot establish any basis for believing infringement should not proceed.

Between the two options that your Honor stated, we obviously prefer the first, and when your Honor referred to identifying a document, I don't want to say I assume something, but I think inherent in that should be that they should identify where in the document the different elements of the claim are identified so that we're not simply presented with a citation to a 150-page document and told

that --

THE COURT: Mr. Poppe, I don't know where you practice, but I have never seen a claim chart that is that detailed at this stage of the game. I don't even see that by the time people get to trial.

I applaud your efforts for doing things by the book, but I've never seen it in practice. If you have -- I mean, if you have seen one, I would like to see it and then I might hold the plaintiff up to that kind of standard. I just simply don't think that that is -- I just have never seen anyone voluntarily do it. I've never seen anyone who has been required to do it.

And, again, I'm always for learning something, so if you have a claim chart where every product is identified to that extent, I would be happy to see it.

So I am not confident that makes any sense. What we're talking about is a good-faith belief and some basis for understanding that a product, in fact, infringes.

Now, so I'm not sure where the middle ground is, but I am going to look for one, because I'm not going to ask the defendant to produce all the documents for all this product, I'm simply not going to. I'm not satisfied that I see enough of a basis to have a comfort level in that.

If there is a group of documents, a group

of products or some way to organize this where the most important products to you we do get information for, I am happy to do that and then we're going to call it a day.

MR. GREENSPOON: Judge, Tab 1 is our one model, one document list that has already been provided. The lengthier interrogatory answer which identifies Foundry Networks document production numbers as our basis for understanding the specific model numbers are infringing.

As for prioritizing, I would love to do that, but part of the impasse has been that because there is this debate about what's properly in the case, we've also not received adequate financial discovery from the other side. That is sort of a follow-on issue. You know, once we lock in what is fairly within the case, then we can have a common dialogue about what's fair play for the financial discovery. Obviously, that impacts how we could prioritize.

As far as reaching a middle ground, I think I do have a suggestion. I think that we can put together one very targeted document request for each of the patents. That is one request per patent. And we've already done this, but I'm willing to start over again, where we ask them to provide -- first of all, they have to answer Interrogatory 27, where we

can find out what is the universe of model numbers that contain the feature set that we flag as a red flag as potential infringments. And then at that point, within those, within that list of model numbers, then they can provide us a targeted response, a targeted document response with regard to each model number.

And just for some context, I'm displaying to your Honor the cover page of some release notes related to the Edge Iron. You'll notice, and this is another thing that shouldn't escape your Honor. The 24GS, 48GS and three other model numbers, they all are described in one document. So when we show you 15 single-spaced pages of model numbers, sometimes the model number itself is duplicated because we're talking about four or five different patents. But in other instances we have release notes or similar types of documents which indicate that they really are the same and these number and letter designations really reflect some enhancements or customization for certain applications, but it does not really impact the core feature set or architectures.

So just, again, to summarize, if they answer Interrogatory 27, give us the universe of items that have these feature sets, then we'll come back and we will try to get that. We'll give them a targeted document request

that will help us with gathering our proof for the jury trial.

THE COURT: And the feature sets you're talking about, is there any product that has all five of these things?

MR. GREENSPOON: No, no, actually. The three -- three of those, I think it's A, B -- I don't recall.

Three of them refer to feature sets implicated by three separate patents. Two of them are implicated separately under one patent. Unfortunately, I wish it were simpler and I could line them up one to one, but I can't. So --

THE COURT: Well, but what you are saying is that there might be a product that has one feature for one patent, another feature from another patent. And you're asking them to provide information about products that really are not relevant to this case? I mean, is that --

MR. GREENSPOON: I'm really not following.

THE COURT: I mean, in my mind, what you are saying is that, when I'm looking at Tab 3, Page 4, and those five things are your feature sets?

MR. GREENSPOON: Each individually is one feature set that implicates a patent. So, for example, Item A.

THE COURT: So if you've got a product that has all the feature -- I don't know whether it's three features or one feature listed in A, port authentication conforming, et cetera, then that infringes at least one claim of one patent? That limitation or feature comprises a limitation?

I'm just trying to understand. I don't quite understand how feature sets translates into claims.

MR. GREENSPOON: That's actually very simple. Port authentication conforming to 802.1X standards leads us to believe that that product infringes the '890 patent.

THE COURT: How?

MR. GREENSPOON: Because in the -- in that standard, there are certain elements of the standard that many, but not all, compliant devices will practice. That particular patent, there's something called a client. There's something called authenticator. There's something called a supplement. This is also how it's termed in the Foundry documents.

When that client, that authenticator and that supplement are used in a particular way, as we have found many, if not most commercial deployments or commercial implemetations do --

THE COURT: But I thought you said we weren't concerned -- which patent is that?

MR. GREENSPOON: '090.

THE COURT: I thought we weren't concerned about the '090 patent.

MR. GREENSPOON: That was Mr. Poppe and I don't understand where he's coming from.

THE COURT: All right. Which of these feature sets are specifically related to the '840 and '192?

MR. GREENSPOON: Item B relates to the '192. Items C and D relate to the '840.

THE COURT: And with respect to the '840, do the products need to have both of these features to be implicated?

MR. GREENSPOON: No.

THE COURT: Or they can have one or the other or both?

MR. GREENSPOON: Yes.

THE COURT: To possibly infringe at least one claim of the '840?

MR. GREENSPOON: Yes.

THE COURT: All right. So we're not looking at A. We're not looking at E. We're looking at Feature Set B, C and D. Is that correct?

MR. GREENSPOON: Mr. Poppe is saying that we don't have a dispute on A and E, but I have that list in Tab 5 where I'm not sure I've gotten discovery on the model

numbers related to those features. I'm willing to talk off line with Mr. Poppe to make sure that we're seeing eye to eye on this.

THE COURT: Now, which of these, in your letter, which of those relate to Features A and E? I mean, I don't know how these exhibits are -- that's Exhibit A relates to Feature A? Is that how it's organized?

MR. GREENSPOON: Unfortunately, no. Actually, no.

Exhibit A relates to what we're putting in Item B. Exhibit B relates to what we're putting under our definition, Item A.

So, in other words, if you look at my --

THE COURT: Keep going. I understand.

MR. GREENSPOON: Yes.

THE COURT: Exhibit C relates to --

MR. GREENSPOON: Exhibit C relates to -- I'm sorry. Item C in the -- under the accused products definition relates to Exhibit E. Item D in the accused products definition relates to Exhibit C. And Item E in the accused products definition relates to Exhibit D.

THE COURT: I am confused.

MR. GREENSPOON: I --

THE COURT: I'm looking at Tab 5. Exhibit A relates to Feature Set B?

MR. GREENSPOON: That's correct.

THE COURT: Exhibit B relates to Feature Set A?

MR. GREENSPOON: Correct.

THE COURT: Exhibit C relates to Feature Set --

MR. GREENSPOON: D, your Honor.

THE COURT: E?

MR. GREENSPOON: D as in dog.

THE COURT: D. Exhibit D relates to Feature Set E?

MR. GREENSPOON: D relates to Feature Set E.

THE COURT: And Exhibit E relates to Feature Set C?

MR. GREENSPOON: C.

THE COURT: And Mr. Poppe, anyway, thinks we should not be having any disputes about Feature Sets A and E.

MR. POPPE: That's correct. To the extent we confirm any Foundry sets contains these features, we'll be producing relevant documents related to those features and those products.

THE COURT: Now, why is it that that is okay? In other words, the claim construction chart is sufficient to satisfy you with respect to those feature sets and those products, but the others are not?

MR. POPPE: Because the allegations with respect

to those feature sets relate to software that is relatively uniform across the products whereas the hardware features differ from product to product. And so our concern is that the way that the feature sets are described in this document behind Tab 3 is far, far too overbroad and that the feature sets should be defined by what's listed in the infringement charts.

So we have no problem identifying ands producing documents related to products that have the specific features identified in those infringement charts, and that's how we think what the parameters on discovery should be.

THE COURT: So we're back to the beginning. All right.

Well, I will give you just a minute each to give me -- I wanted to get this resolved, but I need to sit down and look at this. Unfortunately, that means you're stuck with whatever I come to unless you all agree to something before this. You know, we're back to talking apples and oranges again.

The claims of the '840 and the '192 are -- are method claims, product claims? What are they?

MR. GREENSPOON: I believe in both case they're system claims or apparatus claims.

MR. POPPE: Apparatus claims.

THE COURT: All right. So we are talking

about -- and, Mr. Greenspoon, just before I close for the day, you believe that by identifying the document under Tab 1, for each of these exhibits, that that is a sufficient basis for believing that the product you've identified is implicated by one -- contains the feature sets that would demonstrate infringement or at least a good-faith basis for claiming infringement?

MR. GREENSPOON: Yes.

THE COURT: So maybe what I need to do is, for the disputed products I will let each of you pick ten products with the documents that you've identified and I will see which side has a better -- well, if, in fact, that's a good-faith basis, then I guess I need to find out what that is as opposed to the claim chart, which is not particularly helpful to me. And if I feel as though the documents identified really have nothing to do with the feature sets or the claim set, then, obviously, I will not allow the discovery.

I would look at them all, but I'm not confident I have time to. But if you believe that's a better way of doing it, I'm happy to do that as well.

MR. GREENSPOON: Judge, just let me plant the seed one more time in your mind, that there is going to be a chicken and the egg issue, because I will concede right here, right now, I do not have complete discovery of all the

hardware that I would like to present to the jury to prove my case at trial.

THE COURT: Well, I know you can't prove infringement, but all I am looking for is a good-faith basis for that. You should have something.

MR. GREENSPOON: Absolutely.

THE COURT: And if you don't, then you shouldn't have discovery, and if you do, you should.

So I am happy to look at a representative sample. I am willing to look at all of them. Obviously, if you can work this out in the meantime, that is fine. Otherwise, you need to get that to me and I will try to get back to you. All right?

MR. POPPE: Your Honor, I think that's a fair way to proceed, and I would suggest perhaps that each side pick ten products. It can present something to you and then each side can respond to the other ten products that we pick according to a schedule that we can either set now or work out afterwards.

MR. GREENSPOON: We can work off line with Mr. Poppe and figure out a way, perhaps even in one joint binder, so that you don't have to be fumbling for different presentations.

But before we leave, though, your Honor, it would help us immensely if Foundry were just -- if your Honor were

to simply suggest to Foundry that it would be a good idea to answer Interrogatory No. 27. That's the interrogatory where we've asked them to -- from their own records, from their own knowledge, which is always going to be superior to our knowledge, tell us what the model numbers are that do contain the features, because we -- you know, we put our internal expert through the three-week effort to go through their document production, to try to accomplish the same thing. But it would be really helpful if they would be instructed to finally answer that interrogatory.

THE COURT: And I take it it hasn't been answered because they feel as though they're doing your homework for you? I mean, I don't know.

MR. POPPE: The scope of the response to that interrogatory will depend largely on the result, or on the result of this particular dispute because, again, the scope of the feature that they're asking for, again, we can, you know, identify everything that has a buffer memory, but that's not going to help narrow the scope of the products that are actually reasonably in dispute about infringement because the feature sets are defined so broadly with what they've asked for.

MR. GREENSPOON: I don't know if I'm the chicken or the egg or he's the chicken or he's the egg, but at some point, somebody has to show their cards.

We think we've shown our cards as best we can right now, and what we are talking about is simply a list of model numbers that they will acknowledge contain features that they have to acknowledge that certain other model numbers already contain. We're not asking them to make admissions.

THE COURT: All right. Well, I will keep that under consideration, and you should also -- well, if you all can't reach a compromise on this, then, again, I will make the decision.

All right. Thank you very much, counsel. I appreciate it.

(Counsel respond, "Thank you, your Honor.")

(Court recessed at 6:10 p.m.)

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