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November 14, 2006

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BY E-FILE

The Honorable Sue L. Robinson
Chief Judge
United States District Court
for the District of Delaware
U.S. Courthouse
844 N. King Street
Wilmington, DE 19801

Re: *Alcatel USA Resources, Inc. et al. v. Foundry Networks, Inc.*
D. Del., C.A. No. 05-418-SLR

Dear Chief Judge Robinson:

We write on behalf of Defendant/Counterclaim Plaintiff Foundry Networks, Inc. ("Foundry"), in response to the letter filed on November 6, 2006, by Alcatel Internetworking, Inc. ("Alcatel") (D.I. 204). The Court's initial request to Foundry for a letter memorandum did not envision a Rule 7.1.2 briefing schedule but, because one of the numerous inaccuracies in Alcatel's letter goes well beyond the bounds of even aggressive advocacy in that it falsely accuses Foundry of taking inconsistent positions and its counsel of being less than forthright with the Court, we feel compelled to bring it to Your Honor's attention.

Specifically, on page 4 of its November 6 letter to the Court, Alcatel took statements I made at the October 4, 2006 discovery conference and, by deliberately quoting them out-of-order (and out-of-context), made it appear that: (1) as of October 4, Foundry believed that August 25, rather than March 10, was the operative date to add parties; and (2) as Foundry's counsel, I was unresponsive to direct questions from the Court. *See* Exhibit A hereto (Alcatel's November 6 letter). Both accusations are false.

Alcatel accomplishes this sleight-of-hand by inexplicably *excising* 30 lines of dialogue between Foundry's counsel and the Court, including the very portion of the

transcript in which Foundry's counsel explained its position regarding the March 10 deadline to add parties (excised portion identified in italics below):

> THE COURT: ... With respect to adding this party, though, what I am going to do, and I hate to do it and I hope to get it turned around, is for each of you to -- I mean, the question is: Why wasn't this aspect added in the formal motion by August 25th?
>
> *MR. ROVNER: Your Honor, I can answer that very quickly, and I think there will be no disagreement. The date to amend parties was in March of '06. Howrey was still -- was not able to participate because we were -- there was a pending motion to disqualify. That March 10 date was set very early. We hadn't even gotten through initial document production because we had Phase 1 patent I.D. It just was very early, and by the time Howrey got involved in late June, that date had already passed.*
>
> *So Mr. Cherian and Mr. Greenspan [sic] and I were on one call. We were discussing the adding of all parties and we were all, I thought, working to see if we could figure it out, knowing that the deadline had passed.*
>
> *So it really is not our fault that we did not add parties by March 10, and now we've got some time. It should be, we think -- my request was to give us a date to move to amend -- that's all -- to include an additional party.*
>
> *THE COURT: Well, I mean, I have to go back and look at how we ended up at amending the August 25th date.*
>
> *MR. ROVNER: We had a teleconference with your Honor and -- and you gave us until -- the one month to do that.*
>
> *We did not add the parties because we had been talking with Alcatel and that deadline had passed long ago and we thought we could work it out. And I was on a call with Mr. Greenspoon where we discussed that very issue.*

Exhibit B hereto (October 4, 2006 Tr. at 68:2-6 (included in Alcatel's letter); 68:7-69:11 (excised from the excerpt in Alcatel's letter)).[1]

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[1] Rather than include the italicized passage identified above (my direct response beginning at 68:7, immediately following the court's question), Alcatel's letter partially quotes a statement I made later in the hearing (beginning at 69:12), as if it were my response to the Court's question from the preceding page. *See* Alcatel November 6 letter, at p. 4.

Alcatel's failure to include my direct response to Your Honor's question regarding the operative date to add parties was not merely an oversight; indeed, by including only a snippet of my response to a later question from the Court, it is clear that Alcatel's conduct was intentional; as a sanction, its November 6 letter should be stricken.

For the reasons set forth in its October 23 letter, Foundry requests that it be permitted to join the four Alcatel entities identified as additional counterclaim codefendants. Should Your Honor have any questions, counsel is available at the Court's convenience.

Respectfully,

/s/ Philip A. Rovner
Philip A. Rovner
provner@potteranderson.com

PAR/kgm/762259
cc: Karen L. Pascale, Esq. – by e-mail and hand delivery
Timothy J. Haller, Esq. – by e-mail

EXHIBIT A

THIS EXHIBIT HAS BEEN

REDACTED IN ITS ENTIRETY

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

- - -

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)

- - -

Wilmington, Delaware
Wednesday, October 4, 2006
9:33 o'clock, a.m.

- - -

BEFORE: HONORABLE SUE L. ROBINSON, Chief Judge

- - -

APPEARANCES:

YOUNG, CONAWAY, STARGATT & TAYLOR, LLP
BY: KAREN L. PASCALE, ESQ.

-and-

Valerie J. Gunning
Official Court Reporter

APPEARANCES (Continued):

NIRO, SCAVONE, HALLER & NIRO
BY: TIMOTHY J. HALLER, ESQ. and
ROBERT GREENSPOON, ESQ.
(Chicago, Illinois)

Counsel for Plaintiffs

POTTER, ANDERSON & CORROON
BY: PHILIP A. ROVNER, ESQ.

-and-

HOWREY
BY: K.T. CHERIAN, ESQ. and
CONSTANCE F. RAMOS, ESQ.
(San Francisco, California)

and

ORRICK
BY: MATTHEW H. POPPE, ESQ.
(Menlo Park, California)

Counsel for Defendant

- - -

ALSO PRESENT: DR. STEVEN WASLIEW

- - -

PROCEEDINGS

(Proceedings commenced in the courtroom, beginning at 9:33 a.m.)

THE COURT: Good morning, counsel.

(Counsel respond, "Good morning, your Honor.")

THE COURT: I think today is the day that I have set aside to help you bring discovery to a close and to discuss scheduling, et cetera.

So why don't we start with counsel for the plaintiff, and if you could give me just a brief overview of the issues that you think we should be addressing today, then I will go to defendant's counsel for the brief overview of the issues you think we should be addressing today, and then we are going to prioritize those issues and see which of those I need to hear about and which of those you simply need to talk about before I hear about it to make sure that you have had a bona fide productive discussion among yourselves.

So let's do it that way, one step at a time, and then we will go forward.

Yes, sir?

MR. HALLER: Good morning, Judge. Tim Haller,

for Alcatel.

Before coming here today, Judge, we -- I think I speak for both parties. We did try to have a private session, to try and see what we could resolve, just get it off the table before coming here, and I think it's fair to say the weather, plane delays, the fact that these people had to come from the West Coast, it just made it impossible, so I think at some point, you know, we both intended, we're going to privately try and get some of these things out of the way. I am hopeful we can do that. We just have not had a chance to talk.

THE COURT: My home is your home.

MR. HALLER: Okay. We anticipated that.

In terms of an overview, again, I don't want to be presumptuous and speak for both sides, but --

THE COURT: Just speak for yourself. What do you want to accomplish today?

MR. HALLER: Okay. And I can give you that very quickly and our view on why we are here today.

The source code handling of both sides seems to be a burning issue and seems to be number one on the plate, and I won't bore you with the details at this point. There is a very clear discovery protective order as to how that has been handled. I think it's fair to say each party has a very significant investment in the development of their source

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to you. What he said was --
MR. CHERIAN: He said it was produced, look for it, and it was never produced.
THE COURT: All right.
MR. CHERIAN: Look for it. Do a database search and it's there. It's not there, your Honor.
So we've been going back and forth asking him, since the time to amend the pleadings came and went, since he did not give us this information, we asked that he voluntarily let us do that, and I don't think I have an unequivocal answer from him, and if I do, it is just in the very recent time.
Up to now, it has been a debate back and forth, because in June he says, Please let me know if I should consider your request for Omni PCX and 5020 source code, Request Nos. 1 and 2 of the 20 document requests that the court ordered.
So, your Honor, we've been operating under the -- under the understanding that these documents are going to be produced. Now at this late stage we're told, no, you've got the wrong party. You don't have the right party. And the request here is: Can we file a motion if you want us to file a motion to permit us to add these new parties? They told us informally that, you know, if we had agreed to their Phase 2, they'd have no objection to us adding these new parties

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without motion practice.
So that's where we are, your Honor. I hope I've explained it correctly.
THE COURT: Well, let me understand from Alcatel's lawyers whether in fact -- I take it there is an objection to adding this party, and without the party being added, there's also an implicit objection to any further discovery or discussion about this product, which seems like if there have been ongoing discussions about all of this, that I am not sure how fair it is.
I hate to go back through the record to determine whether adding this party is a fair thing or not, but I suppose I will have to if you all cannot work it out consensually. I mean, the deadline has passed.
MR. CHERIAN: Yes.
THE COURT: So there is either enough discussion going on that everyone thought they were going to work it out consensually or something else is going on, a real lack of communication and understanding about everyone's goals here.
MR. GREENSPOON: At the beginning of August, Judge, I think it might have been August 2 or August 4, I offered to Mr. Cherian what I guess you would consider a standstill agreement. I gave him some information that he had been requesting of me and I was trying to convince him,

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which I don't think I had by the time, that Alcatel Internetworking has no responsibility for this product, and therefore we're unable as a company to provide discovery to you.
So in the context of that conversation, I wrote him an offer where I basically said, Well, why don't we have a standstill agreement on this so that, for the 5020 or whatever other products that are not the responsibility of Alcatel Internetworking, if you think that your Chang patent touches on them, you can certainly feel free to do that, but just let's not distract ourselves by adding that issue right now to this matter where we have enough on our plate with the Omni PCX.
And the response to the offer for a standstill agreement, which implicitly means you'll get the credit for earlier filing date of the lawsuit, you know, even if you formally add the parties some other date, the response was just a thud. There was just no interest at all in that, just interest in continuing to berate us for not producing the discovery that belongs to another legal entity.
THE COURT: All right. So this is what we are going to do. I believe that part of this whole deal -- well, the objection to the motion to file an amended answer and counterclaim was prejudiced because of the timing. I think that objection has been resolved and so the motion is

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granted.
With respect to adding this party, though, what I am going to do, and I hate to do it and I hope to get it turned around, is for each of you to -- I mean, the question is: Why wasn't this aspect added in the formal motion by August 25th?
MR. ROVNER: Your Honor, I can answer that very quickly, and I think there there will be no disagreement. The date to amend parties was in March of '06. Howrey was still -- was not able to participate because we were -- there was a pending motion to disqualify.
That March 10 date was set very early. We hadn't even gotten through initial document production because we had Phase 1 patent I.D. It just was very early, and by the time Howrey got involved in late June, that date had already passed.
So Mr. Cherian and Mr. Greenspan and I were on one call. We were discussing the adding of all parties and we were all, I thought, working to see if we could figure it out, knowing that the deadline had passed.
So it really is not our fault that we did not add parties by March 10, and now we've got some time. It should be, we think -- my request was to give us a date to move to amend -- that's all -- to include an additional party.

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THE COURT: Well, I mean, I have to go back and look at how we ended up at amending the August 25th date.

MR. ROVNER: We had a teleconference with your Honor and -- and you gave us until -- the one month to do that.

We did not add the parties because we had been talking with Alcatel and that deadline had passed long ago and we thought we could work it out. And I was on a call with Mr. Greenspoon where we discussed that very issue.

I think this is the time -- at least I would ask for the opportunity to show you why we should be able to add these parties.

THE COURT: Well, I mean, that's what I am asking you to do.

MR. ROVNER: Okay.

THE COURT: And the question is: What was the state of the record on August 25th? Were the defendants moving forward promptly and reasonably and was there a true misunderstanding or did defendants just let the ball slip? So that's really the question.

And I will let you -- I mean, you file enough paper with me that I certainly do not need a lot of paper. I just need a memorandum of law. I mean, it's actually no

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law, it's just fact. So if you want to give me copies of whatever e-mails or whatever went back and forth, that's fine.

Someone will need to craft a revised scheduling order with the dates I have given you and, hopefully, you can work out other dates.

Source code. I mean, it seems to me that, what, two weeks, you all should be able to have source code exchanged?

MR. HALLER: We're ready to do it tomorrow. We've got two problems: One, Mr. Cherian still has not decided whether he wants them on laptops that he's going to provide or desktops that he's going to provide.

And, number two, Foundry has not been able to commit when they can produce the source code. We'll do it on a simultaneous basis, whenever they're ready.

THE COURT: All right. Well, I'm going to say no later than October 18th, and if there's a problem and something isn't done by October 18th, I guess you can e-mail me because, as I said, I am getting tired of these discovery disputes.

Now, with respect to one final conference, and then I've got a telephone conference I've got to attend to. Just thinking ahead, I frankly, don't think I want to -- well, let me see. If summary judgment motions are in May,

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your expert discovery will be March, April. Fact discovery should be done by February.

So I don't want to see you the rest of the year. As much as I appreciate you, I really don't want to have anything to do with this case for the rest of the year, so I'm going to give you a date in early January and, hopefully by then, you will be done the source code part. You will be done document production and you will be swimming along with whatever other depositions you need. And I'm looking at Wednesday, January 17th, at 4:30. And you can include that in your new scheduling order and you can call it the final discovery conference.

However, although I said I did not want to see you, if the source codes are not at least exchanged consistent with the agreement and your expectations, then you can e-mail me and I will get you on the phone.

Okay? All right. Thank you, counsel, very much.

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

THE COURT: You all can go. It takes me a while to get out of my computer.

(Court recessed at 4:30 p.m.)

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