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IN THE UNITED STATES DISTRICT COURT
03 FEB -4 FOR THE EASTERN DISTRICT OF TEXAS
EASTERN DISTRICT OF TEXAS MARSHALL DIVISION

FILED
U. S. DISTRICT COURT
Eastern District of Texas

FEB 4 2003

DAVID MALAND, CLERK
By
Deputy _____

CISCO SYSTEMS, INC. AND
CISCO TECHNOLOGY, INC.

Plaintiffs,

v.

HUAWEI TECHNOLOGIES, CO., LTD.,
HUAWEI AMERICA, INC. AND
FUTUREWEI TECHNOLOGIES, INC.,

Defendants.

CIVIL ACTION NO. 2:03-CV-027 TJW

JURY REQUESTED

CISCO'S MOTION FOR ORDER THAT DEFENDANTS PRESERVE EVIDENCE

Pursuant to Federal Rule of Civil Procedure 65(b), plaintiffs Cisco Systems, Inc. and Cisco Technology, Inc. (collectively "Cisco") hereby request that the Court issue an temporary restraining order requiring all defendants in this action to preserve evidence that may be relevant to Cisco's claims and prohibiting them from removing potentially relevant evidence from the United States of America. This motion is based on this Notice, the Memorandum of Points and Authorities herein, and the Declarations of Linda Sikes, Jaymie Caster, and G. Hopkins Guy, III, filed herewith; and the Declaration of Scott McElroy in Support of Cisco's Motion for Preliminary Injunction (also attached hereto); the pleadings on file in this matter; all matters of which the Court may take judicial notice; and any oral argument as may be presented to the Court at a hearing on the this matter.

I. INTRODUCTION

On January 23, 2003, Cisco filed its Complaint against Huawei Technologies, Co. Ltd. ("Huawei Ltd (PRC)") and its American subsidiaries, Huawei America, Inc. ("Huawei America") and FutureWei Technologies, Inc., ("FutureWei") (collectively "Huawei" or

“Defendants”) seeking legal and equitable remedies for Huawei’s patent infringement, copyright infringement, violations of Section 43(a) of the Lanham Act, trade secret misappropriation, acts of common law misappropriation, and acts of unfair competition. The Complaint alleges that Huawei’s product line of “Quidway” routers, the operating system program for those routers, and the associated user manuals infringe Cisco’s intellectual property rights.

Cisco has recently obtained disturbing evidence that Defendants, shortly after learning about this lawsuit, embarked on a campaign to remove Huawei’s infringing routers, documentation, and Versatile Routing Platform (“VRP”) software from the United States. Defendants’ actions suggest a plan to remove evidence beyond the jurisdiction of the courts of the United States, thus threatening Cisco’s ability to require that Defendants produce such evidence in discovery. Defendants’ actions present an urgent need for the Court to order all Defendants and their agents to immediately cease any attempts to remove evidence from the United States, and to preserve and maintain all relevant evidence within the territorial limits of the United States and the jurisdiction of its courts.

II. FACTUAL BACKGROUND

Several days after Cisco filed the Complaint, a FutureWei representative contacted a computer equipment vendor, Cityware, that had purchased Quidway routers from Huawei through FutureWei. The FutureWei representative stated that (1) Futurewei needed to recover the Quidway routers Cityware had purchased, and all of the software and documentation, so that Huawei could “deport them” from the United States; (2) Huawei would replace the Huawei routers with Cisco routers; and (3) Huawei would compensate the vendor for any “inconvenience.” Exhibit 1, Declaration of Scott McElroy (the “McElroy Decl.”) at ¶ 11. In addition, since Cisco filed its Complaint, Huawei has removed from its website Quidway router documentation that is the subject of this suit.¹ These actions, if allowed to continue, will result in the removal of important evidence from the jurisdiction of the courts of the United States,

¹ See Declaration of Todd Briggs in Support of Cisco’s Motion for Preliminary Injunction ¶ 14 (The Briggs Declaration is Exhibit 5 to Cisco’s Motion for Preliminary Injunction).

making it extremely difficult, if not impossible, for Cisco to require the Defendants to produce such evidence in discovery.

Cisco also encountered difficulty in serving FutureWei with the summons and complaint. On at least two occasions, persons attempting service of process upon FutureWei's designated agent in Texas were told that the agent was not available to receive service of process because he was in China. Exhibit 2, Declaration of Linda Sikes ("Sikes Decl.") ¶ 3; Exhibit 3, Declaration of Jaymie Caster ("Caster Decl.") ¶ 3. The designated agent was never present at his registered address when service was attempted, requiring Cisco to serve FutureWei through other means.

Cisco has given counsel for all Defendants² notice of its intent to move for an order preserving evidence, as well as notice of the intent to move for preliminary injunction. Exhibit 4, Declaration of G. Hopkins Guy (the "Guy Decl.") ¶ 4, 8.

III. ARGUMENT

A. A TRO is Appropriate in this Case Because Defendants Have Taken Action to Remove Critical Evidence from the United States.

Federal Rule of Civil Procedure 65(b) provides that a court may issue temporary restraining order if:

(1) it clearly appears from specific facts shown by affidavit . . . that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

Fed. R. Civ. Proc. 65(b), *see Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 3 F.3d 877, 885 (5th Cir.1993). To prevent the willful destruction of evidence, courts may issue restraining orders under Rule 65(b) upon a showing that it is the "sole method of preserving a state of affairs in which the court can provide effective final relief." *Matter of Vuitton et Fils S.A.*, 606 F.2d 1, 4

² On February 3, 2003, Stanley Young acknowledged that his law firm is counsel to all three Defendants in this action. *See* Exhibit 4, Guy Decl. ¶ 6.

(2d Cir.1979) (per curiam) (citation omitted) (reversing district court's denial of *ex parte* TRO in case where affiliated defendants concealed and removed evidence from jurisdiction upon learning of imminent lawsuit). Such orders are appropriate when a party threatens "imminent destruction of the disputed property, *its removal beyond the confines of the state*, or its sale to an innocent third party." *Id.* (emphasis added).

B. An Order Preserving Evidence is the Only Way to Ensure that Defendants Will Preserve Evidence In Support of Cisco's Claims

Cisco has presented the Court with precisely the type of evidence that is required to support an TRO preventing the destruction of evidence or its removal from the United States. Indeed, Cisco's evidence in support of this motion demonstrates that Defendants have already embarked upon a plan to do so. McElroy Decl. ¶¶ 10, 11. If Defendants are allowed to continue with such action, Cisco will be irreparably harmed because it may be precluded from obtaining critical evidence that has been removed from the United States. *See Matter of Vuitton et Fils S.A.*, 606 F.2d at 4.

The Court should issue the Order against all Defendants and their agents. In *Vuitton*, the court recognized that the district court had erred in refusing to enter such an order *ex parte*, even against a defendant that had not yet been served with the complaint. *See Id. at 2*. Accordingly, it would be proper in this case for the Court to issue its order against all three defendants, including Huawei Ltd. (PRC), as that defendant is aware of the lawsuit, is acting through its subsidiary, FutureWei, and is in the process of being served according to proper procedures. *See Exhibit 4, Guy Decl.* All parties have been notified that Cisco is seeking this relief.

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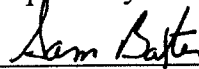
IV. CONCLUSION

For the reasons set forth above, Cisco respectfully requests that the Court issue a Temporary Restraining Order (1) barring Defendants from removing evidence in this action from

the United States, (2) requiring Defendants to return all evidence that has been removed from the United States back to the United States, and (3) requiring Defendants to preserve all evidence that may be relevant to Cisco's claims, including all VRP object code and documentation previously available on the Huawei website, all Huawei routers sold, "deported" from, or now present in the United States, and all versions of VRP source code.

Dated: February 4, 2003.

Respectfully submitted,



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