

# EXHIBIT B

**FILED**  
GREGG COUNTY, TEXAS

No. 2008-481-CCJ MAR 03 2008

O'CLOCK M  
BARBARA DUNCAN, DISTRICT CLERK  
By Deputy

ERIC M. ALBRITTON,  
  
Plaintiff,

v.

CISCO SYSTEMS, INC. &  
RICHARD FRENKEL,  
  
Defendants.

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IN THE DISTRICT COURT

GREGG COUNTY, TEXAS

\_\_\_\_ JUDICIAL DISTRICT

**PLAINTIFF'S ORIGINAL PETITION**

***TO THE HONORABLE JUDGE OF SAID COURT:***

***COMES NOW, ERIC M. ALBRITTON, Plaintiff, and complains of CISCO SYSTEMS, INC. and RICHARD FRENKEL, Defendants, and would respectfully show unto the Court as follows:***

***I.***

**DISCOVERY PLAN**

Plaintiff requests that discovery in this case be conducted under Level III pursuant to Rule 190.4, Tex. R. Civ. P.

***II.***

**REQUEST FOR DISCLOSURE**

Plaintiff requests that Defendants produce the information and documents identified in Rule 194, Tex. R. Civ. P.

**III.**

**THE PARTIES**

**ERIC M. ALBRITTON ("ALBRITTON")** is an individual residing in Gregg County, Texas.

**CISCO SYSTEMS, INC. ("CISCO")** is a corporation organized and existing under the laws of the State of California with its principal place of business in San Jose, California. CISCO may be served with process by delivering a copy of the petition and citation to its registered agent, Prentice Hall Corporation Systems, at 701 Brazos Street, Suite 1050, Austin, Texas 78701.

**RICHARD FRENKEL ("FRENKEL")** is an individual who, upon information and belief, resides in the State of California. He may be served with process by delivering a copy of the petition and a citation to him at his place of business located at 170 West Tasman Drive., M/S SJC-10/2/1, San Jose, California 95134-1700.

**IV.**

**VENUE & JURISDICTION**

This Court has jurisdiction over this dispute in that it is a court of general jurisdiction. Texas law provides for mandatory venue in Gregg County as ALBRITTON resided in Gregg County at the time the Defendants published defamatory statements about the Plaintiff. *See* Tex. Civ. Prac. & Rem. Code § 15.017.

V.

**FACTUAL BACKGROUND**

ALBRITTON is an attorney representing clients in the United States District Courts for the Eastern District of Texas since 1996. Since 1998, he has practiced law, almost exclusively, in the Eastern District of Texas. In addition, he has resided in and been licensed to practice law in the State of Texas since November 4, 1994. Throughout his professional career, ALBRITTON has enjoyed a sterling reputation for ethical and responsible representation. Neither the State Bar of Texas nor any state or federal court has ever issued any sanctions against ALBRITTON. In addition, his law license has never been suspended or revoked for any reason. As a result of this reputation, ALBRITTON has developed a successful practice concentrated largely in intellectual property disputes in the Eastern District of Texas. In furtherance of this practice, ALBRITTON filed a patent infringement suit against CISCO on behalf of ESN, LLC on October 16, 2007.

FRENKEL is an attorney licensed to practice law in the State of California. He is employed by CISCO as its director of intellectual property litigation. With the knowledge and consent – express or implied – of his direct supervisor at CISCO, FRENKEL publishes an internet “blog” purporting to cover patent litigation including in what FRENKEL terms the “Banana Republic of East Texas.” Until recently, FRENKEL published his comments anonymously. In October of 2007, while still publishing anonymously, FRENKEL posted scandalous and defamatory allegations about ALBRITTON on the internet. As set forth in more detail below, FRENKEL’s statements constituted libel and libel per se and were purposefully calculated by FRENKEL and CISCO to damage the reputation and business of ALBRITTON.

In particular, on October 17 and 18, 2007, FRENKEL published statements on the internet that ALBRITTON had "conspired" with the Clerk of the United States District Court for the Eastern District of Texas to "alter documents to try to manufacture subject matter jurisdiction where none existed." At the time he made this statement, FRENKEL was acting in the course and scope of his employment with CISCO and in his official capacity as Director of Intellectual Property Litigation for CISCO. Even more tellingly, at the time he made this statement, FRENKEL had been charged by CISCO with responsibility for management of the very case in which he alleged ALBRITTON had conspired with the Clerk to feloniously alter official documents. A true and correct copy of the defamatory writing distributed by FRENKEL is attached hereto as Exhibit A.

FRENKEL and CISCO have purposefully maximized the dissemination of the defamatory statements and the damage inflicted upon ALBRITTON. In particular, FRENKEL and CISCO published the statements on a web site devoted to intellectual property litigation including the Eastern District of Texas. On information and belief, FRENKEL and CISCO further employed search engine optimization tools and techniques to direct individuals and entities seeking information about ALBRITTON through popular search engines such as "Google" to the defamatory statements. In fact, according to FRENKEL, ALBRITTON's name was the seventh most popular search term directing readers to his site during the week ending on February 15, 2008. Likewise, selecting ALBRITTON's name within the web site leads directly to the defamatory article. On January 30, 2008, FRENKEL boasted that his site had hosted its one hundred thousandth (100,000<sup>th</sup>) visitor.

V.

DEFAMATION

In publishing the false and libelous statements described above, FRENKEL and CISCO have defamed ALBRITTON in direct violation of Texas law. In particular, FRENKEL and CISCO published to third parties a false and defamatory statement of "fact" referring directly to ALBRITTON that caused actual damages to ALBRITTON. In so doing, FRENKEL and CISCO acted with actual malice or with reckless disregard for the truth or falsity of their representations. At a minimum, CISCO and FRENKEL acted without exercising ordinary care for the truth of the statement or the protection of ALBRITTON's reputation.

Further, FRENKEL's and CISCO's wholly false statement that ALBRITTON "conspired" with the officials of the United States District Court to feloniously alter official documents is libelous per se. More particularly, such an outrageous and unsubstantiated statement invariably tends to injure ALBRITTON's reputation and to expose him to public hatred, contempt, or ridicule; expose ALBRITTON to financial injury; and impeach ALBRITTON's honesty, integrity, virtue or reputation thus exposing him to public hatred and ridicule. *See* Tex. Civ. Prac. & Rem. Code Ann. § 73.001 (West 2008). Likewise, Defendants' statements are libelous per se in that they are of such a character as to injure ALBRITTON in his office, profession or occupation and directly accuse him of the commission of a crime.

VI.

DAMAGES

As a direct and proximate result of the false and defamatory statements of FRENKEL and CISCO, ALBRITTON has endured shame, embarrassment, humiliation, mental pain and anguish. Additionally, ALBRITTON has and will in the future be seriously injured in his business reputation, good name and standing in the community. He will, in all likelihood, be exposed to the hatred, contempt, and ridicule of the public in the general as well as of his business associates, clients, friends and relatives. Consequently, ALBRITTON seeks actual damages in a sum within the jurisdictional limits of this Court.

Furthermore, ALBRITTON is entitled to exemplary damages from FRENKEL and CISCO. ALBRITTON would show the Court that FRENKEL acted with the specific intent to injure ALBRITTON in his reputation and business. At a minimum, FRENKEL acted with conscious indifference to the rights, safety or welfare of ALBRITTON with actual, subjective awareness that such conduct posed an extreme degree of risk of harm to the reputation and well-being of ALBRITTON. Likewise, CISCO is vicariously liable for FRENKEL's outrageous conduct in that it authorized, approved and/or ratified FRENKEL's statements. Moreover, at the time of the defamation, CISCO employed FRENKEL as the director of its intellectual property litigation and gave him specific responsibility for the ESN litigation. As a result, FRENKEL was employed in a managerial capacity and acted in the course and scope of his employment at the time he published the defamatory statements. CISCO has done nothing since the publication of the statements to disclaim them or distance itself from FRENKEL.

VII.

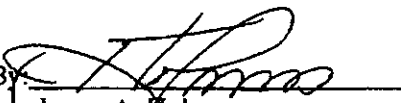
**CONCLUSION & PRAYER FOR RELIEF**

"Libel," it has been said, "is the sword of the coward; anonymity the shield of a dastard." Having anonymously attacked the integrity and reputation of ALBRITTON and impugned the dignity of the United States District Court for the Eastern District of Texas, the time has come for FRENKEL and CISCO to be called to account for their conduct.

**WHEREFORE, PREMISES CONSIDERED,** ERIC M. ALBRITTON respectfully prays that CISCO SYSTEMS, INC. and RICHARD FRENKEL be cited to appear and answer for their actions and that, upon final trial of this cause, he have Judgment against them for the full amount of his actual damages together with such punitive damages as may be necessary to deter Defendants from similar outrage in the future, pre-judgment and post-judgment interest at the highest lawful rate and all costs of this proceeding.

Respectfully Submitted,

**THE LAW OFFICE OF JAMES A. HOLMES, P.C.**

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## Patent Troll Tracker

THURSDAY, OCTOBER 18, 2007

### ESN Convinces EDTX Court Clerk To Alter Documents To Try To Manufacture Subject Matter Jurisdiction Where None Existed

I got a couple of anonymous emails this morning, pointing out that the docket in ESN v. Cisco (the Texas docket, not the Connecticut docket), had been altered. One email suggested that ESN's local counsel called the EDTX court clerk, and convinced him/her to change the docket to reflect an October 16 filing date, rather than the October 15 filing date. I checked, and sure enough, that's exactly what happened - the docket was altered to reflect an October 16 filing date and the complaint was altered to change the filing date stamp from October 15 to October 16. Only the EDTX Court Clerk could have made such changes.

Of course, there are a couple of flaws in this conspiracy. First, ESN counsel Eric Albritton signed the Civil Cover Sheet stating that the complaint had been filed on October 15. Second, there's tons of proof that ESN filed on October 15. Heck, Dennis Crouch may be subpoenaed as a witness!

You can't change history, and it's outrageous that the Eastern District of Texas is apparently, wittingly or unwittingly, conspiring with a non-practicing entity to try to manufacture subject matter jurisdiction. This is yet another example of the abusive nature of litigating patent cases in the Banana Republic of East Texas.

(n.b.: don't be surprised if the docket changes back once the higher-ups in the Court get wind of this, making this post completely irrelevant).

Posted by Troll Tracker at 1:13 PM

0 comments

WEDNESDAY, OCTOBER 17, 2007

### Troll Jumps the Gun, Sues Cisco Too Early

Well, I knew the day would come. I'm getting my troll news from Dennis Crouch now. According to Dennis, a company called ESN sued Cisco for patent infringement on October 15th, while the patent did not issue until October 16th. I looked, and ESN appears to be a shell entity managed by the President and CEO of DirectAdvice, an online financial website. And, yes, he's a lawyer. He clerked for a federal judge in Connecticut, and was an attorney at Day, Berry & Howard. Now he's suing Cisco on behalf of a non-practicing entity.

Send email

email:TrollTracker

About Me

Troll Tracker

Just a lawyer, interested in patent cases, but not interested in publicity

[View my complete profile](#)



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[Peter Zura's 271 Patent Blog](#)

[Patent Prospector](#)

[Michael Smith's EDTX Blog](#)

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I asked myself, can ESN do this? I would think that the court would lack subject matter jurisdiction, since ESN owned no property right at the time of the lawsuit, and the passage of time should not cure that. And, in fact, I was right:

A declaratory judgment of "invalidity" or "noninfringement" with respect to Elk's pending patent application would have had no legal meaning or effect. The fact that the patent was about to issue and would have been granted before the court reached the merits of the case is of no moment. Justiciability must be judged as of the time of filing, not as of some indeterminate future date when the court might reach the merits and the patent has issued. We therefore hold that a threat is not sufficient to create a case or controversy unless it is made with respect to a patent that has issued before a complaint is filed. Thus, the district court correctly held that there was no justiciable case or controversy in this case at the time the complaint was filed. GAF contends, however, that the issuance of the '144 patent cured any jurisdictional defect. We disagree. Later events may not create jurisdiction where none existed at the time of filing.

*GAF Building Materials Corp. v. Elk Corp. of Texas*, 90 F.3d 479, 483 (Fed. Cir. 1996) (citations and quotations omitted).

One other interesting tidbit: Cisco appeared to pick up on this, very quickly. Cisco filed a declaratory judgment action (in Connecticut) yesterday, the day after ESN filed its null complaint. Since Cisco's lawsuit was filed after the patent issued, it should stick in Connecticut.

Perhaps realizing their fatal flaw (as a couple of other bloggers/news items have pointed out), ESN (represented by Chicago firm McAndrews Held & Malloy and local counsel Eric Albritton and T. Johnny Ward) filed an amended complaint in Texarkana today - amending to change absolutely nothing at all, by the way, except the filing date of the complaint. Survey says? XXXXXX (insert "Family Feud" sound here). Sorry, ESN. You're on your way to New Haven. Wonder how Johnny Ward will play there?

Posted by Troll Tracker at 7:00 PM

[1 comment](#)

### **TrollSurfing: Monts & Ware, Ward & Olivo, and Their Clients**

Similar to surfing the web, I started by checking out a hunch I had about Monts & Ware being behind all sorts of troll cases. Then I trollsurfed through a bunch of cases, and I ended up not only with Monts & Ware (Dallas litigation firm), but also Ward & Olivo (patent lawyers from New York/New Jersey), as a thread behind a bunch of

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