

EXHIBIT 3

Maland, David

11/3/2008

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON)
)
v.)
) C.A. NO. 6:08-CV-00089
CISCO SYSTEMS, INC.,)
RICK FRENKEL, MALLUN YEN &)
JOHN NOH)

CERTIFIED COPY

ORAL AND VIDEOTAPED DEPOSITION OF
DAVID MALAND
NOVEMBER 3, 2008
VOLUME I

ORAL AND VIDEOTAPED DEPOSITION OF DAVID MALAND,
produced as a witness at the instance of the Defendant,
and duly sworn, was taken in the above-styled and
numbered cause on the 3rd day of November, 2008, from
9:25 a.m. to 3:15 p.m., before April R. Eichelberger,
CSR in and for the State of Texas, reported by machine
shorthand, at the United States District Court for the
Eastern District of Texas, 211 West Ferguson Street in
the City Tyler and the State of Texas, pursuant to the
Federal Rules of Civil Procedure and the provisions
stated on the record or attached hereto.

Maland, David

11/3/2008

Page 9

1 will announce, in regard to the scope of the authorized
2 testimony today.

3 MR. WELLS: And Robert Wells, also with
4 the United States attorney's office in the same role.

5 THE VIDEOGRAPHER: Will the court
6 reporter please swear in the witness.

7 DAVID MALAND,
8 having been first duly sworn, testified as follows:

9 EXAMINATION

10 BY MR. BABCOCK:

11 Q. Would you state your name, sir?

12 A. David J. Maland.

13 Q. And, Mr. Maland, how are you employed?

14 A. I am the United States District Clerk for the
15 Eastern District of Texas.

16 Q. How long have you held that position?

17 A. Sixteen years and three months.

18 MR. GIBSON: Mr. Babcock, before we go
19 any further, can we put our -- just our brief
20 housekeeping matters on the record? First of all, we --
21 as you know, we have several depositions that are set
22 for today. I have the witness fees that were tendered
23 to Mae Velvin, to Shelley Moore, and to Rhonda Lafitte.
24 They are all deputy clerks employed by the United States
25 District Clerk's Office and reside and work or work in

Maland, David

11/3/2008

Page 27

1 near the end of the day and they wouldn't record it
2 until the beginning of the next day?

3 Q. (BY MR. BABCOCK) Right.

4 A. Entirely possible.

5 Q. Okay.

6 A. That's as much as I can say about it. I'm not
7 qualified to go forth.

8 Q. And you're way ahead of me, so -- Ms. Parker
9 is computer-literate, but I'm not. Okay.

10 A. I can tell you that the docket entry, now,
11 these -- this docket entry, which is really the docket
12 entry in question that was modified --

13 Q. Right.

14 A. -- that does show filing fee, 350, Receipt
15 Number 1292, there's no date connected with it other
16 than October the 16th.

17 Q. And of course, that was changed from the 15th.

18 A. And that was changed. It was originally what
19 Ms. Thompson, Faye N. Thompson in the parenthetical,
20 those are her initials.

21 Q. Okay.

22 A. What she did was change -- when I first looked
23 at it on the computer screen on -- I believe it was
24 October the 17th.

25 Q. Right. Yeah.

Maland, David

11/3/2008

Page 29

1 Q. And then Ms. Thompson modified it on -- two
2 days later on the 17th to reflect 10/16/2007?

3 A. Yes.

4 Q. Okay. Fine. And the other -- other than the
5 date filed, changing it from the 15th to the 16th, and
6 the modified language --

7 A. That -- that gets put in automatically by the
8 computer.

9 Q. Okay. But my point was, the other language
10 before modified was the same on the 15th and the 16th,
11 correct?

12 A. Yeah.

13 Q. That was my point.

14 A. Yeah.

15 Q. Let me keep going through these e-mails that
16 you produced for us, which will be great.

17 A. Very good.

18 Q. Here's Exhibit 86. Are these e-mails -- is
19 the government the same as some of these where you start
20 at the back and go to the front?

21 A. Start at the back. Yeah, chronologically it
22 started out with the --

23 Q. So -- so the first e-mail here would be from
24 Shelley Moore to yourself on October 18th, 2007, at
25 9:23 a.m.?

1 telephonically.

2 Q. Okay.

3 A. This is an e-mail conversation.

4 Q. Right. Okay. "Dear Shelley, check the NEF
5 for the complaint in that case," you wrote back. "I
6 believe it shows a date of 10/16. That's the document
7 that really matters." That's what you wrote back to
8 her?

9 A. I did.

10 Q. And then she writes back to you, "I saw that.
11 And that is why I was puzzled that the computer showed
12 the 15th. She must have finished the entry just seconds
13 after midnight."

14 A. Yes.

15 Q. And that's what she wrote back?

16 A. That's what she wrote.

17 Q. And did your subsequent investigation show
18 that what happened here was that Ms. Mathis had started
19 uploading this lengthy complaint with exhibits prior to
20 midnight and finished it shortly after midnight?

21 A. Yes, yes.

22 Q. And that's what -- that's what you found
23 happened?

24 A. Oh, yes, yeah.

25 Q. Okay. And that's why it got the date on the

Maland, David

11/3/2008

Page 34

1 15th because she had started the filing process on the
2 15th?

3 A. Yeah. Now, there's a document that I want
4 to --

5 Q. First of all, is that right?

6 A. It is right.

7 Q. Okay.

8 A. Absolutely. A document that's germane to
9 this -- let's see if -- it wouldn't be in the e-mails.
10 It would be in the -- oh, it is in the e-mails right at
11 the end.

12 Q. Okay. Let me --

13 A. This is a fairly important document. It is
14 that one.

15 Q. That one.

16 A. Very good.

17 Q. Okay. Exhibit 94, and --

18 A. This is something that we were -- wanted some
19 written confirmation from our administrative office.
20 They are located -- their help desk, their -- really the
21 programmers for this national electronic filing system,
22 they are in San Antonio, Texas. They cover the entire
23 country. And we look to them for information as to how
24 the software operates.

5 Q. Right.

Maland, David

11/3/2008

Page 38

1 writing.

2 Q. Okay. All right. And under the -- under the
3 hypothetical, under our case, if Ms. Mathis started
4 uploading the complaint at 11:30 on the 15th, even
5 though she didn't hit, as the help desk says, the
6 "submit" button until 12:01, the nationwide system is
7 going to create a filing date of October 15th, not
8 October 16th when she hits the button?

9 MR. HOLMES: Objection, form.

10 Q. (BY MR. BABCOCK) Is that right?

11 A. That's a con -- what you mean by filing date
12 is -- it's a real term of art here.

13 Q. Okay. Let me put it --

14 A. And there's more than one date contained on
15 the NEF, which is the document that really determines
16 filing date.

17 Q. Yeah. But the problem, anyway, is -- and do
18 you know who on the help desk was helping you on this?
19 Do you know the name of the person?

20 A. David might.

21 Q. Okay. I'll ask David about it. But the help
22 desk is telling you that the reason the 15th popped up
23 is because Ms. Mathis had started entering the
24 complaint, which is a lengthy complaint, before
25 midnight --

Maland, David

11/3/2008

Page 39

1 A. Yes.

2 Q. -- even though she didn't only hit the submit
3 button until shortly after midnight?

4 MR. HOLMES: Objection, form.

5 A. Right.

6 Q. (BY MR. BABCOCK) Okay. That clears that up.

7 A. We just wanted something from the people who
8 are involved and knew the most about how the software
9 operated to confirm our longstanding suspicion that it
10 dragged in the date when she started the process.

11 Q. Right.

12 A. And I -- well...

13 Q. And you know, from having dealt with rules for
14 your entire career and -- you probably don't know this,
15 but I'm the chair of the Supreme Court advisory
16 committee --

17 A. Are you?

18 Q. -- so I've dealt with rules -- not as long as
19 you.

20 A. The Supreme Court of Texas?

21 Q. Texas, yeah.

22 A. Okay.

23 Q. And normally, with rules, because of statute
24 of limitations and jurisdictional filing deadlines, you
25 want the earlier date, not the later date, right?

Maland, David

11/3/2008

Page 42

1 was riding in the court van back from Plano, Texas. We
2 were working on our new courthouse there, and I was --

3 MR. McWILLIAMS: By the way, is it in
4 west Plano or east?

5 THE WITNESS: Yeah.

6 MR. BABCOCK: See, I told you.

7 THE WITNESS: It's near 121 and the
8 Tollway. Very nice location.

9 MR. BABCOCK: Yeah.

10 A. But this is just -- you know, when I got back
11 there, I was like, oh, that already happened, because
12 she called me or I talked to Ms. Jeffreys while in the
13 van heading home that afternoon, and she immediately --
14 I'm paraphrasing, but said, have you ever -- have you or
15 your staff ever changed a filing date in a case?

16 And I said, well, there's only one that I
17 recall adjusting or correcting the filing date, and it
18 involved a patent case filed by Eric Albritton, only
19 time.

20 And so she quizzed me about that, said she
21 was writing an article about that for deadline soon,
22 wanted just some quotes that she could put in her
23 article, you know, this afternoon was her deadline so
24 she needed something quickly.

25 Q. They always do that.

Maland, David

11/3/2008

Page 54

1 A. It was either Rhonda Lafitte, who is the
2 deputy in charge, or Shelley Moore, deputy clerk. I
3 believe it was Shelley Moore.

4 Q. Okay.

5 A. I'm pretty sure it was Shelley Moore that
6 talked to her.

7 Q. All right. And the -- what you say to the
8 Texas Lawyer, you go on to say, "She wanted" -- she
9 meaning Amie, correct?

10 A. Yes.

11 Q. -- "wanted the clerk's office to change the
12 date to October 16th because she had waited to file the
13 complaint until after the midnight on the 16th." Did I
14 read that correctly?

15 A. Yes, uh-huh.

16 Q. And how did you learn that Ms. Mathis wanted
17 the clerk's office to change the date to October 16th?

18 A. That was relayed to me by Peggy Thompson of
19 the Tyler clerk's office. After Ms. Mathis talked to
20 both Ms. Lafitte and Ms. Moore in Texarkana, they both
21 told her we are not authorized to do something like
22 that; you'll have to call Tyler.

23 So she called Ms. Thompson, Peggy
24 Thompson, who is the criminal court reporter, CJ; she's
25 a supervisor. And then Ms. Thompson relayed the request

Maland, David

11/3/2008

Page 56

1 Thompson relayed to you? That's just what I want to
2 know right now.

3 A. Yeah. The -- it's to change on the docket
4 entry -- where is -- docket sheet. I'm looking for the
5 docket sheet.

6 Q. Here you go.

7 A. Thank you.

8 Q. It's Exhibit 99.

9 A. Thank you. On Exhibit 99, the date in the
10 "date filed" column on page 3 of the then -- of the
11 docket sheet. It pertains to Document Number 1, and the
12 docket text is that for the complaint. When I looked at
13 the docket entry on that day, this date filed read
14 10/15/2007. And what I was told they wanted to change
15 was to change that so it reflected 10/16/2007.

16 Q. Okay. So Ms. Thompson told you the request
17 from Ms. Mathis and Mr. Albritton were that they wanted
18 the date filed, which originally showed 10/15/2007, to
19 be changed to 10/16/2007?

20 A. Yes.

21 Q. That was the request?

22 A. Yeah, based on their notice of -- well, their
23 Notice of Electronic Filing that showed that they had
24 finished the --

25 Q. They had reasons, but that was the request?

Maland, David

11/3/2008

Page 57

1 A. That was the request.

2 Q. Okay.

3 A. To change that date, yes.

4 Q. Okay. And as you tell the Texas Lawyer,
5 continuing on in this paragraph --

6 A. Uh-huh.

7 Q. -- the Texarkana deputy clerk was reluctant to
8 change the date.

9 A. Yes.

10 Q. And referred Amie to the Tyler clerk's office.
11 And as you've just testified, that -- you understood
12 that's what happened?

13 A. Yes.

14 Q. And you're not sure whether it was Rhonda
15 Lafitte or Shelley Moore that referred her to the Tyler
16 clerk's office?

17 A. I think they both talked to her and they both
18 expressed a reluctance and suggested that she talk to
19 us.

20 Q. Did they tell you why they were reluctant?
21 And I'm talking contemporaneously now, back in October
22 of 2007.

23 A. No. You know, the first I heard about it was
24 Peggy coming to me. I was beginning -- I was, to my
25 recollection, getting ready to go somewhere. Maybe it

Maland, David

11/3/2008

Page 58

1 was home. It was close to, you know, afternoon time by
2 my recollection.

3 And the first I heard of it was Peggy
4 coming to me and said, wait, wait, wait, we've got a
5 request here. I need you to take a look at this. But I
6 never talked to Ms. -- either of the Texarkana deputies.
7 I can tell you, though, that this, you know, is rather
8 deeply engrained in them, and I think is evinced by
9 their actions, that they would not do something like
10 that without my permission.

11 Q. Right. And as Shelley Moore told you in
12 writing, she was a little leery about changing the date,
13 correct?

14 A. Yeah, uh-huh.

15 Q. And then she talked to Cindy Paar, and she's
16 even more leery about changing the date?

17 A. Yeah, yeah.

18 Q. And did you ever learn about this Cindy -- and
19 we'll find out later today, but about this Cindy
20 Paar/Shelley Moore conversation that made Shelley Moore
21 even more leery about changing the date?

22 A. I never talked to Cindy about this until just
23 a few days ago.

24 Q. Okay. What did Cindy say?

25 A. She said that the -- she was aware that -- on

Maland, David

11/3/2008

Page 65

1 A. Yeah, but some of it was changed because of
2 the way that the underlying programming worked. The
3 only thing that she changed was that. But the computer
4 automatically puts in this modification language.

5 Q. But the actual stamp at the top of the
6 document -- of the complaint changed as well, you know.

7 A. Not that.

8 Q. No, no. You're talking about the docket
9 sheet. I'm talking about the complaint itself. Hang
10 on. I'll show it to you.

11 A. Okay. I wasn't...

12 Q. Here is Exhibit 21, and you'll see, at the top
13 of the complaint, "Complaint for patent infringement,
14 ESN versus Cisco Systems and Cisco-Linksys, LLC." It
15 says here case, and it gives the case number and
16 document; and it says filed October 15, 2007?

17 A. Yeah.

18 Q. Right?

19 A. Right.

20 Q. And then that -- what do you call that, by the
21 way, that thing at the top of the document?

22 A. Well, it's a header, term of art. Cindy or
23 David may know the answer to that.

24 Q. Okay.

25 A. But that's automatically put in there by the

Maland, David

11/3/2008

Page 71

1 10/16. That, to me, was the ballgame.

2 I had no doubt then and I have no doubt
3 now that -- and I'm not a judge. But I'm the clerk of
4 court, and I know a lot about what's at play here, I
5 think. In my opinion, there was no doubt that those
6 stamps are determinative. The electronic stamps that
7 say 10/16 for each of those documents on the NEF are
8 outcome determinative of this matter.

9 Q. Did -- obviously your office was in contact
10 with Mr. Albritton's office. Do you know whether
11 anybody in your office was in contact with Cisco about
12 this?

13 A. No. No, I don't believe anyone was.

14 Q. Okay.

15 A. I -- they can tell you, but I am quite
16 confident no one talked to them.

17 Q. Okay. And --

18 A. Of course, at the time that it was filed, the
19 Schell case and the complaint was filed, they chose not
20 to E -- use the e-service feature.

21 Q. Who is they, Mr. Albritton?

22 A. Albritton. When Amie filed that thing, I
23 looked at it. They didn't put in opposing counsel.
24 They were serving by -- not by our system. I thought
25 perhaps they had. Now, I just found that out. But if

Maland, David

11/3/2008

Page 73

1 A. It's amongst the -- it's an attachment on
2 these things.

3 Q. Well, in any event, you said you just found
4 out -- you got it?

5 A. I'm looking for my e-mail to the Texas Lawyer
6 because it's got all the attachments.

7 Q. Oh, okay.

8 A. Here we go. Here we go. Okay. We're looking
9 for the NEF. Here we go. This is contemporaneous.
10 This is what happened at that time. Notice will be
11 electronically mailed to. All she did was put her
12 boss's name, Eric M. Albritton. She was the only one
13 that got a copy of the NEF.

14 Q. Okay.

15 A. And I -- just by looking over the materials, I
16 discovered that within the last couple of days. I had
17 thought, you know, another typical way of doing it and
18 many attorneys use the e-service feature of our
19 electronic filing system so that this could be conveyed
20 directly to the other litigants. But obviously when
21 that complaint was filed, it was not. The only notice
22 went to Albritton, the only e-mail notice of that, and
23 of course, to us.

24 Q. Right. Okay. But there was a feature that
25 your office had that, had Mr. Albritton chosen, he could

Maland, David

11/3/2008

Page 74

1 have inputted Cisco data so they would have gotten
2 notice of all these things?

3 A. Yes. The procedure is described amongst those
4 documents that I've given you as to how attorneys are
5 trained so they can input the e-mail addresses of -- or
6 from a pick list, take the opposing counsel and put them
7 into the system and they will get the electronic
8 notification.

9 Q. Okay. So as -- as Mr. Albritton's office was
10 making this request to change the date from the 15th to
11 the 16th, first to the Texarkana office and then to the
12 Tyler office, as far as you know, Cisco had no input
13 into that request?

14 A. I didn't -- at that juncture, know -- other
15 than the caption, know who the attorneys were or
16 anything, just they were the defendants.

17 Q. So my -- the answer is, yes, they didn't have
18 any input into this?

19 A. They had no input, right.

20 Q. And you tell the Texas Lawyer in your -- the
21 last -- next-to-last sentence, "Hindsight being 20/20, I
22 should have instructed the Tyler docket clerk to tell
23 Mr. Albritton to file a motion to correct the docket
24 report rather than having the deputy clerk do a
25 correcting entry." Did I read that correctly?

Maland, David

11/3/2008

Page 75

1 A. You surely did.

2 Q. And why did you feel that way?

3 A. Well, I think at the time that this occurred,
4 when I got the phone call, I was focusing on what I knew
5 about the local rules committee's desire with our
6 procedure to have it work so it reflected the date and
7 time of filing, the -- you know, if there was indicia,
8 clear indicia when the thing -- when they hit the
9 "submit" button on the NEF, which there was, to me, that
10 was the issue being presented. I was not thinking about
11 defendants.

12 And yet, five, six months hence,
13 reflecting on what happened where, you know, we have
14 lawsuits and things happening, I was of the opinion that
15 it would have been preferable to just tell them file a
16 motion to clarify. This is a complex venue.

17 Yet at the time that I did authorize the
18 change, it was my clear opinion that the document was
19 timely filed. And I didn't really have any doubt about
20 it.

21 And yet, when I think back on it, I'm a
22 clerk. I'm not a judge. It ought to be -- you know, if
23 it gets down to this, it should have been a judicial
24 determination. They would have had to ask me and my
25 staff for the same kind of information you're having to

Maland, David

11/3/2008

Page 78

1 Q. Yeah.

2 A. Because it didn't do what it was supposed to.

3 Q. And -- and that's all helpful and I appreciate
4 it. To get back to my question --

5 A. Yes.

6 Q. That's okay. It -- and I'm not being critical
7 of the way you handled it, but I'm just saying that your
8 letter to the Texas Lawyer would seem to indicate --

9 A. Yes.

10 Q. -- that, if this came up again, you would give
11 notice to both sides and let the judge decide whether
12 the docket entry should be changed?

13 A. Absolutely.

14 Q. Is that true?

15 A. Yes, absolutely.

16 Q. Let me ask you to look at Exhibit 88, and
17 this, the bottom of it, it's your letter to the Texas
18 Lawyer. But then above it, it's an e-mail from you to
19 Faye Thompson, Shelley Moore, and Rhonda Lafitte. And
20 you say -- dated March 14, 2008, "Here for your
21 information is a memo I sent to the Texas Lawyer with
22 copies to Chief Judge Heartfield and Judge Folsom
23 regarding the matter above. It represents, to the best
24 of my knowledge, what happened in this case. There is
25 pending litigation involving the facts below in state

Maland, David

11/3/2008

Page 97

1 Q. Yeah. My question was bad because that's not
2 what I was going to.

3 A. Yeah.

4 Q. Was there a mistake made by the clerk's office
5 in -- hang on.

6 A. Pardon me.

7 Q. Was there a mistake made in the clerk's office
8 in handling the initial filing? Forget about the
9 correcting entry. I'm just talking about the initial
10 filing.

11 A. None at all. Thank you for slowing me down.
12 But none, no mistakes at all.

13 Q. Okay. And now, moving -- and you corrected
14 me, too, so we both pat each other on the back.

15 Moving forward to the correcting entry,
16 you don't think your office did anything wrong, but in
17 hindsight, it would have been better if there had been a
18 motion filed?

19 A. It would have been better to have a motion
20 filed, and I should have sent -- I should have
21 alerted -- once I became aware of counsel -- the defense
22 counsel, they should have been put into the loop.

23 Q. Okay. We're out of tape. Thanks. We'll take
24 a quick break, and I'm nearing the end if you can
25 believe this.

Maland, David

11/3/2008

Page 114

1 Tyler and just things like that.

2 Q. Other -- other than logistical e-mails about
3 just getting here and that type of thing, are there any
4 other documents you've withheld?

5 A. No, no.

6 Q. Okay. And are either Mr. Gibson or Mr. Wells
7 representing you as your attorneys in this?

8 A. Only -- they are representing the interest of
9 the United States and not us. That was another helpful
10 clarification that they provided us with. They're here
11 to ensure that the scope of the testimony doesn't go
12 outside of our, you know, specifics on the Tuohy
13 regulations.

14 Q. Sure. Just another couple of questions.
15 First of all, I've noticed, just by looking at the PACER
16 in the eastern district, that sometimes you'll see
17 entries that say filed in error or there will be some
18 indication like that.

19 A. Yeah, yeah.

20 Q. I noticed in this case, however, the docket
21 entry of October 15th, 2007, has completely disappeared
22 from the system. Can you -- number one, do you know
23 that to be true?

24 A. The docket entry for the complaint?

25 Q. Yeah. The docket entry that said

Maland, David

11/3/2008

Page 115

1 October 15th --

2 A. Oh.

3 Q. You know what I'm saying?

4 A. Right. Yeah, that -- that disappeared when
5 Faye Thompson made that correcting -- I mean, that --
6 that's the one thing that disappeared. And yet, from
7 the transaction log, you can see that that adjustment
8 was made. And when I first saw the docket sheet, it
9 said October 15th. But once that change was made, it
10 changed it in the database.

11 Q. Okay. Why wouldn't it show filed in error as
12 you do other? What's the distinction between that?

13 A. Filed in error is a procedure that is used
14 primarily for what we call quality control events, but
15 they are -- when attorneys -- and this, again, is a
16 provision in our local rules. We are not authorized to
17 reject documents for failure to comply with the rules.

18 Nonetheless, this court and many courts
19 have authorized the clerk's office to, in effect,
20 monitor electronic filings for rule compliance. And so,
21 say if you submitted a document that lacks something
22 significant, sometimes the document would be withdrawn
23 and then resubmitted in the proper format.

24 But it's primarily to do with our function
25 of quality control and looking at those documents and,

Maland, David

11/3/2008

Page 119

1 A. And then they've also -- if they're looking at
2 the Notice of Electronic Filing, which is really the
3 document that all of us ought to be looking at because,
4 under the rules, that is the -- it's not what a docket
5 clerk puts under Document Number 1. It's the -- what
6 does the NEF say.

7 Q. But --

8 A. But that was kind of where I was coming from.
9 But looking back on all the difficulty this has caused
10 and what -- you know, perhaps a better course of action
11 at the time, knowing what I know now, you know, there's
12 no way, if this situation occurred again, that we would
13 do the same thing, that we would make an adjusting
14 entry. We would hopefully fix it before then, but we're
15 not going to touch another similar case like this. We
16 would leave it up to a judge.

17 Q. And the reason for that is that a judge would
18 have all the facts available like you provided the Texas
19 Lawyer?

20 A. Yes, right.

21 Q. The public would have those facts available?

22 A. Yes.

23 Q. And the explanation would be there for
24 everyone to take a look at?

25 A. Right. That -- hindsight being 20/20, that

Maland, David

11/3/2008

Page 125

1 reference the complaint, and it does evidence a change
2 in the date filed; but it does not mention 10/15 in that
3 text.

4 Q. We may have this already marked as another
5 exhibit.

6 MR. McWILLIAMS: Chip, I'm going to use
7 your sequence here.

8 MR. BABCOCK: Sure.

9 (Exhibit Number 111 was marked.)

10 Q. (BY MR. McWILLIAMS) Marked as Exhibit 111,
11 and can you identify what that exhibit is?

12 A. That is -- well, it's -- are these a copy of
13 the same? Yeah, you just want me to -- this appears to
14 be a copy of that.

15 Q. Right, right. Just identify the first two
16 pages.

17 A. Yeah, okay. Yeah, yeah, this is a copy of the
18 docket sheet that shows the way that it looked before
19 Ms. Thompson corrected that entry.

20 Q. All right. And what -- what does it say the
21 filing date of the complaint is?

22 A. October 15, 2007.

23 Q. Now, that is the docket sheet and the filing
24 date that is now gone?

25 A. Yeah. But it is indicia of how it looked.

Maland, David

11/3/2008

Page 127

1 the 20 some-odd pages following had a file date of
2 October the 15th, 2007, did it not?

3 A. Right. Yes.

4 Q. Did you send a copy of that complaint in the
5 exhibits to the Texas Lawyer?

6 A. No. I mean, the first time I'd seen that
7 complaint with the header on it was today. But even
8 with or without the header, of course, any -- any
9 printing of that document out of the database would
10 have -- after the case is filed, that header appears on
11 everything.

12 Q. I understand.

13 A. On every page.

14 Q. So if --

15 A. But I did not send the complaint as part of my
16 attachments because I was focusing, as we should, on the
17 Notice of Electronic Filing.

18 Q. I understand. So if a member of the public,
19 on this same October 16th date at 9:40 a.m., had looked
20 at the complaint, it would have had the October 15th
21 filing date across the top?

22 MR. HOLMES: Objection, form.

23 A. At any time, you're correct, yeah, it would
24 have had that.

25 MR. HOLMES: Objection, form.

Maland, David

11/3/2008

Page 131

1 A. Yes. It was in November of 2007. It's that
2 local -- pardon me -- General Order 07-9 was the order
3 amending the local rules.

4 Q. And Mr. Albritton became a member of the local
5 rules committee on what date?

6 A. It would have been in the spring of 2008.
7 That -- there's a particular rhythm to the way that our
8 rules committee works. We -- the appointments are made
9 typically in May of a year, and I send a letter out in
10 June welcoming the new ones. There's generally four new
11 ones every year.

12 Q. And I believe you said that Mr. Albritton was
13 appointed by Judge Davis?

14 A. Judge Davis. And so he would have been
15 appointed by Judge Davis sometime in May of 2008. The
16 letter would have gone out June of 2008 or maybe late
17 May, and we had a physical meeting in that courtroom,
18 Judge Steger's courtroom, sometime in July of 2008.

19 Q. Are all the members of the rules committee
20 appointed by the federal judges --

21 A. Yes.

22 Q. -- in this --

23 A. There are some standing appointments. The
24 then-current U.S. attorney, anybody can -- she or he can
25 delegate their position to others. Also, the

Maland, David

11/3/2008

Page 163

1 about litigating patent cases in the Eastern District of
2 Texas, to your knowledge?

3 A. No.

4 Q. Now, what do you take this to mean, "the
5 banana republic of East Texas"?

6 A. Well, I'm aware that -- I mean, the
7 implication is that our court is some kind of
8 plaintiffs' clip joint and that it favors, you know,
9 plaintiffs over -- or at least favored certain parties
10 over others, that it's less than unbiased. That's what
11 it implies to me. Banana republic is sort of a place
12 that, in common parlance, I think means that it's sort
13 of a dictatorship that invites money to come their way,
14 that it's some kind of ill-gotten gains there. That's
15 what it means to me. It has a negative connotation.

16 Q. Is there any truth to it?

17 A. No.

18 Q. Now, continuing on down the first page,
19 there's another posting. This one's dated Wednesday,
20 October 17th, 2007. Do you see that one?

21 A. Yes.

22 Q. Would you read the title of that one for us?

23 A. "Troll Jumps the Gun, Sues Cisco Too Early."

24 Q. Now, what is a troll, Mr. Maland?

5 A. Well, I do know, you know, a troll -- I was --

Maland, David

11/3/2008

Page 170

1 ought to know exactly what was being sent to them. And
2 he was aware of it prior to me sending.

3 Q. Did either Judge Heartfield or Judge Folsom
4 criticize or ask you to change anything --

5 A. No.

6 Q. -- in what you submitted to them?

7 A. No.

8 Q. Let me ask you to clear this up for me. A
9 couple of these e-mails indicated that at least one of
10 the clerks communicated to you that she was -- the word
11 she used was "leery"?

12 A. Yes.

13 Q. She was leery of making any change to the
14 docket?

15 A. Right.

16 Q. Is that an inappropriate response on her part?

17 A. No.

18 Q. Why not?

19 A. Because the deputy clerks are trained that any
20 kind of adjustment -- now, there's a difference between
21 the type of situation we talked about before where --
22 docketed in error. We do that kind of thing all the
23 time. Things get -- either because of an error on the
24 attorney's part or error in the clerk's office part,
25 they get a notation made. It is rare that we would do a

Maland, David

11/3/2008

Page 182

1 they started loading the documents, and that was
2 vexatious to them and therefore asked for help
3 clarifying that. And they asked the help of my office
4 who appropriately sent the question to me.

5 And being as involved as I am in the
6 local rule formulation process, the process to even
7 provide an instrumentality for electronic filing, I had
8 a background that my deputies didn't and I made a
9 decision to -- based on the document, the NEF that was
10 available, it was clear to me that that's what exactly
11 happened. They had followed the procedures. They were
12 trying and did tender the document electronically
13 shortly after midnight and you could -- I could tell
14 from the documents then at hand and I made a decision to
15 authorize my deputy to change the file date -- date
16 filed in Column 1 on Document Number 1 on the docket
17 sheet, which really -- quite frankly, even that's not
18 dispositive. It's the NEF that matters.

19 Q. Does the content --

20 A. That's what -- I guess because the NEF
21 controlled is why we did it, because I felt that that
22 clarification was, under our rules, appropriate, that
23 that's when in fact -- and I could clearly tell that's
24 when the documents were tendered.

25 Q. Do the contents of Exhibit 31 bear any

Maland, David

11/3/2008

Page 196

1 we've been going up until last year, and some of that
2 is -- the diminution between '07 and '08 would be a loss
3 of -- prisoner cases have gone down a bit.

4 MR. BABCOCK: Darn.

5 THE WITNESS: Yeah.

6 A. But generally speaking, our court, up until
7 this last year, has been bucking a national trend where,
8 because of tort reform initiatives in many states and --
9 civil case filings across the country have been
10 dropping, and ours have maintained a certain amount of
11 steadiness to them.

12 Q. (BY MR. McWILLIAMS) Would it be fair to say
13 that over the last five years, there have been from 10
14 to 15,000 cases filed in the eastern district?

15 A. Yeah, that'd be about right, somewhere in
16 there.

17 Q. And just going back over the last five years
18 and the 10 to 15,000 cases that have been filed, I
19 understand it's your testimony that you've never been
20 asked to change a docket filing date up until this case?

21 A. Right, not like this, that -- no, I've never
22 had that -- this kind of question presented to me.

23 Q. And I believe it's Exhibit 111. We'll find
24 the exhibit, but I --

25 MR. BABCOCK: What are you looking for?

Maland, David

11/3/2008

Page 206

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON)
)
v.)
) C.A. NO. 6:08-CV-00089
CISCO SYSTEMS, INC.,)
RICK FRENKEL, MALLUN YEN &)
JOHN NOH)

REPORTER'S CERTIFICATION
DEPOSITION OF DAVID MALAND
NOVEMBER 3, 2008

I, April Eichelberger, Certified Shorthand Reporter
in and for the State of Texas, hereby certify to the
following:

That the witness, DAVID MALAND, was duly sworn by
the officer and that the transcript of the oral
deposition is a true record of the testimony given by
the witness;

That the deposition transcript was submitted on
_____ to the witness or to the attorney
for the witness for examination, signature and return to
me by _____;

That the amount of time used by each party at the
deposition is as follows:

MR. BABCOCK.....2 hours, 33 minutes

MR. McWILLIAMS...37 minutes

MR. HOLMES.....1 hour, 5 minutes;

Maland, David

11/3/2008

Page 207

1 That pursuant to information given to the deposition
2 officer at the time said testimony was taken, the
3 following includes counsel for all parties of record:

4 FOR THE PLAINTIFF:

5 Mr. James A. Holmes

6 FOR THE DEFENDANT CISCO SYSTEMS, INC.:

7 Mr. Charles L. Babcock, Ms. Crystal J. Parker

8 FOR THE DEFENDANT RICHARD FRENKEL:

9 Mr. George L. McWilliams

10 FOR THE WITNESS:

11 Mr. Thomas E. Gibson, Mr. Bob Wells

12 That \$ _____ is the deposition officer's charges
13 to the Defendant for preparing the original deposition
14 transcript and any copies of exhibits;

15 I further certify that I am neither counsel for,
16 related to, nor employed by any of the parties or
17 attorneys in the action in which this proceeding was
18 taken, and further that I am not financially or
19 otherwise interested in the outcome of the action.

20 Certified to by me this _____ day of

21 _____, 2008.

22
23
24 April Eichelberger
Texas CSR No. 7495
25 Expiration Date: December 31, 2009

1 That pursuant to information given to the deposition
2 officer at the time said testimony was taken, the
3 following includes counsel for all parties of record:

4 FOR THE PLAINTIFF:

5 Mr. James A. Holmes

6 FOR THE DEFENDANT CISCO SYSTEMS, INC.:

7 Mr. Charles L. Babcock, Ms. Crystal J. Parker

8 FOR THE DEFENDANT RICHARD FRENKEL:

9 Mr. George L. McWilliams

10 FOR THE WITNESS:


11 Mr. Thomas E. Gibson, Mr. Bob Wells

12 That \$ _____ is the deposition officer's charges
13 to the Defendant for preparing the original deposition
14 transcript and any copies of exhibits;

15 I further certify that I am neither counsel for,
16 related to, nor employed by any of the parties or
17 attorneys in the action in which this proceeding was
18 taken, and further that I am not financially or
19 otherwise interested in the outcome of the action.

20 Certified to by me this 5th day of

21 November, 2008.

22
23 
24 April Eichelberger
25 Texas CSR No. 7495
Expiration Date: December 31, 2009