

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

JOHN WARD, JR.,

Plaintiff,

vs.

Case No. 08-4022

CISCO SYSTEMS, INC.,

Defendant.

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VIDEOTAPED DEPOSITION OF MALLUN YEN  
VOLUME I

November 18, 2009

9:32 a.m.

675 El Camino Real  
Palo Alto, California

Reported by Pua'aina L. McVay, CSR 12868  
Certified LiveNote Realtime Reporter

1 09:36:39 taking place, you didn't know about them?  
2 09:36:42 A I don't remember knowing about them.  
3 09:36:45 Q Were you ever involved in any of those  
4 09:36:48 discussions?  
5 09:36:48 A No.  
6 09:36:48 Q No one at Baker & Botts ever calls you and  
7 09:36:52 said, hey, we've been in contact with some lawyers for  
8 09:36:55 ESN and asked you for information or input?  
9 09:37:01 MR. BABCOCK: Don't reveal the content of  
10 09:37:03 discussions that you had with Baker & Botts relating  
11 09:37:05 to the ESN lawsuit. If there was a -- the fact of a  
12 09:37:13 conversation may not be privileged but be careful not  
13 09:37:18 to repeat the contents.  
14 09:37:20 THE WITNESS: Okay. Can you repeat the --  
15 09:37:22 MR. BABCOCK: I think he's asking about the  
16 09:37:25 fact of the conversation.  
17 09:37:29 BY MR. HOLMES:  
18 09:37:29 Q Let's do this, Ms. Yen, because this is going  
19 09:37:29 to be an issue that comes up a lot from time to time  
20 09:37:29 in this deposition. Unless I ask you specifically  
21 09:37:31 about the content of conversations with attorneys, I  
22 09:37:33 don't want you to volunteer that information. Okay?  
23 09:37:35 A Okay.  
24 09:37:36 Q I will ask you from time to time if you had  
25 09:37:39 conversations. Okay? And I may or may not discuss

1 09:38:52 A Okay.

2 09:38:53 Q Can you get any closer than middle of

3 09:38:56 October? Was it the 15th, 16th, 17th?

4 09:39:00 A It was the 15th or the 16th.

5 09:39:05 Q What did you hear on the 15th or 16th?

6 09:39:08 A That ESN had filed a lawsuit against Cisco on

7 09:39:15 October 15th which was a day before the patent that

8 09:39:18 they were asserting actually issued.

9 09:39:21 Q So on the 15th or the 16th you heard that?

10 09:39:27 A Yes.

11 09:39:27 Q Okay. And who did you hear that from?

12 09:39:29 A I believe it was Rick Frenkel.

13 09:39:35 Q Do you know how Rick had learned this?

14 09:39:41 A I'm not sure.

15 09:39:44 Q Did he tell you?

16 09:39:46 A He -- I'm not sure. I can tell you how I

17 09:40:00 think he --

18 09:40:01 Q How do you think he learned?

19 09:40:04 A He either went online and found it or someone

20 09:40:08 e-mailed it to him telling him that we had gotten

21 09:40:13 sued. I don't know which one.

22 09:40:14 Q Now, had Mr. Frenkel been involved in any

23 09:40:17 discussions with Baker & Botts and ESN prior to the

24 09:40:21 filing of the ESN lawsuit?

25 09:40:23 A I don't know.

1 09:43:55 A Actually, I don't remember if there was an  
2 09:43:59 RFP process.  
3 09:44:04 MR. BABCOCK: I didn't get that. Did you get  
4 09:44:04 it?  
5 09:44:04 THE REPORTER: Uh-huh. Yes.  
6 09:44:09 MR. BABCOCK: What did she say?  
7 09:44:09 THE WITNESS: I don't remember if there was  
8 09:44:11 an RFP process.  
9 09:44:12 MR. BABCOCK: Okay.  
10 09:44:15 THE WITNESS: How did we select counsel? I  
11 09:44:17 think we talked to various counsel and decided to  
12 09:44:21 select one.  
13 09:44:22 BY MR. HOLMES:  
14 09:44:22 Q The only reason I ask is because Baker &  
15 09:44:25 Botts had already been involved in some discussions  
16 09:44:27 with ESN. Don't you know that now?  
17 09:44:30 A I do.  
18 09:44:31 Q So I guess the reason I'm asking is since  
19 09:44:33 they had already had the discussions with ESN, is that  
20 09:44:37 how they were selected to defend the ESN litigation or  
21 09:44:43 were they?  
22 09:44:44 A They were involved in the ESN defense but I  
23 09:44:48 don't believe they were counsel of record.  
24 09:44:50 Q Do you know why they were handling the ESN  
25 09:44:54 discussions in the first instance?

1 09:52:19 Q Let's be more specific on outside counsel.  
2 09:52:24 Would it have been from Kurt Pankratz?  
3 09:52:24 A It could've been.  
4 09:52:26 Q Is there someone else at Baker & Botts that  
5 09:52:28 you think would have sent this to you?  
6 09:52:34 A Probably not but it could have been.  
7 09:52:36 Q When you saw these three documents then on  
8 09:52:39 the 16th, these PDFs, what did you do in response to  
9 09:52:44 what you saw?  
10 09:52:45 A When you say these three PDFs, what documents  
11 09:52:49 do you mean?  
12 09:52:52 Q The docket sheet, the Civil Cover Sheet and  
13 09:52:55 the complaint?  
14 09:52:56 A Which docket sheet?  
15 09:52:58 Q These are the three that you saw on the 16th  
16 09:53:01 that all had the date 10/15 on them you say?  
17 09:53:06 A Okay.  
18 09:53:06 Q So you received those three PDFs from  
19 09:53:10 probably either Rick or Baker & Botts, and my question  
20 09:53:12 is what did you do?  
21 09:53:13 A I looked at them and I saw that we had been  
22 09:53:17 sued the day before a patent had issued. Oh, I might  
23 09:53:23 have -- I'm wondering if -- I can't remember if I was  
24 09:53:28 sent a document that showed that the patent hadn't  
25 09:53:31 been issued yet. You asked me what else I looked at.

1 09:58:37 A It could have been him, it could have been a  
2 09:58:42 different attorney.  
3 09:58:42 Q Do you remember who it was?  
4 09:58:43 A I don't.  
5 09:58:44 Q Do you remember if you even spoke to Baker &  
6 09:58:48 Botts at this point?  
7 09:58:49 A I don't remember. I may have spoken to Bart  
8 09:58:52 Showalter there.  
9 09:58:54 Q And this is when you learned that ESN had  
10 09:58:56 been in some discussions with outside counsel about  
11 09:58:59 Cisco potentially licensing their technology?  
12 09:59:02 A Yes.  
13 09:59:02 Q Can you tell me what you learned about those  
14 09:59:11 discussions through these contacts with either  
15 09:59:16 Ms. Beckwith, Mr. Ritter and Baker & Botts?  
16 09:59:21 A That they were trying to sell or license a  
17 09:59:26 patent that hadn't issued yet and we don't generally  
18 09:59:31 consider or license or buy patents that haven't issued  
19 09:59:36 yet.  
20 09:59:40 Q Anything else that you learned from those  
21 09:59:45 discussions?  
22 09:59:45 A That the attorneys were from Chicago.  
23 09:59:49 Q So now you've alerted Mr. Chandler, you've  
24 09:59:56 assigned the case, you've gotten yourself up to speed  
25 10:00:02 on the pre-suit discussions. Was there anything else

1 10:01:35 case.  
2 10:01:37 Q From who?  
3 10:01:37 A Beatrice Nguyen.  
4 10:01:43 Q Who is she?  
5 10:01:45 A She's one of our outside counsel.  
6 10:01:47 Q This is all starting on the morning of the  
7 10:01:50 16th?  
8 10:01:50 A I don't remember exactly what date I  
9 10:01:52 contacted her, whether it was the 16th or the 17th.  
10 10:01:55 It was around then.  
11 10:01:57 Q The other things you told me you did, you did  
12 10:02:00 those on the 16th? You alerted Mr. Chandler on the  
13 10:02:07 16th?  
14 10:02:08 A I don't recall exactly the dates but  
15 10:02:11 probably.  
16 10:02:12 Q Same with assigning the case, you assigned it  
17 10:02:16 on the 16th?  
18 10:02:17 A Around then.  
19 10:02:18 Q Your discussions with the team members and  
20 10:02:20 outside counsel about prior discussions with ESN, you  
21 10:02:23 think that happened on the 16th?  
22 10:02:25 A I don't know. It was probably around then.  
23 10:02:29 Q I think all these things are going to be  
24 10:02:32 around then. Do you think it was on the 17th?  
25 10:02:35 A I just don't remember.

1 10:05:18 A Probably not until the 17th if that's when  
2 10:05:21 the document reflected the change.

3 10:05:22 Q So my question is when you decided to contact  
4 10:05:28 Beatrice and Tony about the Hertz case, was it  
5 10:05:31 specifically about the proper procedure, in their  
6 10:05:35 view, for having a date corrected or changed or was it  
7 10:05:40 about this issue of how an incorrect date could  
8 10:05:47 possibly have even gotten on the document?

9 10:05:52 A I don't remember. It might have actually  
10 10:05:56 also been when a complaint is filed early before the  
11 10:06:00 patent issues because I believe that's what happened  
12 10:06:03 in that case.

13 10:06:04 Q So you think you may have actually wanted to  
14 10:06:10 talk to them about all three of those things: About  
15 10:06:13 what happens when suit's filed before the patent  
16 10:06:18 issues, about how is it possible to get inconsistent  
17 10:06:23 dates on the dockets and then what's the procedure to  
18 10:06:27 correct them?

19 10:06:28 A I don't remember exactly because I had only a  
20 10:06:32 vague recollection of Beatrice telling me of something  
21 10:06:37 that happened. So I knew that it was in -- it was a  
22 10:06:41 similar -- it was potentially a similar situation  
23 10:06:45 which is why I wanted to get a copy of the plead ings  
24 10:06:48 to understand what happened.

25 10:06:49 Q So you knew enough about it from your

1 10:06:51 recollection to know that it was close enough that

2 10:06:54 maybe she could help you understand some of the

3 10:06:57 issues, whichever ones that might be, and so you

4 10:07:00 called her?

5 10:07:01 A I thought there was -- there were likely

6 10:07:05 similarities based on my general recollection of what

7 10:07:08 she told me so I wanted to learn more about it.

8 10:07:12 Q But you don't know whether you called her

9 10:07:15 specifically to ask her, hey, what's the proper

10 10:07:18 procedure to correct a docket?

11 10:07:19 A I don't know. I might have asked her that at

12 10:07:23 some point.

13 10:07:24 Q It's one of the issues that may have come up

14 10:07:27 in the discussion but you don't remember her calling

15 10:07:29 you specifically to ask that question?

16 10:07:31 A I don't.

17 10:07:32 Q And you don't recall calling her specifically

18 10:07:35 to ask her, hey, how do these electronic filing

19 10:07:38 systems work and is it possible to get -- how is it

20 10:07:43 possible for the system to generate inconsistent

21 10:07:46 dates?

22 10:07:46 A I don't remember calling her for that

23 10:07:48 purpose.

24 10:07:48 Q And you don't remember calling her

25 10:07:50 specifically to ask her, hey, what happens if you file

1 12:43:17 this is Thursday, October the 18th at 11:30 p.m. from  
2 12:43:21 Mr. Frenkel to you and others. Do you see that?  
3 12:43:23 A Yes.  
4 12:43:23 Q And he's forwarding to you a copy of a motion  
5 12:43:27 to enjoin filed by ESN in the Texas court?  
6 12:43:49 A So it looks like that's what he's doing here.  
7 12:43:52 Q Do you remember receiving that document?  
8 12:43:53 A Not really.  
9 12:43:54 Q Did you review that document?  
10 12:43:56 A I don't think so.  
11 12:43:57 Q Was there anything in that document that you  
12 12:43:59 recall that caused you to think Mr. Frenkel should  
13 12:44:03 amend his post?  
14 12:44:05 A No.  
15 12:44:05 Q Did you know that in the initial post on the  
16 12:44:08 18th Mr. Frenkel referred to the Court as the banana  
17 12:44:15 republic of east Texas?  
18 12:44:17 A I learned that after the complaint was filed.  
19 12:44:20 Q You didn't know that until after Mr. Ward  
20 12:44:23 filed his complaint against you, against Cisco?  
21 12:44:25 A I don't know what his complaint was --  
22 12:44:30 Q Which --  
23 12:44:31 A -- where I learned it.  
24 12:44:34 Q I'm sorry.  
25 12:44:36 Which complaint, you mean whether it was

1 12:44:36 Mr. Ward's or Mr. Albritton's?  
2 12:44:36 A That's correct.  
3 12:44:37 Q So your testimony is you didn't know  
4 12:44:39 Mr. Frenkel has used the phrase banana republic of  
5 12:44:44 east Texas until sometime in the spring of 2008?  
6 12:44:47 A Yes.  
7 12:44:47 Q Did you know that on the 19th he edited that  
8 12:44:51 post and took that down?  
9 12:44:53 A I learned that later.  
10 12:44:54 Q Same time, in the spring?  
11 12:44:56 A Yes.  
12 12:44:56 Q Did you tell him to change that language?  
13 12:44:58 A No.  
14 12:44:58 Q If you had known that he used that language  
15 12:45:01 in his posting, would you have approved it?  
16 12:45:04 A I don't approve or disapprove. It's his  
17 12:45:09 blog.  
18 12:45:09 Q Do you approve of that language?  
19 12:45:12 A I'm not sure how to answer that.  
20 12:45:16 Q Do you believe the Eastern District is a  
21 12:45:19 banana republic?  
22 12:45:22 A No.  
23 12:45:22 Q Do you think it's appropriate for him to  
24 12:45:26 refer to the Court as a banana republic?  
25 12:45:29 A I think he can do what he wants.