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

ERIC M. ALBRITTON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**NO. 6:08-CV-00089**
(1) CISCO SYSTEMS, INC.,	§	
(2) RICHARD FRENKEL, a/k/a	§	
"TROLL TRACKER,"	§	
(3) JOHN NOH and	§	
(4) MALLUN YEN,	§	
	§	
Defendants.	§	

DECLARATION OF PATRICIA L. PEDEN

I, Patricia L. Peden, declare and testify as follows:

1. I make this declaration in support of Plaintiff's Sur-reply to Cisco's Amended Motion to Compel. I have personal knowledge of the facts set forth in this declaration and, if called to testify as a witness, I could and would competently testify to them under oath.

2. On Monday November 17, 2007, just before Cisco witnesses were to be deposed in California, Cisco's counsel, Chip Babcock, asked me to discuss Cisco's concerns with Albritton's interrogatory responses and its concerns with third-party John Ward Jr.'s objections to Cisco's subpoena. I told Mr. Babcock and an associate with his firm, Ms. Parker, that I believed that we could reach an agreement with respect to the Ward Subpoena and that I was willing to discuss Cisco's concerns with Albritton's interrogatory responses. I told Cisco's lawyers that we also needed to discuss issues raised in a letter Albritton sent to Cisco about Cisco's deficient document production. We agreed it made sense to address all the discovery issues at one time at the conclusion of the Cisco depositions. I asked Mr. Babcock to send me an email stating his concerns with Albritton's interrogatory responses so I could be prepared to discuss those in person at the close of the Cisco depositions.

3. On Tuesday, November 18, Mr. Babcock and I again discussed having an in person meet and confer regarding the outstanding discovery issues at the conclusion of the Cisco depositions.

4. On Wednesday, November 19, right after the last deposition concluded at 11:15 a.m. Pacific Time, I approached Ms. Parker and Defendant Frenkel's counsel, George McWilliams, to begin our prescheduled meet and confer. Both Ms. Parker and Mr. McWilliams stated that they were not comfortable meeting and conferring without Mr. Babcock present, who had flown home the night before. I left my contact information with Ms. Parker and Mr. McWilliams and told them to call me at my office when they could reach Mr. Babcock and were prepared to meet and confer. *See* Exh. 1.

5. On Wednesday, November 19, at 6:45 Central Time, Mr. Babcock called my office while I was on a lengthy telephone conference with a client. Mr. Babcock left a voice mail message saying "Uh Patty, this is Chip Babcock and George McWilliams and Crystal Parker uh calling to talk to you about discovery issues . . . Um and uh I will be in the office tomorrow 713.752.4210 and I'll try to tie in Crystal and George but they may be in the air as well. And I know you haven't responded to me yet about the motions that we plan to file so we're just going to go ahead and file 'em and see what happens to that. If we can resolve it before the hearing that would be good. Thank you."

6. Although Cisco rescheduled the in person meet and confer, it did not schedule a time for the substitute telephone conference. Instead, Cisco simply called and left the voice mail message quoted above. None of Cisco's counsel sent me an email telling me they were attempting to meet and confer. If they had, I would have made myself available to take Cisco's call. Nor did Cisco's voice mail suggest that Mr. Babcock would be at his office and available for me to return his call. Instead, he said he would not be available to discuss the issues until the following day.

7. Immediately after I heard Cisco's voicemail message, I sent an email to Cisco's attorneys objecting that they had not met and conferred, and stating that I would object to any

motion filed before Cisco fulfilled its meet and confer obligations. *See* Exh. 1. I did not consider Cisco's one attempt to reach me at my office, after rescheduling the pre-set discovery conference, and adequate attempt to meet and confer.

8. On Wednesday November 19, 2007, Cisco filed its Motion to Compel Compliance with the Ward Subpoena. *See* Docket Entry No. 86.

9. Thereafter, I wrote to Cisco explaining that I was upset by the filing of its motion to compel compliance with the Ward subpoena without meeting and conferring, particularly in light of the fact that I had told them that we were going to be able to reach an agreement. In subsequent discussions, I told Cisco that Ward would voluntarily comply, but not until Cisco withdrew its motion to compel on the basis that it had not met and conferred. I did not want to leave the impression that Ward was evading his discovery obligations, or that Cisco had to file a motion in order to obtain documents, when Ward had already provided documents to his counsel. Cisco withdrew its motion. *See* Docket Entry No. 75.

10. On November 20th, I had several email exchanges with Cisco's counsel, Mr. Babcock, regarding what I perceived as Cisco's failure to meet and confer in good faith. Mr. Babcock's emails to me regarding the motion to compel interrogatory responses stated that he would "withdraw my soon to be filed motion on the interrogatories if you agree to [Cisco's] conditions" and if Albritton would provide answers "under the terms I have outlined." *See* Exh. 2. I did not consider Cisco's "give us everything we want and we'll dismiss the motion we are going to file" approach to be a good faith attempt to meet and confer.

11. On November 20th, I had a telephone conference with Mr. Babcock, Ms. Parker and Mr. McWilliams to address Albritton's concerns with Cisco's production so as to fulfill Albritton's meet and confer obligations. After engaging in a substantive discussion about Albritton's list of discovery issues, the parties were able to reach agreements that made it unnecessary for Albritton to file motions to compel. On a subsequent telephone conference the same day, Mr. Patton and I spoke to Mr. Babcock. During that call we discussed Cisco's concerns with Albritton's interrogatory responses. I told Mr. Babcock that we would discuss the

issue with co-counsel (who had worked on preparing the interrogatory answers) and get back to Cisco quickly. I did not have the opportunity to discuss the issue with co-counsel before Cisco filed its motion to compel hours later. *See* Docket Entry No. 88.

12. Under the Court's Scheduling Order, Cisco's motion to compel did not need to be filed until November 21, 2008. *See* Docket Entry No. 14. In addition, the parties had agreed to extend the deadline to file motions that might require a hearing to November 24th, although that joint motion had not yet been signed by the Court. *See* Docket Entry No. 85. Cisco could have waited another day to file its motion, permitting Albritton time to respond. Mr. Babcock stated that he was filing on November 20, 2007 to accommodate a conflict in his schedule. *See* Exh. 2.

13. Albritton's counsel anticipated having until Albritton's response to Cisco's motion was due to serve supplemental interrogatory responses, thereby mooting Cisco's motion.

14. On Wednesday November 26, 2007 at around 4:30 p.m. Central Time—before Albritton had responded to Cisco's motion to compel—I received another call, this time from Ms. Parker, who informed me that Cisco intended to file an Amended Motion to Compel Albritton's interrogatory responses asking for different relief. *See* Exh. 3. According to Ms. Parker, Cisco would be asking the Court to limit the statements that Albritton claims are defamatory to those contained in his complaint. I told Ms. Parker that I didn't think I could substantively address her request because I doubted that I could reach my client or co-counsel whose offices had already closed for the Thanksgiving weekend. I also expressed my concern that Cisco was dramatically changing the nature of its motion and not providing me an opportunity to discuss the issue with my client before it asked the court for exclusionary relief. Ms. Parker stated that because fact discovery had closed Cisco felt entitled to the relief it was now seeking, and that she was only calling to see if Albritton opposed the motion. *See* Exh. 3. Ms. Parker did not provide the legal basis for Cisco's new motion. She stated that she would file whether or not she heard back from me, or irrespective of whether we had engaged in substantive discussions about the new relief Cisco sought.

15. Five minutes after receiving Ms. Parker's call, unable to reach my client, I sent her and Mr. Babcock an email telling them that I believed that they had again failed to meet and confer as required by the local rules. I also told Ms. Parker and Mr. Babcock that Albritton would provide amended interrogatory responses and therefore Cisco's motion was unnecessary. *See* Exh. 4.

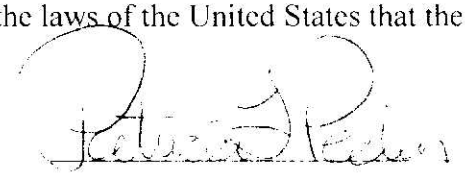
16. About twenty minutes later (at 4:55 p.m. Central), Cisco filed its Amended Motion to Compel. *See* Docket Entry No. 96.

17. With both of Cisco's filings I told Cisco's counsel that Albritton's counsel objected to their "file first and confer later" approach.

18. On January 2, 2009 at 2:43 Central Time, Albritton served Cisco with Supplemental Responses to Cisco's First Set of Interrogatories. *See* Exh. 5.

19. On January 2, 2009 at 4:31 Central Time, Cisco filed its Reply in support of its Amended Motion to Compel Interrogatory Responses. *See* Docket Entry No. 127.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

By: 

Patricia L. Peden