

30(b)(6) Deposition of Richard G. Frenkel 11/18/2008
CONFIDENTIAL - Subject to the Protective Order

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

ERIC M. ALBRITTON,

Plaintiff,

vs.

No. 6:08-CV-00089

(1) CISCO SYSTEMS, INC.,
(2) RICHARD FRENKEL, (3) MALLUN
YEN and (4) JOHN NOH,

Defendants.

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

DEPOSITION OF RICHARD G. FRENKEL

Tuesday, November 18, 2008

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CRS-100282-023



1 A. Ask me questions about it.

2 Q. The issue of malice -- did you make a
3 reasonable investigation to determine what facts you
4 have to support the defense of a lack of malice?

5 A. I don't know that that is an affirmative
6 defense or -- but if it is, I believe that I've made
7 a reasonable investigation of that, too.

8 Q. Okay. And what did you find that would
9 indicate to you that there wasn't any malice here?

10 A. Well --

11 MR. BABCOCK: Object to the form. Define
12 malice.

13 THE WITNESS: That's exactly what I want
14 to know. What do you mean by "malice"?

15 BY MR. PATTON:

16 Q. Were you told what it was you were
17 supposed to testify about as a 30(b)(6) witness?

18 MR. McWILLIAMS: Objection. Form.

19 BY MR. PATTON:

20 Q. Were you informed?

21 A. Yes.

22 Q. Okay. Were you informed that one of the
23 things that you would have to support was that there
24 was no malice here?

25 A. I was told that you would ask me questions

1 relating to that defense, and I would have to answer
2 those questions to the best of my ability after
3 having -- for example, if you put documents in front
4 of me.

5 Q. Okay.

6 A. I wasn't told I had to memorize every fact
7 in the case and...

8 Q. Okay. You're aware, of course, that you
9 did use the terminology there was a lack of malice?

10 A. Yes.

11 MR. BABCOCK: Object to the form.

12 MR. McWILLIAMS: Same objection.

13 BY MR. PATTON:

14 Q. Okay. What facts can you tell me about
15 that would support that assertion on your part?

16 A. If you put documents in front of me, I'll
17 be able to remember whether they do. All the facts
18 that I told you about with the truth, though --

19 Q. Okay.

20 A. -- also apply to the lack of malice
21 defense.

22 Q. Okay.

23 A. I think -- I don't remember if I testified
24 before that we had Baker Botts call the district
25 court clerk and ask them what had happened, but

1 beginning of videotape No. 2, volume 1 in the
2 deposition of Richard Frenkel.

3 (Whereupon, Frenkel Exhibit 1 was marked
4 for identification.)

5 BY MR. PATTON:

6 Q. I have handed you just a moment ago,
7 Mr. Frenkel, Exhibit 1. Correct?

8 A. Yes.

9 Q. Do you recognize that?

10 A. Yes.

11 Q. Okay. Is this a blog that was posted on
12 October the 18th, 2007?

13 A. No.

14 Q. When was this one, the one you have in
15 front of you, Exhibit 1?

16 A. This is the version of the blog as
17 modified by me on October 19th, 2007.

18 Q. Okay. Does it show up on there somewhere?

19 A. Does what show up where?

20 Q. That it was modified on the 19th.

21 A. No.

22 (Whereupon, Frenkel Exhibit 2 was marked
23 for identification.)

24 BY MR. PATTON:

25 Q. I want to hand you 2 and ask you: Is that

1 the one that was posted on the 17th?

2 MR. McWILLIAMS: 17th or 18th?

3 MR. PATTON: I'm sorry. The 18th.

4 THE WITNESS: The part on the first page
5 of Exhibit 2 --

6 BY MR. PATTON:

7 Q. Okay.

8 A. -- is, I believe, what was attached to the
9 complaint in this case. And I believe that is what
10 I posted October 18th, 2007.

11 Q. Okay. There were two postings that
12 indicate October 18th, and that's Exhibits 1 and 2;
13 correct?

14 A. They both have the October 18th date on
15 them, yes.

16 Q. Okay. But Exhibit 2 is the one that was
17 filed first, and Exhibit 1 was modified, whatever
18 you want to call it, on the 19th? Is that what you
19 said?

20 A. Yes. I believe I did modify it, alter it.

21 Q. Okay. So Exhibit 2 is the first one
22 filed -- posted?

23 A. It was the -- I believe that's true, yes.

24 Q. Okay. Let's take a look at it, if we
25 could, No. 2, first.

1 A. Let me just modify that answer. Exhibit 1
2 is a printout of the post that -- the printout was
3 made sometime after the 19th.

4 Q. Why do you say that?

5 A. Because it has the edit line. I just want
6 to make sure my testimony is accurate.

7 Q. Well, I do, too. And I don't really care
8 which one is which, but I want to make sure that I
9 understand.

10 Where is the edit that you're talking
11 about? Which one? On 1 or 2?

12 A. On 1.

13 Q. All right. And where is that located on
14 1?

15 A. On the second page.

16 Q. Where?

17 A. Fourth line, third line.

18 Q. "You can't change history, but you can
19 change a blog"?

20 A. Yes.

21 Q. I don't see the 19th there anywhere.

22 A. It doesn't say the date, but I remember
23 doing it on the 19th.

24 Q. Okay. Where -- after edit? Is that what
25 you're saying?

1 A. Yes.

2 Q. Okay. Now, that was done on 10/19, the
3 edit was done?

4 A. And other changes.

5 Q. Okay. All right. Let's get the other
6 changes. What else was changed?

7 A. I removed the sentence from the original
8 post that referred to the Banana Republic.

9 Q. Okay. Anything else?

10 A. Yes.

11 Q. Okay. What else?

12 A. The paragraph beginning "you can't change
13 history" was reworded.

14 Q. On Exhibit 1 was reworded?

15 A. It was reworded between -- well, again --

16 Q. Exhibit 2 is the first filed?

17 A. That's right. And after that one, the
18 next day it was reworded -- or I reworded it.

19 Q. What was the other change?

20 A. That's it.

21 Q. Which?

22 A. The paragraph being reworded.

23 Q. The bottom paragraph on the first page was
24 reworded?

25 A. On Exhibit 1, that's different than --

1 Q. Right.

2 A. -- Exhibit 2.

3 Q. That "you can't change history" is how it
4 begins?

5 A. It begins the same way in both, but the
6 rest of the words are somewhat different.

7 Q. All right. What I'm trying to find out is
8 where -- what are the alterations or the differences
9 between Exhibit 1, which was the altered or changed
10 document, and Exhibit 2? Where are the differences?

11 A. I just told you. They're all in the --
12 I'm looking at something else here.

13 Q. "You can't change history" paragraph?

14 A. Yes.

15 Q. All right. Well, give me the words that
16 are different.

17 A. Originally I said, "You can't change
18 history, and it's outrageous that the Eastern
19 District of Texas is apparently, wittingly or
20 unwittingly, conspiring with a non-practicing entity
21 to try to manufacture subject matter jurisdiction.
22 This is yet another example of the abusive nature of
23 litigating patent cases in the Banana Republic of
24 east Texas."

25 Q. That's what you said in the first file?

1 A. Right. That was changed to, "You can't
2 change history, and it's outrageous that the Eastern
3 District of Texas may have, wittingly or
4 unwittingly, helped a non-practicing entity to try
5 to manufacture subject matter jurisdiction. Even if
6 this was a 'mistake'" -- with "mistake" in quotes --
7 "which I can't see how it could be, given that
8 someone emailed me a printout of the docket from
9 Monday showing the case, the proper course of action
10 should be a motion to correct the docket."

11 And then there was the edit addition that
12 we just discussed.

13 Q. About the Banana Republic?

14 A. No. The edit says, "Edit: You can't
15 change history, but you can change a blog entry
16 based on information emailed to you from a helpful
17 reader."

18 Q. Okay. But that -- you did --

19 THE VIDEOGRAPHER: I'm sorry. Somebody's
20 phone is on and invading the audio.

21 MR. BABCOCK: Not me.

22 MR. PATTON: It could be me. It is me --
23 or it may be me.

24 MR. BABCOCK: Bad, bad, bad.

25 MR. PATTON: But it's me no longer.

1 Okay. Back on the record.

2 BY MR. PATTON:

3 Q. Why was the date not changed on this
4 second posting on the next day?

5 A. The software I was using didn't have that
6 feature.

7 Q. Okay. Could you have started the next
8 day's blog by telling every -- whoever read it, "I
9 am modifying what I said yesterday"?

10 A. When I put the line in there saying
11 "edit," that was my way of doing that. I could have
12 said "edited 10/19/07." I didn't.

13 Q. Okay. And you let the reader determine
14 what the edits were?

15 MR. McWILLIAMS: Objection. Form.

16 BY MR. PATTON:

17 Q. Is that what you're saying?

18 A. I did not put in there what I was
19 altering.

20 Q. Where did you get -- what is the basis of
21 your assertion that the proper way to do this would
22 be to file a motion to correct the docket?

23 A. That was my opinion.

24 Q. Did you base your opinion on anything,
25 something you read or something someone told you, or