

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

ERIC M. ALBRITTON,

Plaintiff,

v.

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

Defendants.

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NO. 6:08-CV-00089

**PLAINTIFF'S OBJECTIONS AND SECOND SUPPLEMENTAL ANSWERS TO
CISCO SYSTEM, INC.'S FIRST SET OF INTERROGATORIES**

TO: Cisco Systems, Inc., Mallun Yen and John Noh, by and through their attorney of record, Mr. Charles Babcock, 1401 McKinney, Suite 1900, Houston, Texas 77010 and Richard Frenkel, by and through his attorney of record, Mr. George McWilliams, P.O. Box 58, Texarkana, Texas 75504-0058.

COMES NOW, Eric Albritton and submits these objections and supplemental answers, under oath, to the Interrogatories propounded to him by Cisco Systems, Inc., in accordance with Rule 33 of the Federal Rules of Civil Procedure.



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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to Charles Babcock, 1401 McKinney, Suite 1900, Houston, Texas 77010, attorney for Cisco Systems, Inc., Mallun Yen and John Noh and Mr. George McWilliams, attorney for Richard Frenkel, P.O. Box 58, Texarkana, Texas 75504-0058, via electronic mail and U.S. First Class Mail on this 22nd day of January, 2009.



Nicholas H. Patton

INTERROGATORY NO. 1:

Identify verbatim all statements that you allege Richard Frenkel posted that are “scandalous and defamatory allegations about Albritton” as alleged in paragraph 15 of Plaintiff’s Original Complaint.

ANSWER:

Plaintiff objects to this Interrogatory in that its answer may be determined by examining the business records of Cisco Systems, Inc. and Richard Frenkel. FED. R. Civ. P. 33(d). Plaintiff responds pursuant to Rule 33(d) by referring Cisco to the attached articles published by Frenkel in the course and scope of his employment with Cisco. *See* attached Exhibits 1, 2 & 3.

Subject to the above objection, Albritton further responds that the scandalous and defamatory allegations made by Frenkel cannot be identified “verbatim” as requested in Interrogatory No. 1. Given the temporal proximity of the posts, an average reader would not evaluate the posts, or the statements contained therein, in isolation, but would consider them together to conclude that Albritton engaged in criminal and/or unprofessional or improper conduct. Cisco and Frenkel’s accusations are false, defamatory, and injure Albritton’s reputation, particularly in his business and occupation. Cisco and Frenkel’s accusations appeared in two consecutive posts. The October 17 post identifies the factual predicate, including identifying Albritton, that sets the stage for the October 18th Post. The October 18th post does not rehash the facts of the prior post, but builds upon them to accuse Albritton of conspiring to alter an official governmental record for the express purpose of manufacturing subject matter jurisdiction where none otherwise existed to benefit his client at Cisco’s expense. The modified October 18th Post was likewise read in connection with the post of the 17th. Some of the statements in Frenkel and Cisco’s October 17, 2007 post, October 18, 2007 post, and revised October 18, 2007 post are, on their face, more directly defamatory than others. A discussion of certain Cisco and Frenkel’s defamatory statements follows:

The October 17, 2007 post is titled “Troll Jumps the Gun, Sues Cisco Too Early.” That post states that ESN did not have subject matter jurisdiction when it filed its complaint in the Eastern District of Texas and “that realizing their fatal flaw” ESN’s counsel, including Albritton, filed an amended complaint in the ESN case “amending to change absolutely nothing at all, by the way, except the filing date of the complaint.” Those statements are false. Those statements, particularly when taken in the context of the posts as a whole, give the defamatory impression that Albritton engaged in criminal, unethical and improper conduct in his business and profession to create subject matter jurisdiction where none existed to benefit his client at Cisco’s expense, in violation of the law and in violation of his obligations as a member of the bar. Those statements attack Albritton in his business and profession.

The October 18, 2007 post continues to publish false and defamatory statements about Albritton. The October 18, 2007 post was published by Frenkel at the direction of Defendants Cisco, Noh and Yen. The October 18, 2007 post is titled “ESN convinces EDTX Court Clerk to Alter Documents To Try To Manufacture Subject Matter Jurisdiction Where None Existed.” That statement is false. That statement, particularly when taken in the context of the posts as a

whole, accuses Albritton of criminal, unethical and improper conduct in his business and profession and in his capacity as a member of the bar. That statement also gives the defamatory impression that Albritton engaged in criminal, unethical or improper conduct in his business and profession to create subject matter jurisdiction where none existed to benefit his client at Cisco's expense. That statement attacks Albritton in his business and profession by accusing him of criminal, unethical and improper acts in connection with the altering of a governmental record in violation of the law and his obligations as a member of the bar.

The October 18, 2007 post also states that the ESN docket had been "altered" 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." The post states that the Troll Tracker "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." Those statements are false. Those statements, particularly when taken in the context of the posts as a whole, accuse Albritton of criminal, unethical and improper conduct in his business and profession to create subject matter jurisdiction where none existed to benefit his client at Cisco's expense, in violation of the law and in violation of his obligations as a member of the bar. Those statements also give the defamatory impression that Albritton fraudulently manufactured subject matter jurisdiction where none otherwise existed to benefit his client to Cisco's detriment. Those statements attack Albritton in his business and profession by accusing him of criminal, unethical and improper acts in connection with the altering of a governmental record in violation of the law and his obligations as a member of the bar.

The October 18th post continues to describe the events in connection with the filing of the ESN complaint as a "conspiracy" and to use other language suggesting that Albritton engaged in criminal, unethical or improper conduct, including alleging that there was "tons of proof" that the complaint had been filed on October 15th and that "subpoenas" and "witnesses" may be necessary to prove the complaint was filed on October 15th. Those statements are false. Those statements, particularly when taken in the context of the posts as a whole, accuse Albritton of criminal conduct, unethical conduct and improper conduct in his business and profession. Those statements also give the defamatory impression that Albritton fraudulently manufactured subject matter jurisdiction where none otherwise existed to benefit his client to Cisco's detriment. Those statements accuse Albritton of criminal, unethical or improper conduct in his business and profession, in violation of the law and in violation of his obligations as a member of the bar. That statement attacks Albritton in his business and profession.

The October 18th post stated that "ESN counsel Eric Albritton signed the Civil Cover Sheet stating that the complaint had been filed on October 15." That statement is false. That statement is defamatory of Albritton because it insinuates, particularly when taken in the context of the posts as a whole, that Albritton knew that the ESN complaint had been filed on October 15 (which is factually incorrect) but nonetheless engaged in criminal, unethical or improper conduct in his business and profession to fraudulently create subject matter jurisdiction where none existed to benefit his client at Cisco's expense, and in violation of the law and his obligations as a member of the bar. That statement attacks Albritton in his business and profession by accusing him of criminal, unethical and improper acts in connection with the altering of a governmental

record in violation of the law and his obligations as a member of the bar.

The October 18, 2007 post also stated that "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." That statement is false. That statement, particularly when taken in the context of the posts as a whole, accuses Albritton of conspiring to alter an official governmental document, which is criminal, unethical conduct an improper conduct in Albritton's business and profession. That statement also gives the defamatory impression that Albritton engaged in criminal, unethical or improper conduct in his business and profession to fraudulently create subject matter jurisdiction where none existed to benefit his client at Cisco's expense or to perpetrate a fraud on the unsuspecting clerk's office to achieve his nefarious purpose. That statement attacks Albritton in his business and profession by accusing him of criminal, unethical and improper acts in connection with the altering of a governmental record in violation of the law and his obligations as a member of the bar.

The October 18, 2007 post also stated that the ESN conspiracy is further proof of the abusive nature of litigating patent cases in the "Banana Republic of East Texas," suggesting that Albritton was caught engaging in a conspiracy and in abusive litigation tactics in the Eastern District of Texas. That statement is false. That statement is defamatory of Albritton because it alleges, particularly when taken in the context of the posts as a whole, that Albritton engaged in criminal, unethical or improper conduct in his business and profession to fraudulently create subject matter jurisdiction where none existed to benefit his client at Cisco's expense, and in violation of the law and his obligations as a member of the bar. That statement attacks Albritton in his business and profession by accusing him of criminal, unethical and improper acts in connection with the altering of a governmental record in violation of the law and his obligations as a member of the bar.

The October 18, 2007 post, as revised by Frenkel contains all of the same defamatory statements listed above with respect to Albritton, but makes some revisions aimed at softening Frenkel and Cisco's accusations against the Court. The revised post deleted Frenkel and Cisco's statement regarding abusive nature of litigating patent cases in the "Banana Republic of East Texas." The revised post also changed the original post to state that "it's outrageous that the Eastern District of Texas may have, wittingly or unwittingly, helped a non-practicing entity to try to manufacture subject matter jurisdiction." While the post softened its allegations against the court clerks, it continued to allege that Albritton engaged in criminal, unethical or improper conduct in his business and profession to fraudulently create subject matter jurisdiction where none existed to benefit his client at Cisco's expense, and in violation of the law and his obligations as a member of the bar, although he may have been able to perpetrate that fraud in some manner without the Eastern District of Texas knowing his fraudulent purpose. That statement is defamatory of Albritton because it alleges, particularly when taken in the context of the posts as a whole, that Albritton engaged in criminal, unethical or improper conduct in his business and profession to fraudulently create subject matter jurisdiction in violation of the law and his obligations as a member of the bar. That statement creates a false and defamatory impression that Albritton engaged in criminal, unethical, and improper conduct in his profession. That statement attacks Albritton in his business and profession by accusing him of criminal, unethical and improper acts in connection with the altering of a governmental record in violation

of the law and his obligations as a member of the bar.

The revised October 18, 2007 post's removal of the reference to the Banana Republic of East Texas, and changing some of the language referring to the clerks, did not affect Cisco and Frenkel's accusation with respect to Albritton, and continued to accuse Albritton of engaging in criminal, unethical, improper or nefarious conduct to create subject matter jurisdiction where none existed before, to benefit his client at Cisco's expense, and in violation of the law, his ethical obligations, and his duties to the Court as a member of the bar.

The revised October 18, 2007 post also added the following statement: "Even if this was a 'mistake,' which I can't see how it could be, given that someone emailed me a printout of the docket from Monday showing the case, the proper course of action should be a motion to correct this docket." This statement is false and defamatory. The statement creates the defamatory impression that the correction of the docket in the ESN case could not have been as a result of an error or an honest mistake, but was as previously stated, part of a conspiracy, unethical conduct, or improper conduct undertaken by Albritton. Frenkel omitted from this post the fact that Albritton and ESN claimed that the date on the docket entry was the result of an error in the court's software. Had Frenkel included that information, the revised Oct. 18 post would have portrayed a far different meaning to the reader than Frenkel's continuing assertions of criminal and unethical conduct. The statement, particularly when taken in the context of the posts as a whole, accuses Albritton of criminal and unethical conduct. That statement also gives the defamatory impression that Albritton fraudulently manufactured subject matter jurisdiction where none otherwise existed to benefit his client to Cisco's detriment. That statement accuses Albritton of criminal, unethical or improper conduct in his business and profession and in violation of the law and his obligations as a member of the bar.

The revised October 18, 2007 post also stated that a motion to correct the docket should have been filed. That statement is false and defamatory. The revised post omitted the fact that no such motion is required under the local rules. Instead, Frenkel's inclusion of this statement further reinforced his accusations that Albritton engaged in a course of conduct that was criminal, unethical, improper, corrupt, and in violation of the local rules that he is required to follow as an officer of the court. The statement, particularly when taken in the context of the posts as a whole, gives the defamatory impression that Albritton fraudulently manufactured subject matter jurisdiction where none otherwise existed to benefit his client to Cisco's detriment. The statement accuses Albritton of criminal, unethical or improper conduct in his business and profession and in violation of the law and his obligations as a member of the bar.

Subject to the above objections, Albritton further responds as follows: Although Albritton has set forth specific examples of defamatory statements made by Frenkel and Cisco, the October 17th, October 18th, and revised October 18th post, those statements must be considered in the context of Frenkel's posts as a whole. Therefore, Albritton responds that Frenkel's posts in their totality are defamatory of Albritton. *See Turner v. KTRK Television*, 38 S.W.3d at 103, 114-15 (Tex. 2000); 114-16; *see also Golden Bear Dist. Sys. of Texas v. Chase Revel, Inc.*, 708 F.2d 944, 949 (5th Cir. 1983); *Texas Disposal Sys Landfill, Inc. v. Waste Mgmt Holdings*, 219 S.W.3d 563, 583 (Tex. App.- Austin [3rd Dist] 2007). Frenkel's defamatory posts, in their entirety, create the false impression that Albritton engaged in criminal and unethical behavior.

Therefore, the following statements, taken in context and as a whole, are defamatory of Albritton:

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. I asked myself, can ESN do this? I would think that the court would lack subject matter jurisdiction, since ESN owned no properly 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 contents, 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. *CAF 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 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

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

The October 18th Post was later amended to read: “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 may have, wittingly or unwittingly, helped a non-practicing entity to try to manufacture subject matter jurisdiction. Even if this was a “mistake,” which I can’t see how it could be, given that someone emailed me a printout of the docket from Monday showing the case, the proper course of action should be a motion to correct the docket. (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).

EDIT: You can’t change history, but you can change a blog entry based

on information emailed to you from a helpful reader.

Posted by Troll Tracker at 1:13 PM

INTERROGATORY NO. 2:

Identify all statements that you contend are defamatory in the October 17, 2007, posting referred to in paragraph 16 of Plaintiff's Original Complaint.

ANSWER:

Plaintiff objects to this Interrogatory in that its answer may be determined by examining the business records of Cisco Systems, Inc. and Richard Frenkel. FED. R. Civ. P. 33(d). Subject to these objections, Plaintiff responds pursuant to Rule 33(d) by referring Cisco to the attached October 17, 2007 post published by Frenkel in the course and scope of his employment with Cisco. See attached Exhibits 1, 2 & 3.

Subject to the above objection, Albritton further responds that given the temporal proximity of the posts, an average reader would not evaluate them in isolation, but would consider them together to conclude that Albritton indulged in criminal and/or unprofessional conduct. Cisco's accusations appeared in two consecutive posts. The October 17 post identifies the factual predicate, including identifying Albritton, that sets the stage for the October 18th Post. The October 18th post does not rehash the facts of the prior post, but builds upon them to accuse Albritton of conspiring to alter official governmental records for the express purpose of manufacturing subject matter jurisdiction. The modified October 18th Post was likewise read in connection with the post of the 17th. Some of the statements in Frenkel and Cisco's October 17, 2007 post, October 18, 2007 post, and revised October 18, 2007 post are, on their face, more directly defamatory than others.

The October 17, 2007 post is titled "Troll Jumps the Gun, Sues Cisco Too Early." That post states that ESN did not have subject matter jurisdiction when it filed its complaint in the Eastern District of Texas and "that realizing their fatal flaw" ESN's counsel, including Albritton, filed an amended complaint in the ESN case "amending to change absolutely nothing at all, by the way, except the filing date of the complaint." Those statements are false. Those statements, particularly when taken in the context of the posts as a whole, give the defamatory impression that Albritton engaged in criminal, unethical or improper conduct in his business and profession to create subject matter jurisdiction where none existed to benefit his client at Cisco's expense, in violation of the law and in violation of his obligations as a member of the bar.

Subject to the above objections, Albritton further responds as follows: Although Albritton has set forth specific examples of defamatory statements made in Frenkel and Cisco's October 17th post, those statements must be considered in the context of Frenkel's posts as a whole. Therefore, Albritton responds that Frenkel's posts in their totality are defamatory of Albritton. See *Turner v. KTRK Television*, 38 S.W.3d at 103, 114-15 (Tex. 2000); 114-16; see also *Golden Bear Dist. Sys. of Texas v. Chase Revel, Inc.*, 708 F.2d 944, 949 (5th Cir. 1983); *Texas Disposal*

Sys Landfill, Inc. v. Waste Mgmt Holdings, 219 S.W.3d 563, 583 (Tex. App.- Austin [3rd Dist] 2007). Frenkel's defamatory posts, in their entirety, create the false impression that Albritton engaged in criminal and unethical behavior.

In further response Albritton claims the following language of the October 17, 2007 posting, taken in context and as a whole, is defamatory:

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. I asked myself, can ESN do this? I would think that the court would lack subject matter jurisdiction, since ESN owned no properly 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. *CAF 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 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?

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Posted by Troll Tracker at 1:13 PM

The October 18th Post was later amended to read: "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!

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Posted by Troll Tracker at 1:13 PM

INTERROGATORY NO. 3:

Identify each "libelous statement" verbatim referred to in paragraph 24 of Plaintiff's Original Complaint.

ANSWER:

Plaintiff objects to this Interrogatory in that its answer may be determined by examining the business records of Cisco Systems, Inc. and Richard Frenkel. FED. R. Civ. P. 33(d).. Subject to these objections, Plaintiff responds pursuant to Rule 33(d) by referring Cisco to the attached October 18th post and revised October 18th post published by Frenkel in the course and scope of his employment with Cisco. See attached Exhibits 1, 2 & 3.

Subject to the above objection, Albritton further responds that it is not possible to identify "each libelous statement verbatim" separately and in isolation as requested in Interrogatory No. 3. Given the temporal proximity of the posts, an average reader would not evaluate them in isolation, but would consider them together to conclude that Albritton indulged in criminal and/or unprofessional conduct. Cisco's accusations appeared in two consecutive posts. The October 17 post identifies the factual predicate, including identifying Albritton, that sets the stage for the October 18th Post. The October 18th post does not rehash the facts of the prior post, but builds upon them to accuse Albritton of conspiring to alter official governmental records for the express purpose of manufacturing subject matter jurisdiction. The modified October 18th Post was likewise read in connection with the post of the 17th. Some of the statements in Frenkel and Cisco's October 18 2007 post, and revised October 18, 2007 post are, on their face, more directly defamatory than others. A discussion of certain defamatory statements follows:

The October 17, 2007 post is titled "Troll Jumps the Gun, Sues Cisco Too Early." That post states that ESN did not have subject matter jurisdiction when it filed its complaint in the Eastern District of Texas and "that realizing their fatal flaw" ESN's counsel, including Albritton, filed an amended complaint in the ESN case "amending to change absolutely nothing at all, by the way, except the filing date of the complaint." Those statements are false. Those statements, particularly when taken in the context of the posts as a whole, give the defamatory impression that Albritton engaged in criminal, unethical and improper conduct in his business and profession to create subject matter jurisdiction where none existed to benefit his client at Cisco's expense, in violation of the law and in violation of his obligations as a member of the bar. Those statements attack Albritton in his business and profession.

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That statement attacks Albritton in his business and profession by accusing him of criminal, unethical and improper acts in connection with the altering of a governmental record in violation of the law and his obligations as a member of the bar.

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The revised October 18, 2007 post also added the following statement: "Even if this was a 'mistake,' which I can't see how it could be, given that someone emailed me a printout of the docket from Monday showing the case, the proper course of action should be a motion to correct this docket." This statement is false and defamatory. The statement creates the defamatory impression that the correction of the docket in the ESN case could not have been as a result of an error or an honest mistake, but was as previously stated, part of a conspiracy, unethical conduct, or improper conduct undertaken by Albritton. Frenkel omitted from this post the fact that Albritton and ESN claimed that the date on the docket entry was the result of an error in the court's software. Had Frenkel included that information, the revised Oct. 18 post would have portrayed a far different meaning to the reader than Frenkel's continuing assertions of criminal and unethical conduct. The statement, particularly when taken in the context of the posts as a whole, accuses Albritton of criminal and unethical conduct. That statement also gives the defamatory impression that Albritton fraudulently manufactured subject matter jurisdiction where none otherwise existed to benefit his client to Cisco's detriment. That statement accuses Albritton of criminal, unethical or improper conduct in his business and profession and in violation of the law and his obligations as a member of the bar.

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Subject to the above objections, Albritton further responds as follows: Although Albritton has set forth specific examples of defamatory statements made by Frenkel and Cisco, the October 18th, and revised October 18th post, those statements must be considered in the context of Frenkel's posts as a whole. Therefore, Albritton responds that Frenkel's posts in their totality are defamatory of Albritton. *See Turner v. KTRK Television*, 38 S.W.3d at 103, 114-15 (Tex. 2000); 114-16; *see also Golden Bear Dist. Sys. of Texas v. Chase Revel, Inc.*, 708 F.2d 944, 949 (5th Cir. 1983); *Texas Disposal Sys Landfill, Inc. v. Waste Mgmt Holdings*, 219 S.W.3d 563, 583

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In further response Albritton claims the following language of the October 17, 2007 and October 18, 2007 postings, taken in context and as a whole, are defamatory:

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. I asked myself, can ESN do this? I would think that the court would lack subject matter jurisdiction, since ESN owned no properly 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. *CAF 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 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?

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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

The October 18th Post was later amended to read: "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 may have, wittingly or unwittingly, helped a non-practicing entity to try to manufacture subject matter jurisdiction. Even if this was a "mistake," which I can't see how it could be, given that someone emailed me a printout of the docket from Monday showing the case, the proper course of action should be a motion to correct the docket. (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).

EDIT: You can't change history, but you can change a blog entry based

on information emailed to you from a helpful reader.

Posted by Troll Tracker at 1:13 PM

INTERROGATORY NO. 4:

Identify all "false and defamatory statements regarding Albritton" referred to in paragraph 28 of Plaintiffs Original Complaint.

ANSWER:

Plaintiff objects to this Interrogatory in that its answer may be determined by examining the business records of Cisco Systems, Inc. and Richard Frenkel. FED, R. Civ. P. 33(d). Subject to these objections, Plaintiff responds pursuant to Rule 33(d) by referring Cisco to the attached articles published by Frenkel in the course and scope of his employment with Cisco. See attached Exhibits 1, 2 & 3.

Subject to the above objection, Albritton further responds that Cisco's accusations appeared in two consecutive posts. The October 17 post identifies the factual predicate, including identifying Albritton, that sets the stage for the October 18th Post. The October 18th post does not rehash the facts of the prior post, but builds upon them to accuse Albritton of conspiring to alter official governmental records for the express purpose of manufacturing subject matter jurisdiction. The modified October 18th Post was likewise read in connection with the post of the 17th. Some of the statements in Frenkel and Cisco's October 18 2007 post, and revised October 18, 2007 post are, on their face, more directly defamatory than others. A discussion of certain defamatory statements follows:

The October 17, 2007 post is titled "Troll Jumps the Gun, Sues Cisco Too Early." That post states that ESN did not have subject matter jurisdiction when it filed its complaint in the Eastern District of Texas and "that realizing their fatal flaw" ESN's counsel, including Albritton, filed an amended complaint in the ESN case "amending to change absolutely nothing at all, by the way, except the filing date of the complaint." Those statements are false. Those statements, particularly when taken in the context of the posts as a whole, give the defamatory impression that Albritton engaged in criminal, unethical and improper conduct in his business and profession to create subject matter jurisdiction where none existed to benefit his client at Cisco's expense, in violation of the law and in violation of his obligations as a member of the bar. Those statements attack Albritton in his business and profession.

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INTERROGATORY NO. 5:

Identify all "false and defamatory statement of 'fact'" referred to in paragraph 32 of Plaintiffs Original Complaint.

ANSWER:

Plaintiff objects to this Interrogatory in that its answer may be determined by examining the business records of Cisco Systems, Inc. and Richard Frenkel. FED. R. Civ. P. 33(d). Subject to these objections, Plaintiff responds pursuant to Rule 33(d) by referring Cisco to the attached articles published by Frenkel in the course and scope of his employment with Cisco. See attached Exhibits 1, 2 & 3.

Subject to the above objection, Albritton further responds that the false and defamatory statements of fact requested in Interrogatory No. 5 must be determined in light of the facts contained in those posts and the facts omitted from those posts. Given the temporal proximity of the posts, an average reader would not evaluate them in isolation, but would consider them together to conclude that Albritton indulged in criminal and/or unprofessional conduct. Cisco's accusations appeared in two consecutive posts. The October 17 post identifies the factual predicate, including identifying Albritton, that sets the stage for the October 18th Post. The October 18th post does not rehash the facts of the prior post, but builds upon them to accuse Albritton of conspiring to alter official governmental records for the express purpose of manufacturing subject matter jurisdiction. The modified October 18th Post was likewise read in connection with the post of the 17th. Some of the statements in Frenkel and Cisco's October 17, 2007 post, October 18, 2007 post, and revised October 18, 2007 post are, on their face, more directly defamatory than others. Other facts known to Frenkel should have been included in his posts, but were omitted so as to portray a false and defamatory impression of Albritton. A discussion of certain false and defamatory statements of fact follows:

The October 17, 2007 post is titled "Troll Jumps the Gun, Sues Cisco Too Early." That post states that ESN did not have subject matter jurisdiction when it filed its complaint in the Eastern District of Texas and "that realizing their fatal flaw" ESN's counsel, including Albritton, filed an amended complaint in the ESN case "amending to change absolutely nothing at all, by the way, except the filing date of the complaint." Those statements are false. The ESN complaint was amended to attach a copy of the patent, not in an attempt to conspire to create subject matter jurisdiction. ESN had subject matter jurisdiction in the Eastern District of Texas. Those statements, particularly when taken in the context of the posts as a whole, give the defamatory impression that Albritton engaged in criminal, unethical and improper conduct in his business and profession to create subject matter jurisdiction where none existed to benefit his client at Cisco's expense, in violation of the law and in violation of his obligations as a member of the bar. Those statements attack Albritton in his business and profession.

The October 18, 2007 post continues to publish false and defamatory statements about Albritton. The October 18, 2007 post was published by Frenkel at the direction of Defendants

Cisco, Noh and Yen. The October 18, 2007 post is titled "ESN convinces EDTX Court Clerk to Alter Documents To Try To Manufacture Subject Matter Jurisdiction Where None Existed." That statement is false. As stated above, ESN had subject matter jurisdiction in the Eastern District of Texas. Albritton did not convince the court clerk to alter documents. Documents were not altered. Albritton did not conspire to alter documents to create subject matter jurisdiction where none existed. That statement, particularly when taken in the context of the posts as a whole, accuses Albritton of criminal, unethical and improper conduct in his business and profession and in his capacity as a member of the bar. That statement also gives the defamatory impression that Albritton engaged in criminal, unethical or improper conduct in his business and profession to create subject matter jurisdiction where none existed to benefit his client at Cisco's expense. That statement attacks Albritton in his business and profession by accusing him of criminal, unethical and improper acts in connection with the altering of a governmental record in violation of the law and his obligations as a member of the bar.

The October 18, 2007 post also states that the ESN docket had been "altered" 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." The post states that the Troll Tracker "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." Those statements are false. The ESN docket was not "altered" (insinuating illegal or nefarious conduct) but was corrected by the clerk to show the correct filing date. ESN's local counsel did not "convince" the court clerk to correct the docket. Albritton did not convince the court clerk to correct the docket. The filing date was not October 15, but rather October 16, 2007. The complaint was not altered. The date stamp was never changed, and has at all times reflected an October 16, 2007 filing date. The troll tracker did not "check" in that he never called the clerk's office or Albritton to ascertain the correct facts. Those statements, particularly when taken in the context of the posts as a whole, accuse Albritton of criminal, unethical and improper conduct in his business and profession to create subject matter jurisdiction where none existed to benefit his client at Cisco's expense, in violation of the law and in violation of his obligations as a member of the bar. Those statements also give the defamatory impression that Albritton fraudulently manufactured subject matter jurisdiction where none otherwise existed to benefit his client to Cisco's detriment. Those statements attack Albritton in his business and profession by accusing him of criminal, unethical and improper acts in connection with the altering of a governmental record in violation of the law and his obligations as a member of the bar.

The October 18th post continues to describe the events in connection with the filing of the ESN complaint as a "conspiracy" and to use other language suggesting that Albritton engaged in criminal, unethical or improper conduct, including alleging that there was "tons of proof" that the complaint had been filed on October 15th and that "subpoenas" and "witnesses" may be necessary to prove the complaint was filed on October 15th. Those statements are false. Albritton did not engage in a conspiracy or any other criminal conduct with respect to the filing of the ESN complaint. There is no such "tons of proof." Those statements, particularly when taken in the context of the posts as a whole, accuse Albritton of criminal conduct, unethical conduct and improper conduct in his business and profession. Those statements also give the defamatory impression that Albritton fraudulently manufactured subject matter jurisdiction

where none otherwise existed to benefit his client to Cisco's detriment. Those statements accuse Albritton of criminal, unethical or improper conduct in his business and profession, in violation of the law and in violation of his obligations as a member of the bar. That statement attacks Albritton in his business and profession.

The October 18th post stated that "ESN counsel Eric Albritton signed the Civil Cover Sheet stating that the complaint had been filed on October 15." That statement is false. Albritton signed a civil cover sheet that was submitted to the court clerk (but not filed). The Civil Cover Sheet does not contain a statement by Albritton that he filed the ESN complaint on Oct. 15, 2007. That statement is defamatory of Albritton because it insinuates, particularly when taken in the context of the posts as a whole, that Albritton knew that the ESN complaint had been filed on October 15 (which is factually incorrect) but nonetheless engaged in criminal, unethical or improper conduct in his business and profession to fraudulently create subject matter jurisdiction where none existed to benefit his client at Cisco's expense, and in violation of the law and his obligations as a member of the bar. That statement attacks Albritton in his business and profession by accusing him of criminal, unethical and improper acts in connection with the altering of a governmental record in violation of the law and his obligations as a member of the bar.

The October 18, 2007 post also stated that "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." That statement is false. No one in the clerks' office, at ESN, or associated with Albritton's practice tried to change history. No one in the clerks' office, at ESN, or in associated with Albritton's practice tried to manufacture subject matter jurisdiction were none existed. Albritton did not conspire with the clerks' office. Albritton did not attempt to achieve the unlawful, unethical, and improper purposes alleged in Frenkel and Cisco's posts by deceiving, misleading or duping the clerks' into helping him alter a governmental record to create subject matter jurisdiction where none existed. That statement, particularly when taken in the context of the posts as a whole, accuses Albritton of conspiring to alter an official governmental document, which is criminal, unethical conduct an improper conduct in Albritton's business and profession. That statement also gives the defamatory impression that Albritton engaged in criminal, unethical or improper conduct in his business and profession to fraudulently create subject matter jurisdiction where none existed to benefit his client at Cisco's expense or to perpetrate a fraud on the unsuspecting clerk's office to achieve his nefarious purpose. That statement attacks Albritton in his business and profession by accusing him of criminal, unethical and improper acts in connection with the altering of a governmental record in violation of the law and his obligations as a member of the bar.

The October 18, 2007 post also stated that the ESN conspiracy is further proof of the abusive nature of litigating patent cases in the "Banana Republic of East Texas," suggesting that Albritton was caught engaging in a conspiracy and in abusive litigation tactics in the Eastern District of Texas. That statement is false. There is nothing abusive about Albritton's conduct or his practice in the Eastern District of Texas. That statement is defamatory of Albritton because it alleges, particularly when taken in the context of the posts as a whole, that Albritton engaged in criminal, unethical or improper conduct in his business and profession to fraudulently create subject matter jurisdiction where none existed to benefit his client at Cisco's expense, and in

violation of the law and his obligations as a member of the bar. That statement attacks Albritton in his business and profession by accusing him of criminal, unethical and improper acts in connection with the altering of a governmental record in violation of the law and his obligations as a member of the bar.

The October 18, 2007 post, as revised by Frenkel contains all of the same defamatory statements listed above with respect to Albritton, but makes some revisions aimed at softening Frenkel and Cisco's accusations against the Court. The revised post deleted Frenkel and Cisco's statement regarding abusive nature of litigating patent cases in the "Banana Republic of East Texas." The revised post also changed the original post to state that "it's outrageous that the Eastern District of Texas may have, wittingly or unwittingly, helped a non-practicing entity to try to manufacture subject matter jurisdiction." While the post softened its allegations against the court clerks, it continued to allege that Albritton engaged in criminal, unethical or improper conduct in his business and profession to fraudulently create subject matter jurisdiction where none existed to benefit his client at Cisco's expense, and in violation of the law and his obligations as a member of the bar, although he may have been able to perpetrate that fraud in some manner without the Eastern District of Texas knowing his fraudulent purpose. The revised October 18, 2007 post rests on the same false "facts" and innuendo as the original post. That statement is defamatory of Albritton because it alleges, particularly when taken in the context of the posts as a whole that Albritton engaged in criminal, unethical or improper conduct in his business and profession to fraudulently create subject matter jurisdiction in violation of the law and his obligations as a member of the bar. That statement creates a false and defamatory impression that Albritton engaged in criminal, unethical, and improper conduct in his profession. That statement attacks Albritton in his business and profession by accusing him of criminal, unethical and improper acts in connection with the altering of a governmental record in violation of the law and his obligations as a member of the bar.

The revised October 18, 2007 post's removal of the reference to the Banana Republic of East Texas, and changing some of the language referring to the clerks, did not affect Cisco and Frenkel's accusation with respect to Albritton, and continued to accuse Albritton of engaging in criminal, unethical, improper or nefarious conduct to create subject matter jurisdiction where none existed before, to benefit his client at Cisco's expense, and in violation of the law, his ethical obligations, and his duties to the Court as a member of the bar.

The revised October 18, 2007 post also added the following statement: "Even if this was a 'mistake,' which I can't see how it could be, given that someone emailed me a printout of the docket from Monday showing the case, the proper course of action should be a motion to correct this docket." This statement is false and defamatory. The "header" on the ESN complaint and as reflected on the docket entry was a mistake. The statement creates the defamatory impression that the correction of the docket in the ESN case could not have been as a result of an error or an honest mistake, but was as previously stated, part of a conspiracy, unethical conduct, or improper conduct undertaken by Albritton. Frenkel omitted from this post the fact that Albritton and ESN claimed that the date on the docket entry was the result of an error in the court's software. Had Frenkel included that information, the revised Oct. 18 post would have portrayed a far different meaning to the reader than Frenkel's continuing assertions of criminal and unethical conduct. The statement, particularly when taken in the context of the posts as a whole,

accuses Albritton of criminal and unethical conduct. That statement also gives the defamatory impression that Albritton fraudulently manufactured subject matter jurisdiction where none otherwise existed to benefit his client to Cisco's detriment. That statement accuses Albritton of criminal, unethical or improper conduct in his business and profession and in violation of the law and his obligations as a member of the bar.

The revised October 18, 2007 post also stated that a motion to correct the docket should have been filed. That statement is false and defamatory. The correction to the docket in the ESN case did not require the filing of a motion to correct the docket. The revised post omitted the fact that no such motion is required under the local rules. Instead, Frenkel's inclusion of this statement further reinforced his accusations that Albritton engaged in a course of conduct that was criminal, unethical, improper, corrupt, and in violation of the local rules that he is required to follow as an officer of the court. The statement, particularly when taken in the context of the posts as a whole, gives the defamatory impression that Albritton fraudulently manufactured subject matter jurisdiction where none otherwise existed to benefit his client to Cisco's detriment. The statement accuses Albritton of criminal, unethical or improper conduct in his business and profession and in violation of the law and his obligations as a member of the bar.

Subject to the above objections, Albritton further responds as follows: Frenkel's posts in their totality are defamatory of Albritton. *See Turner v. KTRK Television*, 38 S.W.3d at 103, 114-15 (Tex. 2000); 114-16; *see also Golden Bear Dist. Sys. of Texas v. Chase Revel, Inc.*, 708 F.2d 944, 949 (5th Cir. 1983); *Texas Disposal Sys Landfill, Inc. v. Waste Mgmt Holdings*, 219 S.W.3d 563, 583 (Tex. App.- Austin [3rd Dist] 2007). Although Albritton has set forth specific examples of defamatory factual statements made by Frenkel and Cisco in the October 17th, October 18th, and revised October 18th posts, those statements must be considered in the context of Frenkel's posts as a whole. Therefore, Albritton responds that Frenkel's defamatory posts, in their entirety, create the false impression that Albritton engaged in criminal and unethical behavior.

In further response Albritton claims the following language of the October 17, 2007 and October 18, 2007 postings, taken in context and as a whole, are defamatory:

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. I asked myself, can ESN do this? I would think that the court would lack subject matter jurisdiction, since ESN owned no properly 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. *CAF 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 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?

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