

EXHIBIT 2

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

CERTIFIED COPY

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

ORAL DEPOSITION OF
ERIC M. ALBRITTON
OCTOBER 27TH, 2008

ORAL DEPOSITION OF ERIC ALBRITTON, produced as a witness at the instance of the CLAIMANT, and duly sworn, was taken in the above-styled and numbered cause on the 27th of October, 2008, from 12:44 p.m. to 4:24 p.m., before Tammy Staggs, CSR in and for the State of Texas, reported by machine shorthand, at the Law Offices of James A. Holmes, 605 South Main, Suite 203, Henderson, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

1 P R O C E E D I N G S

2 (Exhibits 21A - 63 marked)

3 THE VIDEOGRAPHER: Here begins the
4 videotape deposition of Eric Albritton in the matter of
5 Eric M. Albritton vs. Cisco Systems, Inc., Rick Frenkel,
6 et al. Case No. 6:08CV00089. Today's date is October
7 27th of 2008. The time is approximately 12:44 p.m. Now
8 on the record.

9 ERIC ALBRITTON,

10 having been first duly sworn, testified as follows:

11 EXAMINATION

12 BY MR. BABCOCK:

13 Q. Would you state your name, sir.

14 A. Eric Albritton.

15 Q. Mr. Albritton, here is Exhibit 21A. I just
16 like to start each deposition with a notice. Obviously
17 you're here, so there's no question about that.

18 What -- how are you employed?

19 A. I'm a lawyer.

20 Q. And do you practice with a firm?

21 A. I do.

22 Q. What's the name of the firm?

23 A. Eric M. Albritton, PC.

24 Q. And PC stands for professional corporation,
25 correct?

1 documents. But as you certainly know, Mr. Babcock, from
2 working this case --

3 Q. Don't assume I know anything.

4 A. Well, that's -- the file stamp, if -- if you
5 read the local Rules and when you talk to Mr. Maland, as
6 he's indicated before, the file stamp are these jumbles
7 of letters and numbers all of which show unequivocally
8 that it was filed on the 16th of 2007. That's the file
9 stamp.

10 Q. Okay. And the -- if that -- if that shows
11 that unequivocally, then why wouldn't -- why wouldn't
12 this thing up here at the top of the document and every
13 page of the document which -- you'd agree that's a
14 stamp, right?

15 A. That is not -- you asked if it was a file
16 stamp and it is not.

17 Q. Well, it's -- what do you call this?

18 A. I don't know, Mr. Babcock, but it's not a file
19 stamp.

20 Q. Okay. Well, why was it important to get that
21 changed?

22 A. It's -- it's a mistake because it shows here
23 that it was filed on the 16th. And if you look here,
24 when you read the local Rules you'll see it says that
25 the date and time indicated on the ECF notice of filing

1 is when the filing is made. It says that it was entered
2 on the 16th of 2007 at 12:01 a.m. That is the file --
3 that indicates it was filed on the 16th at 12:01 a.m.

4 And when you get to depose the clerk's
5 office, they will tell you unequivocally that the
6 filing -- this is the file stamp, and it shows that it
7 was filed on the 16th. Why there was some glitch in the
8 system to where this incorrect date was stamped on the
9 top of these documents, I do not know the answer to
10 that.

11 Q. Okay. You left out a little bit when you were
12 reading here. It said entered on 10/16 at 12:01 a.m.
13 CDT, and then what does it say?

14 A. And filed at 12/15/07.

15 Have you read the local Rules,
16 Mr. Babcock?

17 Q. I'm going to take the deposition,
18 Mr. Albritton.

19 A. Okay.

20 Q. Do you want to take my deposition?

21 A. The local rule says at the date and time
22 stamped is when it's deemed filed. There's only one
23 entry on this where there's a date that corresponds with
24 the time, and it's at 10/16/2007 at 12:01 a.m. Central
25 Daylight Time.

1 Q. What are the words that immediately follow
2 that?

3 A. And filed on 10/15/2007.

4 Q. Okay. And so you would admit that there's at
5 least an ambiguity there?

6 A. I would not.

7 Q. Okay. Well, then -- then why didn't you just
8 leave it alone? Why did you have to have Amie --

9 A. Because --

10 Q. -- calling the clerk?

11 A. I didn't -- A, I did not have Amie call the
12 clerk. And B, because Cisco was taking the frivolous
13 position in Connecticut that we had filed this on the
14 15th, which was in truth and fact incorrect.

15 Q. Well, if it was frivolous, then surely the
16 Connecticut court would have seen that.

17 A. Well, evidently Cisco realized it because they
18 dismiss -- they agreed to jurisdiction in this court.

19 Q. Well, what happened, in fairness, is that both
20 parties dismissed their lawsuits. Both ESN dismissed
21 the Texas lawsuit and Cisco dismissed the Connecticut
22 lawsuit. So you could try to settle it, right?

23 A. I was actually involved in that. I don't
24 believe you were, Mr. Babcock. And they certainly
25 agreed to the dismissal of these lawsuits. And the

1 Q. Well, three months then.

2 A. Okay.

3 Q. Ninety days would be three months, right?

4 A. It would.

5 Q. Okay. And getting back to the -- the thing --
6 you called it a stamp at the top of the complaint. It
7 says filed 10/15/2007. That's what it says, right?

8 A. It does say that.

9 Q. And that is a stamp, right?

10 A. That is a stamp of some sort generated by the
11 software, yes.

12 Q. And the software is -- belongs to the United
13 States District Clerk for the Eastern District of Texas,
14 right?

15 A. I believe so.

16 Q. Okay.

17 A. I mean, it's -- it belongs to the government
18 in some way.

19 Q. Okay. And the filing date was important
20 because if you -- if it was, in fact, filed on the 15th,
21 then the Court would lack subject matter jurisdiction
22 since the patent didn't issue until the 16th, right?

23 A. That's correct.

24 Q. Okay. And you say that Cisco's position that
25 it was filed on the 15th was frivolous. And why do you

1 this court that there -- there is not a complaint that
2 has a file stamp on it that says 10/15/2007 and another
3 one that says 10/16/2007?

4 A. Mr. Babcock, that is not a file stamp. I
5 don't know if you're imprecise on purpose or by
6 accident, but that is not a file stamp. There are not
7 two documents that have different filed stamp dates.

8 Q. All right. You don't want to call it a stamp,
9 even though you did in your testimony. You're not --
10 are you telling this court and the jury that there are
11 not two documents that have different things on them,
12 whether you want to call it a stamp or a piece of
13 writing or whatever, but one says filed 10/15/2007 and
14 the other one says filed 10/16/2007?

15 A. There are two documents --

16 Q. All right.

17 A. -- that have headers that have different dates
18 on them, yes.

19 Q. And -- all right. And did you tell
20 Judge Folsom about that?

21 A. No.

22 Q. Did you make a motion to the Court to correct
23 the docket so that Cisco would have an opportunity to
24 challenge that?

25 A. I did not.

1 filed against me.

2 Q. Okay. And I take it that everything Amie did
3 after the first phone call, which you say you didn't
4 know about, but everything she did after that first
5 phone call was with your knowledge and approval,
6 correct?

7 A. I don't re- -- I do not know where in the
8 process we talked, but I fully support everything that
9 she did.

10 Q. Okay. And you -- of course, after this
11 problem surfaced, you did an investigation to determine
12 exactly what had happened, what had gone on, correct?

13 A. What do you mean by "an investigation"?

14 Q. Well, I mean, once it became such a big deal,
15 you know, there's a newspaper art- -- I mean, Internet
16 articles about it, you felt compelled to file a lawsuit,
17 you certainly investigated thoroughly the facts
18 surrounding this filing problem, correct?

19 A. Well, I looked very early on and looked at the
20 document before we filed this motion to enjoin that
21 clearly showed when it was filed. I looked again at my
22 E-mail that shows the E-mail says it was filed at the
23 16th on 12:01 a.m. And so, you know, no other
24 investigation was necessary.

25 Q. Well, did you -- did you have any dialogue

1 with Cisco about these clear facts that you're talking
2 about? Did you call anybody from Cisco up and say, hey,
3 there's been a problem. We want to fix it this way.

4 A. Well, I've talked to Judge Parker and to Sam
5 Baxter both and told them that, you know, this was filed
6 in the morning and that, you know, somebody had accused
7 me of being a criminal and that I was very, very unhappy
8 about that. I knew both of them had represented Cisco,
9 and I know then Cisco ultimately agreed and never filed
10 anything in court.

11 If they think I did something wrong, not
12 only has no grievance been filed, but nobody ever filed
13 anything at the clerk's office and said, whoa, wait a
14 minute, you know, there is no subject matter
15 jurisdiction or Mr. Albritton did -- did something
16 wrong. Nobody's ever done that.

17 Q. Let me ask you a little more precise a
18 question. Before the entries were changed, the docket
19 sheet and the -- whatever you want to call it on the top
20 of the complaint was changed from the 15th to the 16th,
21 did you speak to anybody at Cisco about it?

22 A. I don't recall the chronology of when I talked
23 to Judge Parker and to Sam Baxter.

24 Q. Well, let me just ask you since you put both
25 of them on your disclosures. Did you talk to

1 Q. For the last five or ten years certainly?

2 A. Well, not for the last ten years, no.

3 Q. Five years?

4 A. Maybe five years, maybe less.

5 Q. Okay.

6 MR. BABCOCK: He needs to do the tape,
7 and we'll take a quick break.

8 THE VIDEOGRAPHER: This marks the end of
9 Tape 1. Going off the record. The time is
10 approximately 1:43 p.m.

11 (Recess held, 1:43 p.m. to 1:51 p.m.)

12 THE VIDEOGRAPHER: This is the beginning
13 of Tape No. 2. Back on the record. The time is
14 approximately 1:51 p.m.

15 Q. (BY MR. BABCOCK) Mr. Albritton, I want to
16 have you look at Exhibit 14.

17 A. Yes, sir.

18 Q. And it's a series of E-mails. And it starts,
19 you say to Amie Mathis, is this right. And are you
20 referring to this memo from Mr. Maland about the
21 sequence of events in the -- on the filing issue?

22 A. Yes, sir.

23 Q. All right. And then Amie replies right above
24 that, (as read): The chain is right. I talked to
25 Texarkana, and then I talked to David Provines and

1 then -- and then the/they were supposed to transfer me
2 to David Maland, but he was out and I was given to Peggy
3 Thompson.

4 And then she goes on to explain more,
5 correct?

6 A. Yes, sir.

7 Q. All right. And then after the -- after the
8 clerk's memo you say (as read): Thanks. You've done
9 good. I appreciate you.

10 Did you tell that to Ms. Mathis on March
11 14th of 2008?

12 A. Absolutely.

13 Q. Okay. How did you -- how did you -- how did
14 your office get the Maland memo, do you know?

15 A. Yeah, Jamie Holmes sent it to me.

16 Q. Okay. Do you know how he got it?

17 A. I believe Mr. Maland sent it to him.

18 Q. And was Mr. Holmes acting as your counsel at
19 that time?

20 A. Yes, sir.

21 Q. Did Mr. Baxter tell you in this conversation
22 on October 18th that he was going to be representing
23 Cisco in this case that you had filed, the ESN case?

24 A. I don't recall specifically, although I
25 believe that he would.

1 me and the clerk's office of being criminals and
2 conspiring together to manufacture subject matter
3 jurisdiction, something to that effect.

4 Q. Okay. What did -- what did Wesley Hill
5 respond?

6 A. I don't recall. I'm sure he said something
7 about them being sorry no-good suckers. Them being
8 whoever the anonymous person was, but I don't recall
9 specifically.

10 Q. Do you recall him using the phrase "sorry
11 no-good suckers"?

12 A. No.

13 Q. That's your phrase?

14 A. Yes, sir.

15 Q. Have you ever called the people responsible
16 for the Troll Tracker article on the October 18th sorry
17 no-good suckers before?

18 A. I don't recall if I've called them that
19 specifically, but I've called them lots of ugly names.

20 Q. Okay. To whom?

21 A. I don't know.

22 Q. But you're not shy about calling them names, I
23 take it?

24 A. When they accuse me of being a criminal,
25 absolutely not.

1 Q. And the TTLA is the Texas Trial Lawyers
2 Association, correct?

3 A. Uh-huh.

4 Q. Is that a "yes"?

5 A. Yes, sir.

6 Q. And that is normally a -- that group is
7 consistent members of the plaintiff's side of the bar,
8 right?

9 A. That's right.

10 Q. Okay.

11 A. I mean, I don't know if it's exclusively the
12 case.

13 Q. I think they give you some DNA testing before
14 you can get in, is what I've heard.

15 The -- have you ever participated in any
16 lobbying efforts to lobby for legislation?

17 A. I have been to DC a couple of times with
18 lobbyists, yes.

19 Q. Okay. And were they -- were those lobbyists
20 lobbying on any specific piece of legislation?

21 A. Yes.

22 Q. And what legislation was that?

23 A. The patent reform legislation.

24 Q. And who were those lobbyists?

25 A. Max Sandlin.

1 Q. Anybody else?

2 A. I went to some -- some people in Max's office
3 and then I've met with -- although I don't think I ever
4 went to any meetings with the AAJ, or however you call
5 it, lobbyists.

6 Q. What is AAJ?

7 A. American Association for Justice, I believe.

8 Q. And what -- what does -- is that an industry
9 group or is that -- what kind of --

10 A. It's a lawyer group.

11 Q. Lawyer group?

12 A. Uh-huh.

13 Q. Is that a "yes"?

14 A. Yes, sir. I'm sorry.

15 Q. And is that lawyer group typically plaintiff's
16 lawyers?

17 A. I guess. I mean, it's -- it used to be called
18 ATLA.

19 Q. Okay.

20 A. And each time I went, I went with Sam Baxter.

21 Q. And you say you went with him. Did you -- I
22 mean, are you saying you physically traveled with him or
23 were you part of the same --

24 A. We were there together. We were there
25 together.

1 Q. And were you lobbying on patent reform in the
2 same way? Were you lobbying for -- both lobbying for
3 the same --

4 A. Absolutely. And I'm not a lobbyist, so I
5 wasn't lobbying. I was just -- I was just there for
6 these meetings, but I would broadly, you know, in
7 fairness, say they that had to do with lobbying.

8 Q. Okay. And these meetings were held in
9 Washington, DC, I take it?

10 A. Yes, sir.

11 Q. And who were you meeting with?

12 A. I met with Senator Durbin. I met with, you
13 know, various people. I can't recall. A senator from
14 South Dakota, not Tim Johnson. The -- although I spoke
15 to people in mister -- or Senator Johnson's office. I
16 don't recall exactly. I mean, Senator Cornyn, your
17 senator.

18 Q. Our senator?

19 A. Absolutely. I've met with his staff on
20 several occasions.

21 Q. Okay. Did you meet anybody on the House side?

22 A. Yes.

23 Q. And who on the House side?

24 A. I don't recall.

25 Q. You said you were up there on two occasions?

1 A. Yeah, at least two.

2 Q. At least two?

3 A. I've talked to -- also I've talked extensively
4 to a fellow in Senator Boxer's office.

5 Q. That's the senator from California, right?

6 A. Yes, sir.

7 Q. Okay. In addition to these two -- in addition
8 to these two trips, did you also communicate with people
9 in congress, both the Senate and the House side, by
10 telephone even though you weren't physically in
11 Washington?

12 A. I've spoken on the phone with Senator Boxer's
13 staff several times.

14 Q. And what committee does Senator Boxer sit on
15 that would -- would be involved in the patent reform
16 effort?

17 A. I have no idea.

18 Q. Why was it that you were speaking to Senator
19 Boxer's staff, a California senator, as opposed to
20 Cornyn or...

21 A. Well, I spoke to Cornyn also, but this guy and
22 I had become friendly. I think Mr. Frenkel had been
23 lobbying the same fellow.

24 Q. And he -- Mr. Frenkel would have been on the
25 opposite side of you on this --

1 A. Presumptively.

2 Q. Because you were against the patent reform
3 effort, correct?

4 A. Some aspects of it, yes.

5 Q. Particularly the aspects dealing with venue,
6 right?

7 A. I certainly do not support the venue
8 provision.

9 Q. And so we're on the same page, the venue
10 provision would have made the filing of patent suits in
11 the Eastern District of Texas not as easy to do, harder
12 to do, right?

13 A. That's right.

14 Q. Okay. When did you begin your lobbying
15 effort?

16 A. Yeah, I mean, that's really -- I'm not fussing
17 with you, but that's a little bit of a -- you know, not
18 fully accurate characterization. I'm sort of tagging
19 along, but I don't remember the first time I went up
20 there with Sam.

21 Q. Okay. Was that the first time you did it when
22 you went to Sam up to Washington?

23 A. Yes, sir.

24 Q. Okay. And was that in 2008 or before 2008?

25 A. I don't recall, Mr. Babcock.

1 Q. Was it before the ESN lawsuit?

2 A. I don't recall. I don't believe so, but I'm
3 not sure. It may have been. I frankly just don't
4 recall.

5 Q. Okay.

6 A. Maybe before and after, I don't know.

7 Q. Okay. Was this patent reform effort -- and
8 specifically focusing on the venue part of it, that is
9 where you can bring a lawsuit -- was that something that
10 was being discussed in the public media? I seem
11 remember a New York Times article about it. But anyway
12 it doesn't matter. Is that something that was being
13 discussed in the public media?

14 A. I don't recall.

15 Q. Are you aware that some members of the Bar
16 across the country felt that -- that the Eastern
17 District of Texas was -- was an unfair venue or put
18 defendants at a disadvantage in some -- in some way?

19 A. I don't know what other people think.

20 Q. Are you aware that Justice Scales from the
21 bench called the Eastern District a renegade district?

22 A. I recall something about that, yes.

23 Q. Okay. What do you recall about that?

24 A. Just exactly what you said.

25 Q. Do you know if that -- if that got any

1 traction in terms of being discussed in the Eastern
2 District?

3 A. Not -- I mean, I can't tell you anything
4 specific. I mean, I certainly don't think that's an
5 accurate characterization. But what Justice Scalea said
6 about the Eastern District of Texas has nothing to do
7 with the fact that Cisco Systems and Rick Frenkel called
8 me a criminal.

9 Q. Are you -- do you remember there's a phrase in
10 the -- in the article about the Banana Republic?

11 A. Uh-huh.

12 Q. About -- something about abusive practices in
13 the Banana Republic of East Texas? I'll get it out in a
14 second, but --

15 A. Yeah, I mean, you're sort of smiling. I guess
16 -- I don't think that's a cute saying.

17 Q. Do you think that that phrase is defamatory of
18 you?

19 A. No. I think it gives context to what he was
20 saying about me, but -- or potentially does, I don't
21 know. But I don't -- I don't think -- well, strike
22 that.

23 I mean, I certainly think he is saying
24 that what I did was abusive because he seems to be
25 linking that, I don't know. Yeah, I mean, he clearly

1 certain that we talked about it that day as well, the
2 day of the Inn of Court meeting.

3 Q. Okay. Did you ever hand the Troll Tracker
4 articles, either the October 17th or October 18th, to
5 any person?

6 A. Not to my knowledge.

7 Q. Okay. Did you ever distribute it in some
8 other way like E-mail or mail or fax to anybody else?

9 A. I don't believe so, Mr. Babcock.

10 Q. In the -- at the Inn of Court meeting on the
11 18th, did you tell Bob Parker that -- about the Banana
12 Republic statement?

13 A. I don't recall specifically.

14 Q. And how about Sam Baxter, did you tell him at
15 the Inn of Court meeting about the Banana Republic
16 statement?

17 A. I don't recall specifically.

18 Q. Do you know whether the October 18th article
19 has ever been modified?

20 A. Yes.

21 Q. Okay. And tell me what you know about that.

22 A. Well, I know that somebody evidently thought
23 better of that statement and took it down, but decided
24 evidently to leave up the outrageous statements about
25 me.

1 Q. Okay.

2 A. So I guess it was Cisco thought it was okay to
3 say ugly thinks about Eric Albritton, but not about the
4 judges.

5 Q. Do you know when the Banana Republic statement
6 was taken down?

7 A. Within a day or two.

8 Q. Was it -- was the October 18th article ever,
9 to your knowledge, modified in any other way?

10 A. I don't recall. There were some other slight
11 modifications. I think there was some, you know,
12 language that tried to soften it that said, well,
13 we're -- you know, whether this was intentional or
14 not -- I don't recall, but you can obviously just
15 compare them, but I don't recall specifically.

16 I do know that up until February it
17 continued to say that I conspired with the United States
18 District Clerk to alter a document, to manufacture
19 subject matter jurisdiction where none existed, and I
20 also know that it continued to say that I had filed an
21 amended complaint for no other reason than to correct
22 the -- the problem with subject matter jurisdiction as
23 evidence that it was some sort of a recognition on my
24 part that I had done wrong.

25 Q. You said up until February. What happened in

1 these defamatory statements.

2 Q. But are you going to say to the jury that even
3 though you can't quantify it, you think that you have
4 lost --

5 A. No, I'm not going to say that because I can't
6 quantify it. I mean, I very well may have, but I -- I'm
7 not seeking that damage because there's no way to know
8 it. People don't call me up and say, hey, Eric, we're
9 not using you anymore because, you know, Rick Frenkel
10 told us that you're a criminal.

11 Q. Okay.

12 A. It doesn't work that way.

13 Q. All right. So -- so for whatever reasons
14 you're not -- you're not going to claim reputational
15 damages in this case?

16 A. That's not true.

17 Q. Okay. So you are going to claim reputational
18 damages?

19 A. Well, Mr. Babcock, you're a lot smarter than
20 me about first amendment law. I don't -- I don't know
21 exactly what you mean. I'm not claiming lost wages or
22 money damages, economic damages, as a result of lost
23 business based on the defamatory statements. But has my
24 reputation being harmed --

25 Q. Yes.

1 you believe the law presumes?

2 A. I'm not here to offer legal opinions.

3 Whatever the law presumes is whatever the law presumes.

4 Q. Okay. So -- so to get -- get back to my
5 question a few questions ago, you're not willing to rule
6 out anything that the law would permit you to have other
7 than economic damages?

8 A. I'm not asking for any economic damage.

9 Q. And other than that, you're going for
10 everything?

11 A. As we sit here this second, I think a jury
12 ought to be able to award, you know, the damages it
13 believes are appropriate, except for I'm not asking for,
14 you know, medical bills or economic damages.

15 Q. Okay. The ambiguity that I mentioned earlier
16 was created by your complaint vis-a-vis your
17 disclosures, and it says in your complaint that you've
18 endured shame, embarrassment, humiliation, mental pain,
19 and anguish. Are you still seeking damages for all
20 those things?

21 A. Yes. This has been extremely, extremely
22 traumatic.

23 Q. Okay. Can you identify for me a friend who
24 was a friend of yours prior to the October 18th and 17th
25 articles and who is -- and who is now not a friend as a

1 result of those articles?

2 A. Thank God I can't. My real friends know that
3 this is untrue. It's the other folks in the world who
4 don't know me that are the problem.

5 Q. Okay. Well, we'll just go category by
6 category. And you say real friends. Are there any kind
7 of casual friends that are no longer friends because of
8 these articles?

9 A. Not that I know of.

10 Q. Okay. How about business associates, are
11 there any business associates who thought highly of you
12 before these articles who no longer do?

13 A. Yeah, evidently so.

14 Q. Okay. Tell me who.

15 A. Michael Barclay. You know, he's a lawyer at
16 Wilson Sonsini where George McWilliams's client
17 networks. I worked for Michael Barclay, in fact. In
18 fact, I worked for Wilson Sonsini on two occasions. I
19 worked for them in my very first patent case or my very
20 first IP cases, the one I referenced where Cisco sued
21 Huawei. Michael Barclay -- I'm sorry. Jonathan -- oh,
22 I don't remember his last name right now. Wilson
23 Sonsini Goodrich & Rosati hired me to represent 3Com.
24 They evidently thought I was a pretty smart guy and
25 pretty good lawyer.

1 17th and 18th articles and after?

2 A. Based on what Cisco said about me?

3 Q. Yes, based on the articles.

4 A. Of what Cisco said about me?

5 Q. Well, are you distinguishing something that
6 Cisco said versus the articles?

7 A. Well, didn't Cisco take responsibility for
8 what Mr. Frenkel said?

9 Q. Well, you know, that's, as you say, a matter
10 of law. But I'm trying to focus on the articles that
11 you're suing about.

12 A. My family has not said to me that -- and I
13 don't believe that they think different of me based on
14 what Cisco and Rick Frenkel lied about me.

15 Q. So your relationship with your family is
16 unaffected by the articles, correct?

17 A. That was not the question you asked, but I
18 don't believe they think of me any differently as a
19 result of these statements. Has this affected my family
20 life? Certainly.

21 Q. Okay. Tell me how.

22 A. Because I'm sick, not physically, I'm sick
23 over the fact that those people said these horrible,
24 malicious lies about me. And that you and George
25 McWilliams to this day are telling the world that what

1 A. Then maybe Mr. McWilliams hasn't produced all
2 the documents, but I don't believe seeing multiple --
3 more than one anonymous E-mails.

4 Q. Well, be that as it may, you have no basis
5 then for saying whether he got a couple of anonymous
6 E-mails this morning or not, right?

7 A. All I know is what he has said in many
8 respects is untrue, so I have no reason to know if this
9 would -- would be the exception and that it would be
10 true.

11 Q. The -- it is true, however, that the docket in
12 ESN vs. Cisco had been altered, correct?

13 A. The -- the date on the docket had been changed
14 to -- the docket entry No. 1, the date had been changed,
15 yes.

16 Q. All right. And it says (as read): One E-mail
17 suggested that ESN's local counsel called the Eastern
18 District Texas court clerk and convinced him, slash, her
19 to change the docket to reflect on October 16th filing
20 dater rather than the October 15th filing date.

21 And forget about whether the E-mail
22 suggested it or not, but it is true that your clerk --
23 well, strike that.

24 It is true you were local counsel for
25 ESN, correct?

1 A. I was.

2 Q. All right.

3 A. And still am.

4 Q. Still are. And it is true that Amie Mathis
5 called the Eastern District of Texas court clerk.
6 That's true, right?

7 A. She did call the court clerk, yes.

8 Q. And you say, I guess, that it's not true that
9 Amie convinced him, slash, her to change the docket to
10 reflect an October 16th filing date rather than the
11 October 15th filing date?

12 A. Yeah, that's absolutely untrue. She did not
13 convince him to do it or her to do it, and I think that
14 they will tell you that she did not convince anybody to
15 do anything.

16 Q. Well, we'll -- we'll -- we'll see what they
17 say.

18 A. You can accuse them to.

19 Q. And are you saying that -- that they would
20 have changed this on their own if she hadn't contacted
21 them?

22 A. That's not what I'm saying. I'm saying that
23 she pointed out to them that there was a mistake and
24 they fixed it because it was obviously a mistake.

25 Q. You don't think that she asked them to fix the

1 here is --

2 A. It's not an argument. It's just the facts.

3 Q. Your position. I've litigated with people
4 before that think that their version of the facts is
5 true, and that's fine you have that right.

6 A. It's good. We'll let the jury decide,
7 Mr. Babcock.

8 Q. That's true.

9 A. I didn't call your people criminals.

10 Q. And apparently they didn't call you a criminal
11 either --

12 A. Okay. Well, that's good.

13 Q. But we'll get to it.

14 There's no question, as we went through
15 before, that whatever you call it -- whether you call it
16 a file stamp or a header or gibberish -- there was
17 something changed on the complaint that went across the
18 top of every page and it changed it from the
19 October 15th to the October 16th, correct?

20 A. That's correct.

21 Q. And so if he had just said instead of what he
22 said that the complaint was altered to change the header
23 from October 15th to October 16th, that would be
24 accurate?

25 A. If you ignore the -- the introduction where it

1 A. You can try that.

2 Q. Does the local rule not provide for that?

3 A. That's fine, Mr. Babcock.

4 Q. We'll probably get done by 5:00 if you answer
5 my questions. Okay?

6 Now, I'm referring to this language here
7 which says -- I'm not referring to the headline. I'm
8 referring to the language that says (as read): The
9 docket was altered to reflect an October 16th filing
10 date, and the complaint was altered to change the filing
11 date stamp from October 15th to October 16th.

12 If we change that from the filing date
13 stamp to the header, that would be accurate, correct?

14 A. Not when taken in context with the -- you
15 know, whatever you call it, the title of the article.

16 Q. But it would be more accurate if he had said
17 the complaint was altered to change the header from
18 October 15th to October 16th, correct?

19 A. Yes.

20 Q. All right. He then goes on to say (as read):
21 Only the Eastern District court clerk could have made
22 such changes.

23 That's true, isn't it?

24 A. Absolutely.

25 Q. All right. So you couldn't have done that,

1 Q. Did you sign --

2 A. It says -- it says -- you have to be accurate.

3 Q. Mr. Albritton, will you listen to my question?

4 A. It says (as read): ESN counsel signed the
5 civil cover sheet stating that the complaint had been
6 filed on October 15th.

7 That is untrue.

8 Q. Okay.

9 A. Did I sign the civil cover sheet on the 15th?

10 That is true.

11 Q. Okay. Thank you.

12 Is ESN a non-practicing entity?

13 A. I have no idea. I assume that's true.

14 MR. BABCOCK: I think we're out of tape,
15 maybe. Let's take a quick break.

16 THE VIDEOGRAPHER: This is the end of
17 Tape 2. We're going off the record. The time is
18 approximately 2:50 p.m.

19 (Recess held, 2:50 p.m. to 3:03 p.m.)

20 THE VIDEOGRAPHER: This marks the
21 beginning of Tape 3. We're back on the record. The
22 time is approximately 3:03 p.m.

23 Q. (BY MR. BABCOCK) Mr. Albritton, I'm going to
24 hand you Exhibit 22, which is something that's called
25 Patently-O, Patent Law Blog. Have you ever seen this

1 A. Well, you have the E-mails there if you'll
2 give them to me, but basically when we filed the
3 complaint, the patent -- as I understand it, patents
4 issue at midnight Eastern.

5 Q. Right.

6 A. But you can't get a printed copy until later
7 in the day. And so despite the fact the patent had
8 issued prior to us filing the lawsuit, we could not
9 attach a copy of the complaint -- I'm sorry -- a copy of
10 the patent to the complaint. So the complaint makes no
11 reference to an exhibit -- the patent as the exhibit.
12 We obviously didn't attach it. So I E-mailed Johnny,
13 and I'm sure we talked about it too, that said should we
14 go ahead and amend to add the complaint. Because, you
15 know, there's no local rule that says you have to attach
16 a patent.

17 Q. And when you said -- when you said attach the
18 complaint, you meant attach the patent?

19 A. I meant attach the patent.

20 Q. Right. Okay.

21 A. So I said to Johnny, should we go ahead and
22 amend and he said, well, don't burn your amendment yet.
23 And then I said -- because as you surely know under the
24 Federal Rules, you get, you know, one free amendment.
25 And I said to him, well, the reason we need to amend is

1 because of what I just explained to you. And he said,
2 oh, okay, then go ahead and amend. And so we did, which
3 of course shows that the statement of Mr. Frenkel about
4 we amended to make no changes and only for the purpose
5 of correcting our mistake is -- that statement is false.

6 Q. Here's Exhibit 26 and that's the E-mail you
7 were referring to, correct?

8 A. Uh-huh.

9 Q. Is that a "yes"?

10 A. Yes, sir. That's on the 16th at like
11 8 o'clock.

12 Q. And then there's a longer string that is
13 Exhibit 28, which refers to the -- what you were saying
14 about then (as read): Yes, let's burn the amendment.
15 We can amend again without leave after the DCO is
16 entered if we need to.

17 You were -- that's what you were just
18 talking about a minute ago?

19 A. Yeah. I say to Johnny, should we file an
20 amended complaint? He responds and says don't burn it.
21 Did we reference the patent in the complaint? I said no
22 because we -- it hadn't printed at the time we filed the
23 complaint. And then Johnny said, yeah, he agrees.
24 Let's burn the amendment. We can always amend later.

25 Q. Okay. So your point is that -- that there was

1 something changed from the original complaint to the
2 amended complaint because you had attached the actual
3 patent where as before you had not?

4 A. Well, yes, and if you look at the complaint
5 it's different. It now says attached as Exhibit A or
6 whatever is the patent. So there was a change. And it
7 was not, you know, for the purpose of fixing some error
8 on our part.

9 Q. Okay.

10 A. I make lots of mistakes, but I didn't here.

11 Q. We were talking about Dennis Crouch the author
12 of Patently-O a minute ago.

13 A. Yes, sir.

14 Q. Let me show you Exhibit 39. And Exhibit 39
15 appears to be an E-mail from Peter McAndrews to yourself
16 and John Ward. It says (as read): See attached E-mail
17 from Dennis Crouch. Crouch is the guy who allegedly
18 tipped off Frenkel about our complaint.

19 Were you aware at the time you received
20 this -- this E-mail that Crouch had tipped off Frenkel
21 about the complaint?

22 A. I don't know if Crouch tipped off Frenkel. I
23 have no idea what the real truth is there about -- in
24 fact, based on -- and I don't know this for sure, but
25 based on the documents you've produced, I doubt that

1 Q. And in what -- what capacity?

2 A. Well, I mean, we're, for instance, on the
3 Local Rules Committee together.

4 Q. Okay. And is that the federal court rules?

5 A. Yes, sir.

6 Q. And how long have you been on the Local Rules
7 Committee?

8 A. I've been on the Local Rules Committee for
9 three months or so.

10 Q. So you got on in --

11 A. After the -- after the defamation.

12 Q. So you got on in August of '08?

13 A. No, that's not -- I don't know when I got on.
14 I estimated. I don't know when I got on.

15 Q. But it's -- but it's sometime --

16 A. And three months would not -- yeah, I don't
17 know. I just don't recall.

18 Q. And how do you get on the Local Rules
19 Committee?

20 A. It's recommended by the Court.

21 Q. And any specific member of the Court?

22 A. I don't know exactly how that works.

23 Q. All right. And how often does the Local Rules
24 Committee meet?

25 A. I don't know.

1 complaint. Now, you can, as I understand it, file
2 without going through all the procedure of requesting a
3 case number in advance.

4 Q. By the way, why was it so important to file
5 this at -- at midnight or the one minute after midnight
6 as opposed to just, you know, filing it the next morning
7 or the next afternoon?

8 A. Well, because there was concern that Cisco
9 would file a declaratory judgment action.

10 Q. And if they had done that and gotten it first,
11 then you would have been stuck in any forum they wanted?

12 A. Potentially.

13 Q. As opposed to what ESN wanted?

14 A. Potentially, yes.

15 Q. Have you talked to Michael Smith about the
16 issues revolving around the filing of the ESN vs. Cisco
17 Systems case in October -- the October filing is what
18 I'm talking about.

19 A. Yeah. I don't recall having any, you know,
20 oral conversations with Michael Smith.

21 Q. Have you had any written conversations?

22 A. He's E-mailed me a couple of times. As you
23 know -- I gave this to you -- he E-mailed me about some
24 newspaper reporter that had called him and then he had
25 E-mailed about some other things, you know, because

1 something you have to get online, and there's a whole
2 procedure you have to go through. Okay. And then after
3 you upload the document, it says -- there's a button and
4 it's got a big warning. Maybe Mr. McWilliams has done
5 this, I don't know. I'm sure she has. And it says
6 warning, when you push this button this is when the
7 thing is filed, something to that effect, okay.

8 So she logged in on the 15th, uploaded
9 the stuff, but did not make the transmission and the
10 filing until after the 16th. So maybe as -- what I can
11 understand from what Dave Maland says -- and I don't
12 know if Dave has direct knowledge of this or where he's
13 learning this -- but evidently from reading what Dave
14 Maland says in that most recent memo that you kept
15 referencing, it appears to me that he's saying the
16 mistake is a -- on the date is a result of logging in on
17 the 15th initiating that session even though it was
18 filed on the 16th.

19 Q. But would that be a software mistake or an
20 Amie mistake?

21 A. Amie did nothing wrong here because filing is
22 at the time you transmit the document, and that was done
23 on the 16th.

24 Q. So you're saying it's a software mistake?

25 A. I'm saying that the wrong date being stamped

1 Q. Okay. And are the -- is the information in
2 this Exhibit 62 to your law firm Web site accurate?

3 A. I believe it is.

4 Q. In October of 2007 was it just you and Scott
5 Hacker that were the lawyers in this firm?

6 A. No. I mean, right around that time Jason
7 Saunders had come on.

8 Q. Okay. So you, Mr. Hacker, and Jason Saunders,
9 correct?

10 A. Yeah, he was only there for a short while.

11 Q. Okay. And is Mr. Hacker still there?

12 A. No, he's a federal judge.

13 Q. I take it that this -- that this -- these
14 articles by the Troll Tracker and Mr. Frenkel have not
15 hurt your relationship with the judiciary in the Eastern
16 District of Texas, would that be fair to say?

17 A. Not to my knowledge.

18 Q. In fact, some -- one or more judges appointed
19 you to this committee since the articles, right, the
20 Rules Committee?

21 A. Yes.

22 Q. Okay.

23 A. I mean, I assume that's how it works. I think
24 I was recommended by a judge, and I don't know exactly
25 how it works.

1 Q. Okay.

2 A. I know I was at the office all weekend working
3 on a cert petition and death penalty case while I'm
4 getting ready to pick a jury on the third, so this week
5 I'm real, real busy.

6 Q. Okay. And do you recall how much income you
7 received from your law practice in 2007?

8 A. Uh-uh.

9 Q. Excuse me?

10 A. No, sir.

11 Q. Okay. And how do you file with the Internal
12 Revenue Service? Do you have a Subchapter S Corporation
13 or how do you handle that?

14 A. I think it is an S Corp.

15 Q. Okay. And you would have to refer to your
16 federal income tax return to tell me how much income you
17 made in 2007, right?

18 A. Uh-huh.

19 Q. Is that a "yes"?

20 A. Yes, sir. But, of course, you know, income --
21 you know, some of the things that I earned in 2007 were
22 from cases that were, you know, signed up in 2005.

23 Q. Sure. Do you know whether your income from
24 your law practice is going to increase in 2008 over
25 2007? I know we've got two months to go.

1 A. I believe it will.

2 Q. Okay. Even though you can't be specific, can
3 you tell me generally how much you made in 2007 from
4 your law practice?

5 A. No.

6 Q. Can you tell me whether it was 100,000 or a
7 hundred million?

8 A. It was neither a 100,000 nor a hundred
9 million.

10 Q. Somewhere in between?

11 A. Yes, sir.

12 Q. Was it in the millions?

13 MR. HOLMES: Let's -- why don't we hold
14 off on that until we get a response from the Court on
15 your motion. We -- you asked for that information in
16 your motion to compel --

17 MR. BABCOCK: I did.

18 MR. HOLMES: -- and that's part of what
19 I've been objecting to. So I would ask we hold off on
20 that until we get a ruling.

21 MR. BABCOCK: Okay.

22 Q. (BY MR. BABCOCK) I know you're your own man,
23 but you're going to follow what your lawyer says?

24 A. Yeah, and just to be clear, I'm not saying --
25 I mean, I will have made more money in 2008 than 2007.

1 And just like I told you in the very beginning, you
2 know, I cannot quantify and I'm not claiming that I've
3 been financially harmed as a result of this. I may have
4 been, but there's no way of knowing that.

5 MR. BABCOCK: Well, subject to reserving
6 the right to ask the witness questions on that topic if
7 the Judge rules in our favor, then I'll pass to
8 Mr. McWilliams.

9 MR. HOLMES: All right. Thank you.

10 EXAMINATION

11 BY MR. McWILLIAMS:

12 Q. Eric, I don't know whether Mr. Babcock asked
13 you about your case load change from 2007 to 2008. What
14 -- has your case load increased in 2008 over 2007 or can
15 you tell?

16 A. I have no idea.

17 Q. What's your sense about that?

18 A. Well, what case load are you talking about,
19 Mr. McWilliams?

20 Q. Well, like most lawyers know what case load
21 is.

22 A. I've got fewer criminal cases probably. You
23 know, when Hacker was appointed judge, I started ramping
24 down my criminal business. So my criminal business is
25 diminishing. I have probably -- I have filed -- I have

1 A. You know, that is my assumption. I do not
2 know specifically, you know, all the intricacies about
3 jurisdiction when you have a published application or
4 not. I don't know that level of minutia. My operating
5 assumption is that we were filing on the 16th because
6 that's when the patent issued.

7 Q. But assume that it was filed on the 15th and
8 assume that there would be an issue about the timeliness
9 of the prosecution of the complaint on this patent, that
10 would have been an untimely filing, would it not?

11 A. That's exact -- maybe I'm being unclear.
12 That's what I'm trying to answer. It was my operating
13 assumption that it needed to be filed on the 16th
14 because that's when the patent issued. Whether or not
15 you -- provisional rights would have given subject
16 matter jurisdiction, I do not know the minutia about
17 that. And, obviously, there's some confusion and if you
18 read your own E-mails there's lengthy discussions about
19 that with Mr. Frenkel.

20 Q. Okay. Why then was it so important for Amie
21 to stay up until midnight and file it from her home?

22 A. Because just as I just said, it was our
23 operating assumption -- okay. And I believe this to
24 this day. I mean, again, I don't know the minutia but
25 the patent issued on the 16th. We believed it needed to

1 be filed after the patent issued, and we wanted to file
2 suit before Cisco could sue us.

3 THE VIDEOGRAPHER: End of Tape 3. Going
4 off the record. The time is approximately 4:04 p.m.

5 (Recess held, 4:04 p.m. to 4:10 p.m.)

6 THE VIDEOGRAPHER: This marks the
7 beginning of Tape 4. Back on the record. The time is
8 approximately 4:10 p.m.

9 Q. (BY MR. MCWILLIAMS) Eric, do you know if
10 anybody contacted the clerk's office regarding this
11 filing date issue other than Amie Mathis?

12 A. No, sir.

13 Q. Okay. You didn't contact the office?

14 A. No, sir.

15 Q. I believe you say you fully support whatever
16 she did in her contacts with the office?

17 A. Without a doubt.

18 Q. Okay. And I guess Johnny Ward would also?

19 A. You'll have to ask him in his deposition.

20 Q. Okay. Did the electronic notice of this
21 filing on the 16th, did it -- did it go to Cisco?

22 A. I don't think so.

23 Q. Now, not only was the banner, quote, filed
24 October 15th, 2007 in error but the actual docketing of
25 the complaint was also an error, was it not?

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

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

REPORTER'S CERTIFICATION
DEPOSITION OF ERIC ALBRITTON
OCTOBER 27TH, 2008

I, TAMMY LEA STAGGS, Certified Shorthand Reporter in
and for the State of Texas, hereby certify to the
following:

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

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

1 me by _____;

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

4 Mr. James A. Holmes - (0:00)

5 Mr. Charles L. Babcock - (2:38)

6 Mr. George L. McWilliams - (0:35)

7

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

11 FOR THE PLAINTIFF:
12 James A. Holmes, Esq.

13 FOR THE DEFENDANT, CISCO SYSTEMS, INC.:
14 Charles L. Babcock, Esq.

15 FOR THE DEFENDANT, RICHARD FRENKEL:
16 George L. McWilliams, Esq.
17 Nicole Peavy

18

19

20

21

22

23

24 That \$ _____ is the deposition officer's charges
25 to the Defendant, Cisco Systems, for preparing the
original deposition transcript and any copies of
exhibits;

1 I further certify that I am neither counsel for,
 2 related to, nor employed by any of the parties or
 3 attorneys in the action in which this proceeding was
 4 taken, and further that I am not financially or
 5 otherwise interested in the outcome of the action.
 6 certified to by me this 31st of October, 2008.

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