

# EXHIBIT 3

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

CERTIFIED COPY

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

\*\*\*\*\*

ORAL AND VIDEOTAPED DEPOSITION OF  
DAVID MALANDÓ  
NOVEMBER 3, 2008  
VOLUME I

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ORAL AND VIDEOTAPED DEPOSITION OF DAVID MALAND,  
produced as a witness at the instance of the Defendant,  
and duly sworn, was taken in the above-styled and  
numbered cause on the 3rd day of November, 2008, from  
9:25 a.m. to 3:15 p.m., before April R. Eichelberger,  
CSR in and for the State of Texas, reported by machine  
shorthand, at the United States District Court for the  
Eastern District of Texas, 211 West Ferguson Street in  
the City Tyler and the State of Texas, pursuant to the  
Federal Rules of Civil Procedure and the provisions  
stated on the record or attached hereto.

1 will announce, in regard to the scope of the authorized  
2 testimony today.

3 MR. WELLS: And Robert Wells, also with  
4 the United States attorney's office in the same role.

5 THE VIDEOGRAPHER: Will the court  
6 reporter please swear in the witness.

7 DAVID MALAND,  
8 having been first duly sworn, testified as follows:

9 EXAMINATION

10 BY MR. BABCOCK:

11 Q. Would you state your name, sir?

12 A. David J. Maland.

13 Q. And, Mr. Maland, how are you employed?

14 A. I am the United States District Clerk for the  
15 Eastern District of Texas.

16 Q. How long have you held that position?

17 A. Sixteen years and three months.

18 MR. GIBSON: Mr. Babcock, before we go  
19 any further, can we put our -- just our brief  
20 housekeeping matters on the record? First of all, we --  
21 as you know, we have several depositions that are set  
22 for today. I have the witness fees that were tendered  
23 to Mae Velvin, to Shelley Moore, and to Rhonda Lafitte.  
24 They are all deputy clerks employed by the United States  
25 District Clerk's Office and reside and work or work in

1 near the end of the day and they wouldn't record it  
2 until the beginning of the next day?

3 Q. (BY MR. BABCOCK) Right.

4 A. Entirely possible.

5 Q. Okay.

6 A. That's as much as I can say about it. I'm not  
7 qualified to go forth.

8 Q. And you're way ahead of me, so -- Ms. Parker  
9 is computer-literate, but I'm not. Okay.

10 A. I can tell you that the docket entry, now,  
11 these -- this docket entry, which is really the docket  
12 entry in question that was modified --

13 Q. Right.

14 A. -- that does show filing fee, 350, Receipt  
15 Number 1292, there's no date connected with it other  
16 than October the 16th.

17 Q. And of course, that was changed from the 15th.

18 A. And that was changed. It was originally what  
19 Ms. Thompson, Faye N. Thompson in the parenthetical,  
20 those are her initials.

21 Q. Okay.

22 A. What she did was change -- when I first looked  
23 at it on the computer screen on -- I believe it was  
24 October the 17th.

25 Q. Right. Yeah.

1 Q. And then Ms. Thompson modified it on -- two  
2 days later on the 17th to reflect 10/16/2007?

3 A. Yes.

4 Q. Okay. Fine. And the other -- other than the  
5 date filed, changing it from the 15th to the 16th, and  
6 the modified language --

7 A. That -- that gets put in automatically by the  
8 computer.

9 Q. Okay. But my point was, the other language  
10 before modified was the same on the 15th and the 16th,  
11 correct?

12 A. Yeah.

13 Q. That was my point.

14 A. Yeah.

15 Q. Let me keep going through these e-mails that  
16 you produced for us, which will be great.

17 A. Very good.

18 Q. Here's Exhibit 86. Are these e-mails -- is  
19 the government the same as some of these where you start  
20 at the back and go to the front?

21 A. Start at the back. Yeah, chronologically it  
22 started out with the --

23 Q. So -- so the first e-mail here would be from  
24 Shelley Moore to yourself on October 18th, 2007, at  
25 9:23 a.m.?

1 telephonically.

2 Q. Okay.

3 A. This is an e-mail conversation.

4 Q. Right. Okay. "Dear Shelley, check the NEF  
5 for the complaint in that case," you wrote back. "I  
6 believe it shows a date of 10/16. That's the document  
7 that really matters." That's what you wrote back to  
8 her?

9 A. I did.

10 Q. And then she writes back to you, "I saw that.  
11 And that is why I was puzzled that the computer showed  
12 the 15th. She must have finished the entry just seconds  
13 after midnight."

14 A. Yes.

15 Q. And that's what she wrote back?

16 A. That's what she wrote.

17 Q. And did your subsequent investigation show  
18 that what happened here was that Ms. Mathis had started  
19 uploading this lengthy complaint with exhibits prior to  
20 midnight and finished it shortly after midnight?

21 A. Yes, yes.

22 Q. And that's what -- that's what you found  
23 happened?

24 A. Oh, yes, yeah.

25 Q. Okay. And that's why it got the date on the

1 15th because she had started the filing process on the  
2 15th?

3 A. Yeah. Now, there's a document that I want  
4 to --

5 Q. First of all, is that right?

6 A. It is right.

7 Q. Okay.

8 A. Absolutely. A document that's germane to  
9 this -- let's see if -- it wouldn't be in the e-mails.  
10 It would be in the -- oh, it is in the e-mails right at  
11 the end.

12 Q. Okay. Let me --

13 A. This is a fairly important document. It is  
14 that one.

15 Q. That one.

16 A. Very good.

17 Q. Okay. Exhibit 94, and --

18 A. This is something that we were -- wanted some  
19 written confirmation from our administrative office.  
20 They are located -- their help desk, their -- really the  
21 programmers for this national electronic filing system,  
22 they are in San Antonio, Texas. They cover the entire  
23 country. And we look to them for information as to how  
24 the software operates.

25 Q. Right.

1 writing.

2 Q. Okay. All right. And under the -- under the  
3 hypothetical, under our case, if Ms. Mathis started  
4 uploading the complaint at 11:30 on the 15th, even  
5 though she didn't hit, as the help desk says, the  
6 "submit" button until 12:01, the nationwide system is  
7 going to create a filing date of October 15th, not  
8 October 16th when she hits the button?

9 MR. HOLMES: Objection, form.

10 Q. (BY MR. BABCOCK) Is that right?

11 A. That's a con -- what you mean by filing date  
12 is -- it's a real term of art here.

13 Q. Okay. Let me put it --

14 A. And there's more than one date contained on  
15 the NEF, which is the document that really determines  
16 filing date.

17 Q. Yeah. But the problem, anyway, is -- and do  
18 you know who on the help desk was helping you on this?  
19 Do you know the name of the person?

20 A. David might.

21 Q. Okay. I'll ask David about it. But the help  
22 desk is telling you that the reason the 15th popped up  
23 is because Ms. Mathis had started entering the  
24 complaint, which is a lengthy complaint, before  
25 midnight --



1 A. Yes.

2 Q. -- even though she didn't only hit the submit  
3 button until shortly after midnight?

4 MR. HOLMES: Objection, form.

5 A. Right.

6 Q. (BY MR. BABCOCK) Okay. That clears that up.

7 A. We just wanted something from the people who  
8 are involved and knew the most about how the software  
9 operated to confirm our longstanding suspicion that it  
10 dragged in the date when she started the process.

11 Q. Right.

12 A. And I -- well...

13 Q. And you know, from having dealt with rules for  
14 your entire career and -- you probably don't know this,  
15 but I'm the chair of the Supreme Court advisory  
16 committee --

17 A. Are you?

18 Q. -- so I've dealt with rules -- not as long as  
19 you.

20 A. The Supreme Court of Texas?

21 Q. Texas, yeah.

22 A. Okay.

23 Q. And normally, with rules, because of statute  
24 of limitations and jurisdictional filing deadlines, you  
25 want the earlier date, not the later date, right?

1 was riding in the court van back from Plano, Texas. We  
2 were working on our new courthouse there, and I was --

3 MR. McWILLIAMS: By the way, is it in  
4 west Plano or east?

5 THE WITNESS: Yeah.

6 MR. BABCOCK: See, I told you.

7 THE WITNESS: It's near 121 and the  
8 Tollway. Very nice location.

9 MR. BABCOCK: Yeah.

10 A. But this is just -- you know, when I got back  
11 there, I was like, oh, that already happened, because  
12 she called me or I talked to Ms. Jeffreys while in the  
13 van heading home that afternoon, and she immediately --  
14 I'm paraphrasing, but said, have you ever -- have you or  
15 your staff ever changed a filing date in a case?

16 And I said, well, there's only one that I  
17 recall adjusting or correcting the filing date, and it  
18 involved a patent case filed by Eric Albritton, only  
19 time.

20 And so she quizzed me about that, said she  
21 was writing an article about that for deadline soon,  
22 wanted just some quotes that she could put in her  
23 article, you know, this afternoon was her deadline so  
24 she needed something quickly.

25 Q. They always do that.

1 A. It was either Rhonda Lafitte, who is the  
2 deputy in charge, or Shelley Moore, deputy clerk. I  
3 believe it was Shelley Moore.

4 Q. Okay.

5 A. I'm pretty sure it was Shelley Moore that  
6 talked to her.

7 Q. All right. And the -- what you say to the  
8 Texas Lawyer, you go on to say, "She wanted" -- she  
9 meaning Amie, correct?

10 A. Yes.

11 Q. -- "wanted the clerk's office to change the  
12 date to October 16th because she had waited to file the  
13 complaint until after the midnight on the 16th." Did I  
14 read that correctly?

15 A. Yes, uh-huh.

16 Q. And how did you learn that Ms. Mathis wanted  
17 the clerk's office to change the date to October 16th?

18 A. That was relayed to me by Peggy Thompson of  
19 the Tyler clerk's office. After Ms. Mathis talked to  
20 both Ms. Lafitte and Ms. Moore in Texarkana, they both  
21 told her we are not authorized to do something like  
22 that; you'll have to call Tyler.

23 So she called Ms. Thompson, Peggy  
24 Thompson, who is the criminal court reporter, CJ; she's  
25 a supervisor. And then Ms. Thompson relayed the request

1 Thompson relayed to you? That's just what I want to  
2 know right now.

3 A. Yeah. The -- it's to change on the docket  
4 entry -- where is -- docket sheet. I'm looking for the  
5 docket sheet.

6 Q. Here you go.

7 A. Thank you.

8 Q. It's Exhibit 99.

9 A. Thank you. On Exhibit 99, the date in the  
10 "date filed" column on page 3 of the then -- of the  
11 docket sheet. It pertains to Document Number 1, and the  
12 docket text is that for the complaint. When I looked at  
13 the docket entry on that day, this date filed read  
14 10/15/2007. And what I was told they wanted to change  
15 was to change that so it reflected 10/16/2007.

16 Q. Okay. So Ms. Thompson told you the request  
17 from Ms. Mathis and Mr. Albritton were that they wanted  
18 the date filed, which originally showed 10/15/2007, to  
19 be changed to 10/16/2007?

20 A. Yes.

21 Q. That was the request?

22 A. Yeah, based on their notice of -- well, their  
23 Notice of Electronic Filing that showed that they had  
24 finished the --

25 Q. They had reasons, but that was the request?

1 A. That was the request.

2 Q. Okay.

3 A. To change that date, yes.

4 Q. Okay. And as you tell the Texas Lawyer,  
5 continuing on in this paragraph --

6 A. Uh-huh.

7 Q. -- the Texarkana deputy clerk was reluctant to  
8 change the date.

9 A. Yes.

10 Q. And referred Amie to the Tyler clerk's office.  
11 And as you've just testified, that -- you understood  
12 that's what happened?

13 A. Yes.

14 Q. And you're not sure whether it was Rhonda  
15 Lafitte or Shelley Moore that referred her to the Tyler  
16 clerk's office?

17 A. I think they both talked to her and they both  
18 expressed a reluctance and suggested that she talk to  
19 us.

20 Q. Did they tell you why they were reluctant?  
21 And I'm talking contemporaneously now, back in October  
22 of 2007.

23 A. No. You know, the first I heard about it was  
24 Peggy coming to me. I was beginning -- I was, to my  
25 recollection, getting ready to go somewhere. Maybe it

1 was home. It was close to, you know, afternoon time by  
2 my recollection.

3 And the first I heard of it was Peggy  
4 coming to me and said, wait, wait, wait, we've got a  
5 request here. I need you to take a look at this. But I  
6 never talked to Ms. -- either of the Texarkana deputies.  
7 I can tell you, though, that this, you know, is rather  
8 deeply engrained in them, and I think is evinced by  
9 their actions, that they would not do something like  
10 that without my permission.

11 Q. Right. And as Shelley Moore told you in  
12 writing, she was a little leery about changing the date,  
13 correct?

14 A. Yeah, uh-huh.

15 Q. And then she talked to Cindy Paar, and she's  
16 even more leery about changing the date?

17 A. Yeah, yeah.

18 Q. And did you ever learn about this Cindy -- and  
19 we'll find out later today, but about this Cindy  
20 Paar/Shelley Moore conversation that made Shelley Moore  
21 even more leery about changing the date?

22 A. I never talked to Cindy about this until just  
23 a few days ago.

24 Q. Okay. What did Cindy say?

25 A. She said that the -- she was aware that -- on

1 A. Yeah, but some of it was changed because of  
2 the way that the underlying programming worked. The  
3 only thing that she changed was that. But the computer  
4 automatically puts in this modification language.

5 Q. But the actual stamp at the top of the  
6 document -- of the complaint changed as well, you know.

7 A. Not that.

8 Q. No, no. You're talking about the docket  
9 sheet. I'm talking about the complaint itself. Hang  
10 on. I'll show it to you.

11 A. Okay. I wasn't...

12 Q. Here is Exhibit 21, and you'll see, at the top  
13 of the complaint, "Complaint for patent infringement,  
14 ESN versus Cisco Systems and Cisco-Linksys, LLC." It  
15 says here case, and it gives the case number and  
16 document; and it says filed October 15, 2007?

17 A. Yeah.

18 Q. Right?

19 A. Right.

20 Q. And then that -- what do you call that, by the  
21 way, that thing at the top of the document?

22 A. Well, it's a header, term of art. Cindy or  
23 David may know the answer to that.

24 Q. Okay.

25 A. But that's automatically put in there by the

1 10/16. That, to me, was the ballgame.

2 I had no doubt then and I have no doubt  
3 now that -- and I'm not a judge. But I'm the clerk of  
4 court, and I know a lot about what's at play here, I  
5 think. In my opinion, there was no doubt that those  
6 stamps are determinative. The electronic stamps that  
7 say 10/16 for each of those documents on the NEF are  
8 outcome determinative of this matter.

9 Q. Did -- obviously your office was in contact  
10 with Mr. Albritton's office. Do you know whether  
11 anybody in your office was in contact with Cisco about  
12 this?

13 A. No. No, I don't believe anyone was.

14 Q. Okay.

15 A. I -- they can tell you, but I am quite  
16 confident no one talked to them.

17 Q. Okay. And --

18 A. Of course, at the time that it was filed, the  
19 Schell case and the complaint was filed, they chose not  
20 to E -- use the e-service feature.

21 Q. Who is they, Mr. Albritton?

22 A. Albritton. When Amie filed that thing, I  
23 looked at it. They didn't put in opposing counsel.  
24 They were serving by -- not by our system. I thought  
25 perhaps they had. Now, I just found that out. But if



1 A. It's amongst the -- it's an attachment on  
2 these things.

3 Q. Well, in any event, you said you just found  
4 out -- you got it?

5 A. I'm looking for my e-mail to the Texas Lawyer  
6 because it's got all the attachments.

7 Q. Oh, okay.

8 A. Here we go. Here we go. Okay. We're looking  
9 for the NEF. Here we go. This is contemporaneous.  
10 This is what happened at that time. Notice will be  
11 electronically mailed to. All she did was put her  
12 boss's name, Eric M. Albritton. She was the only one  
13 that got a copy of the NEF.

14 Q. Okay.

15 A. And I -- just by looking over the materials, I  
16 discovered that within the last couple of days. I had  
17 thought, you know, another typical way of doing it and  
18 many attorneys use the e-service feature of our  
19 electronic filing system so that this could be conveyed  
20 directly to the other litigants. But obviously when  
21 that complaint was filed, it was not. The only notice  
22 went to Albritton, the only e-mail notice of that, and  
23 of course, to us.

24 Q. Right. Okay. But there was a feature that  
25 your office had that, had Mr. Albritton chosen, he could

1 have inputted Cisco data so they would have gotten  
2 notice of all these things?

3 A. Yes. The procedure is described amongst those  
4 documents that I've given you as to how attorneys are  
5 trained so they can input the e-mail addresses of -- or  
6 from a pick list, take the opposing counsel and put them  
7 into the system and they will get the electronic  
8 notification.

9 Q. Okay. So as -- as Mr. Albritton's office was  
10 making this request to change the date from the 15th to  
11 the 16th, first to the Texarkana office and then to the  
12 Tyler office, as far as you know, Cisco had no input  
13 into that request?

14 A. I didn't -- at that juncture, know -- other  
15 than the caption, know who the attorneys were or  
16 anything, just they were the defendants.

17 Q. So my -- the answer is, yes, they didn't have  
18 any input into this?

19 A. They had no input, right.

20 Q. And you tell the Texas Lawyer in your -- the  
21 last -- next-to-last sentence, "Hindsight being 20/20, I  
22 should have instructed the Tyler docket clerk to tell  
23 Mr. Albritton to file a motion to correct the docket  
24 report rather than having the deputy clerk do a  
25 correcting entry." Did I read that correctly?

1 A. You surely did.

2 Q. And why did you feel that way?

3 A. Well, I think at the time that this occurred,  
4 when I got the phone call, I was focusing on what I knew  
5 about the local rules committee's desire with our  
6 procedure to have it work so it reflected the date and  
7 time of filing, the -- you know, if there was indicia,  
8 clear indicia when the thing -- when they hit the  
9 "submit" button on the NEF, which there was, to me, that  
10 was the issue being presented. I was not thinking about  
11 defendants.

12 And yet, five, six months hence,  
13 reflecting on what happened where, you know, we have  
14 lawsuits and things happening, I was of the opinion that  
15 it would have been preferable to just tell them file a  
16 motion to clarify. This is a complex venue.

17 Yet at the time that I did authorize the  
18 change, it was my clear opinion that the document was  
19 timely filed. And I didn't really have any doubt about  
20 it.

21 And yet, when I think back on it, I'm a  
22 clerk. I'm not a judge. It ought to be -- you know, if  
23 it gets down to this, it should have been a judicial  
24 determination. They would have had to ask me and my  
25 staff for the same kind of information you're having to

1 Q. Yeah.

2 A. Because it didn't do what it was supposed to.

3 Q. And -- and that's all helpful and I appreciate  
4 it. To get back to my question --

5 A. Yes.

6 Q. That's okay. It -- and I'm not being critical  
7 of the way you handled it, but I'm just saying that your  
8 letter to the Texas Lawyer would seem to indicate --

9 A. Yes.

10 Q. -- that, if this came up again, you would give  
11 notice to both sides and let the judge decide whether  
12 the docket entry should be changed?

13 A. Absolutely.

14 Q. Is that true?

15 A. Yes, absolutely.

16 Q. Let me ask you to look at Exhibit 88, and  
17 this, the bottom of it, it's your letter to the Texas  
18 Lawyer. But then above it, it's an e-mail from you to  
19 Faye Thompson, Shelley Moore, and Rhonda Lafitte. And  
20 you say -- dated March 14, 2008, "Here for your  
21 information is a memo I sent to the Texas Lawyer with  
22 copies to Chief Judge Heartfield and Judge Folsom  
23 regarding the matter above. It represents, to the best  
24 of my knowledge, what happened in this case. There is  
25 pending litigation involving the facts below in state

1 Q. Yeah. My question was bad because that's not  
2 what I was going to.

3 A. Yeah.

4 Q. Was there a mistake made by the clerk's office  
5 in -- hang on.

6 A. Pardon me.

7 Q. Was there a mistake made in the clerk's office  
8 in handling the initial filing? Forget about the  
9 correcting entry. I'm just talking about the initial  
10 filing.

11 A. None at all. Thank you for slowing me down.  
12 But none, no mistakes at all.

13 Q. Okay. And now, moving -- and you corrected  
14 me, too, so we both pat each other on the back.

15 Moving forward to the correcting entry,  
16 you don't think your office did anything wrong, but in  
17 hindsight, it would have been better if there had been a  
18 motion filed?

19 A. It would have been better to have a motion  
20 filed, and I should have sent -- I should have  
21 alerted -- once I became aware of counsel -- the defense  
22 counsel, they should have been put into the loop.

23 Q. Okay. We're out of tape. Thanks. We'll take  
24 a quick break, and I'm nearing the end if you can  
25 believe this.

1 Tyler and just things like that.

2 Q. Other -- other than logistical e-mails about  
3 just getting here and that type of thing, are there any  
4 other documents you've withheld?

5 A. No, no.

6 Q. Okay. And are either Mr. Gibson or Mr. Wells  
7 representing you as your attorneys in this?

8 A. Only -- they are representing the interest of  
9 the United States and not us. That was another helpful  
10 clarification that they provided us with. They're here  
11 to ensure that the scope of the testimony doesn't go  
12 outside of our, you know, specifics on the Tuohy  
13 regulations.

14 Q. Sure. Just another couple of questions.  
15 First of all, I've noticed, just by looking at the PACER  
16 in the eastern district, that sometimes you'll see  
17 entries that say filed in error or there will be some  
18 indication like that.

19 A. Yeah, yeah.

20 Q. I noticed in this case, however, the docket  
21 entry of October 15th, 2007, has completely disappeared  
22 from the system. Can you -- number one, do you know  
23 that to be true?

24 A. The docket entry for the complaint?

25 Q. Yeah. The docket entry that said

1 October 15th --

2 A. Oh.

3 Q. You know what I'm saying?

4 A. Right. Yeah, that -- that disappeared when  
5 Faye Thompson made that correcting -- I mean, that --  
6 that's the one thing that disappeared. And yet, from  
7 the transaction log, you can see that that adjustment  
8 was made. And when I first saw the docket sheet, it  
9 said October 15th. But once that change was made, it  
10 changed it in the database.

11 Q. Okay. Why wouldn't it show filed in error as  
12 you do other? What's the distinction between that?

13 A. Filed in error is a procedure that is used  
14 primarily for what we call quality control events, but  
15 they are -- when attorneys -- and this, again, is a  
16 provision in our local rules. We are not authorized to  
17 reject documents for failure to comply with the rules.

18 Nonetheless, this court and many courts  
19 have authorized the clerk's office to, in effect,  
20 monitor electronic filings for rule compliance. And so,  
21 say if you submitted a document that lacks something  
22 significant, sometimes the document would be withdrawn  
23 and then resubmitted in the proper format.

24 But it's primarily to do with our function  
25 of quality control and looking at those documents and,

1           A.    And then they've also -- if they're looking at  
2 the Notice of Electronic Filing, which is really the  
3 document that all of us ought to be looking at because,  
4 under the rules, that is the -- it's not what a docket  
5 clerk puts under Document Number 1. It's the -- what  
6 does the NEF say.

7           Q.    But --

8           A.    But that was kind of where I was coming from.  
9 But looking back on all the difficulty this has caused  
10 and what -- you know, perhaps a better course of action  
11 at the time, knowing what I know now, you know, there's  
12 no way, if this situation occurred again, that we would  
13 do the same thing, that we would make an adjusting  
14 entry. We would hopefully fix it before then, but we're  
15 not going to touch another similar case like this. We  
16 would leave it up to a judge.

17          Q.    And the reason for that is that a judge would  
18 have all the facts available like you provided the Texas  
19 Lawyer?

20          A.    Yes, right.

21          Q.    The public would have those facts available?

22          A.    Yes.

23          Q.    And the explanation would be there for  
24 everyone to take a look at?

25          A.    Right. That -- hindsight being 20/20, that



1 reference the complaint, and it does evidence a change  
2 in the date filed; but it does not mention 10/15 in that  
3 text.

4 Q. We may have this already marked as another  
5 exhibit.

6 MR. McWILLIAMS: Chip, I'm going to use  
7 your sequence here.

8 MR. BABCOCK: Sure.

9 (Exhibit Number 111 was marked.)

10 Q. (BY MR. McWILLIAMS) Marked as Exhibit 111,  
11 and can you identify what that exhibit is?

12 A. That is -- well, it's -- are these a copy of  
13 the same? Yeah, you just want me to -- this appears to  
14 be a copy of that.

15 Q. Right, right. Just identify the first two  
16 pages.

17 A. Yeah, okay. Yeah, yeah, this is a copy of the  
18 docket sheet that shows the way that it looked before  
19 Ms. Thompson corrected that entry.

20 Q. All right. And what -- what does it say the  
21 filing date of the complaint is?

22 A. October 15, 2007.

23 Q. Now, that is the docket sheet and the filing  
24 date that is now gone?

25 A. Yeah. But it is indicia of how it looked.

1 the 20 some-odd pages following had a file date of  
2 October the 15th, 2007, did it not?

3 A. Right. Yes.

4 Q. Did you send a copy of that complaint in the  
5 exhibits to the Texas Lawyer?

6 A. No. I mean, the first time I'd seen that  
7 complaint with the header on it was today. But even  
8 with or without the header, of course, any -- any  
9 printing of that document out of the database would  
10 have -- after the case is filed, that header appears on  
11 everything.

12 Q. I understand.

13 A. On every page.

14 Q. So if --

15 A. But I did not send the complaint as part of my  
16 attachments because I was focusing, as we should, on the  
17 Notice of Electronic Filing.

18 Q. I understand. So if a member of the public,  
19 on this same October 16th date at 9:40 a.m., had looked  
20 at the complaint, it would have had the October 15th  
21 filing date across the top?

22 MR. HOLMES: Objection, form.

23 A. At any time, you're correct, yeah, it would  
24 have had that.

25 MR. HOLMES: Objection, form.

1 A. Yes. It was in November of 2007. It's that  
2 local -- pardon me -- General Order 07-9 was the order  
3 amending the local rules.

4 Q. And Mr. Albritton became a member of the local  
5 rules committee on what date?

6 A. It would have been in the spring of 2008.  
7 That -- there's a particular rhythm to the way that our  
8 rules committee works. We -- the appointments are made  
9 typically in May of a year, and I send a letter out in  
10 June welcoming the new ones. There's generally four new  
11 ones every year.

12 Q. And I believe you said that Mr. Albritton was  
13 appointed by Judge Davis?

14 A. Judge Davis. And so he would have been  
15 appointed by Judge Davis sometime in May of 2008. The  
16 letter would have gone out June of 2008 or maybe late  
17 May, and we had a physical meeting in that courtroom,  
18 Judge Steger's courtroom, sometime in July of 2008.

19 Q. Are all the members of the rules committee  
20 appointed by the federal judges --

21 A. Yes.

22 Q. -- in this --

23 A. There are some standing appointments. The  
24 then-current U.S. attorney, anybody can -- she or he can  
25 delegate their position to others. Also, the

1 about litigating patent cases in the Eastern District of  
2 Texas, to your knowledge?

3 A. No.

4 Q. Now, what do you take this to mean, "the  
5 banana republic of East Texas"?

6 A. Well, I'm aware that -- I mean, the  
7 implication is that our court is some kind of  
8 plaintiffs' clip joint and that it favors, you know,  
9 plaintiffs over -- or at least favored certain parties  
10 over others, that it's less than unbiased. That's what  
11 it implies to me. Banana republic is sort of a place  
12 that, in common parlance, I think means that it's sort  
13 of a dictatorship that invites money to come their way,  
14 that it's some kind of ill-gotten gains there. That's  
15 what it means to me. It has a negative connotation.

16 Q. Is there any truth to it?

17 A. No.

18 Q. Now, continuing on down the first page,  
19 there's another posting. This one's dated Wednesday,  
20 October 17th, 2007. Do you see that one?

21 A. Yes.

22 Q. Would you read the title of that one for us?

23 A. "Troll Jumps the Gun, Sues Cisco Too Early."

24 Q. Now, what is a troll, Mr. Maland?

25 A. Well, I do know, you know, a troll -- I was --

1 ought to know exactly what was being sent to them. And  
2 he was aware of it prior to me sending.

3 Q. Did either Judge Heartfield or Judge Folsom  
4 criticize or ask you to change anything --

5 A. No.

6 Q. -- in what you submitted to them?

7 A. No.

8 Q. Let me ask you to clear this up for me. A  
9 couple of these e-mails indicated that at least one of  
10 the clerks communicated to you that she was -- the word  
11 she used was "leery"?

12 A. Yes.

13 Q. She was leery of making any change to the  
14 docket?

15 A. Right.

16 Q. Is that an inappropriate response on her part?

17 A. No.

18 Q. Why not?

19 A. Because the deputy clerks are trained that any  
20 kind of adjustment -- now, there's a difference between  
21 the type of situation we talked about before where --  
22 docketed in error. We do that kind of thing all the  
23 time. Things get -- either because of an error on the  
24 attorney's part or error in the clerk's office part,  
25 they get a notation made. It is rare that we would do a

1 they started loading the documents, and that was  
2 vexatious to them and therefore asked for help  
3 clarifying that. And they asked the help of my office  
4 who appropriately sent the question to me.

5 And being as involved as I am in the  
6 local rule formulation process, the process to even  
7 provide an instrumentality for electronic filing, I had  
8 a background that my deputies didn't and I made a  
9 decision to -- based on the document, the NEF that was  
10 available, it was clear to me that that's what exactly  
11 happened. They had followed the procedures. They were  
12 trying and did tender the document electronically  
13 shortly after midnight and you could -- I could tell  
14 from the documents then at hand and I made a decision to  
15 authorize my deputy to change the file date -- date  
16 filed in Column 1 on Document Number 1 on the docket  
17 sheet, which really -- quite frankly, even that's not  
18 dispositive. It's the NEF that matters.

19 Q. Does the content --

20 A. That's what -- I guess because the NEF  
21 controlled is why we did it, because I felt that that  
22 clarification was, under our rules, appropriate, that  
23 that's when in fact -- and I could clearly tell that's  
24 when the documents were tendered.

25 Q. Do the contents of Exhibit 31 bear any

1 we've been going up until last year, and some of that  
2 is -- the diminution between '07 and '08 would be a loss  
3 of -- prisoner cases have gone down a bit.

4 MR. BABCOCK: Darn.

5 THE WITNESS: Yeah.

6 A. But generally speaking, our court, up until  
7 this last year, has been bucking a national trend where,  
8 because of tort reform initiatives in many states and --  
9 civil case filings across the country have been  
10 dropping, and ours have maintained a certain amount of  
11 steadiness to them.

12 Q. (BY MR. McWILLIAMS) Would it be fair to say  
13 that over the last five years, there have been from 10  
14 to 15,000 cases filed in the eastern district?

15 A. Yeah, that'd be about right, somewhere in  
16 there.

17 Q. And just going back over the last five years  
18 and the 10 to 15,000 cases that have been filed, I  
19 understand it's your testimony that you've never been  
20 asked to change a docket filing date up until this case?

21 A. Right, not like this, that -- no, I've never  
22 had that -- this kind of question presented to me.

23 Q. And I believe it's Exhibit 111. We'll find  
24 the exhibit, but I --

25 MR. BABCOCK: What are you looking for?

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

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

REPORTER'S CERTIFICATION  
DEPOSITION OF DAVID MALAND  
NOVEMBER 3, 2008

I, April Eichelberger, Certified Shorthand Reporter  
in and for the State of Texas, hereby certify to the  
following:

That the witness, DAVID MALAND, 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  
me by \_\_\_\_\_;

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

MR. BABCOCK.....2 hours, 33 minutes

MR. McWILLIAMS...37 minutes

MR. HOLMES.....1 hour, 5 minutes;



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

4 FOR THE PLAINTIFF:

5 Mr. James A. Holmes

6 FOR THE DEFENDANT CISCO SYSTEMS, INC.:

7 Mr. Charles L. Babcock, Ms. Crystal J. Parker

8 FOR THE DEFENDANT RICHARD FRENKEL:

9 Mr. George L. McWilliams

10 FOR THE WITNESS:

11 Mr. Thomas E. Gibson, Mr. Bob Wells

12 That \$ \_\_\_\_\_ is the deposition officer's charges  
13 to the Defendant for preparing the original deposition  
14 transcript and any copies of exhibits;

15 I further certify that I am neither counsel for,  
16 related to, nor employed by any of the parties or  
17 attorneys in the action in which this proceeding was  
18 taken, and further that I am not financially or  
19 otherwise interested in the outcome of the action.

20 Certified to by me this \_\_\_\_ day of

21 \_\_\_\_\_, 2008.

22  
23  
24 \_\_\_\_\_  
April Eichelberger  
Texas CSR No. 7495  
Expiration Date: December 31, 2009  
25

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19 otherwise interested in the outcome of the action.

20 Certified to by me this 5<sup>th</sup> day of

21 November, 2008.

22  
23 

24 April Eichelberger  
Texas CSR No. 7495

25 Expiration Date: December 31, 2009