

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

JOHN WARD, JR.

§
§
§
§
§
§
§

v.

CISCO SYSTEMS, INC. AND
RICK FRENKEL

C. A. NO. 08-4022
JURY TRIAL DEMANDED

**RICK FRENKEL'S MOTION TO DISMISS OR TRANSFER
FOR LACK OF PERSONAL JURISDICTION**

TO THE HONORABLE COURT:

Defendant Rick Frenkel ("Frenkel") files this motion to dismiss pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure or transfer pursuant to 28 U.S.C. § 1631 for lack of personal jurisdiction and shows the Court the following:


This Court does not have personal jurisdiction over Frenkel because he does not have sufficient minimum contacts with Arkansas and because asserting jurisdiction over Frenkel would offend traditional notions of fair play and substantial justice. Accordingly, Frenkel seeks dismissal of this action or transfer of this action to United States District Court for the Eastern District of Texas, Tyler Division, so that this case may be consolidated with an almost identical lawsuit pending there.

In support of this motion, Frenkel attaches the following:

- Declaration of Richard Frenkel, a true and correct copy of which is attached as Exhibit A.
- Original Petition in *Eric Albritton v. Cisco Systems, Inc. and Richard Frenkel*, Civil Action Number 6:08-cv-89, in the United States District Court for the Eastern District of Texas, Tyler Division, a true and correct copy of which is attached as Exhibit B.
- Plaintiff's First Amended Petition in *John Ward, Jr. v. Cisco Systems, Inc. and Richard Frenkel*, Civil Action No. 2007-2502-A, in the District Court for the 188th Judicial District of Gregg County, Texas, a true and correct copy of which is attached as Exhibit C.
- Cisco Systems, Inc.'s Original Answer in *Eric Albritton v. Cisco Systems, Inc. and Richard Frenkel*, Civil Action Number 6:08-cv-89, in the United States District Court for the Eastern District of Texas, Tyler Division, a true and correct copy of which is attached as Exhibit D.

WHEREFORE, PREMISES CONSIDERED, Frenkel respectfully requests that its Motion to Dismiss or Motion to Transfer for Lack of Personal Jurisdiction be in all things granted; that this cause of action be dismissed for lack of subject matter jurisdiction or transferred to the Tyler Division of the Eastern District of Texas; and that Frenkel be granted such other relief, both at law and in equity, as the Court deems just and proper.

Respectfully submitted,

By: 

Michael D. Barnes
Arkansas Bar No.: 88071
Wright, Lindsey & Jennings LLP
200 West Capitol Avenue, Suite 2300
Little Rock, Arkansas 772201-3699
(501) 212-1228
(501) 376-9442—Fax
Email: mbarnes@wlj.com

and

George L. McWilliams
Arkansas Bar No: 68078
GEORGE L. MCWILLIAMS, P.C.
406 Walnut
P.O. Box 58
Texarkana, Texas 75504-0058
(903) 277-0098
(870) 773-2967—Fax
Email: glmlawoffice@gmail.com

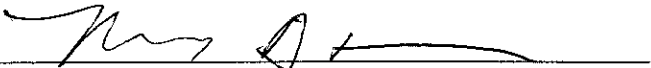
ATTORNEYS FOR DEFENDANT
RICK FRENKEL

CERTIFICATE OF SERVICE

This is to certify that on this 24 day of April, 2008, a true and correct copy of the foregoing was served electronically, upon:

Nicholas H. Patton
Patton, Tidwell & Schroeder, LLP
4605 Texas Boulevard
Texarkana, Texas 75503

Richard E. Griffin
Charles L. Babcock
Jackson Walker L.L.P.
1404 McKinney, Suite 1900
Houston, Texas 77010



Michael D. Barnes

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

JOHN WARD, JR.

v.

CISCO SYSTEMS, INC. AND
RICK FRENKEL

§
§
§
§
§
§
§

C. A. NO. 08-4022
JURY TRIAL DEMANDED

DECLARATION OF RICHARD FRENKEL

STATE OF CALIFORNIA §

COUNTY OF SANTA CLARA §

1. My name is Richard Frenkel (I have been named in this lawsuit as "Rick Frenkel.") I am over twenty-one years of age and in all respect competent to execute this declaration. I am a defendant in the above-referenced lawsuit, and all of the matters stated herein are within my personal knowledge and are true and correct.

2. I do not do business in Arkansas, and I have not committed a tort in Arkansas. My only contacts with Arkansas have been three trips that I have taken over the past 26 years that required me to pass through the state of Arkansas. Those trips are wholly unrelated to the above-referenced lawsuit.

I, Richard Frenkel, declare under the penalty of perjury that the foregoing is true and correct.

Executed on April 16, 2008.



RICHARD FRENKEL

EXHIBIT B

FILED
GREGG COUNTY, TEXAS

No. 2008-481-CCJ MAR 03 2008

O'CLOCK M
BARBARA DUNCAN, DISTRICT CLERK
By Deputy

ERIC M. ALBRITTON,

Plaintiff,

v.

CISCO SYSTEMS, INC. &
RICHARD FRENKEL,

Defendants.

§
§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT

GREGG COUNTY, TEXAS

____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, ERIC M. ALBRITTON, Plaintiff, and complains of CISCO SYSTEMS, INC. and RICHARD FRENKEL, Defendants, and would respectfully show unto the Court as follows:

I.

DISCOVERY PLAN

Plaintiff requests that discovery in this case be conducted under Level III pursuant to Rule 190.4, Tex. R. Civ. P.

II.

REQUEST FOR DISCLOSURE

Plaintiff requests that Defendants produce the information and documents identified in Rule 194, Tex. R. Civ. P.

III.

THE PARTIES

ERIC M. ALBRITTON ("ALBRITTON") is an individual residing in Gregg County, Texas.

CISCO SYSTEMS, INC. ("CISCO") is a corporation organized and existing under the laws of the State of California with its principal place of business in San Jose, California. CISCO may be served with process by delivering a copy of the petition and citation to its registered agent, Prentice Hall Corporation Systems, at 701 Brazos Street, Suite 1050, Austin, Texas 78701.

RICHARD FRENKEL ("FRENKEL") is an individual who, upon information and belief, resides in the State of California. He may be served with process by delivering a copy of the petition and a citation to him at his place of business located at 170 West Tasman Drive., M/S SJC-10/2/1, San Jose, California 95134-1700.

IV.

VENUE & JURISDICTION

This Court has jurisdiction over this dispute in that it is a court of general jurisdiction. Texas law provides for mandatory venue in Gregg County as ALBRITTON resided in Gregg County at the time the Defendants published defamatory statements about the Plaintiff. *See* Tex. Civ. Prac. & Rem. Code § 15.017.

V.

FACTUAL BACKGROUND

ALBRITTON is an attorney representing clients in the United States District Courts for the Eastern District of Texas since 1996. Since 1998, he has practiced law, almost exclusively, in the Eastern District of Texas. In addition, he has resided in and been licensed to practice law in the State of Texas since November 4, 1994. Throughout his professional career, ALBRITTON has enjoyed a sterling reputation for ethical and responsible representation. Neither the State Bar of Texas nor any state or federal court has ever issued any sanctions against ALBRITTON. In addition, his law license has never been suspended or revoked for any reason. As a result of this reputation, ALBRITTON has developed a successful practice concentrated largely in intellectual property disputes in the Eastern District of Texas. In furtherance of this practice, ALBRITTON filed a patent infringement suit against CISCO on behalf of ESN, LLC on October 16, 2007.

FRENKEL is an attorney licensed to practice law in the State of California. He is employed by CISCO as its director of intellectual property litigation. With the knowledge and consent – express or implied – of his direct supervisor at CISCO, FRENKEL publishes an internet “blog” purporting to cover patent litigation including in what FRENKEL terms the “Banana Republic of East Texas.” Until recently, FRENKEL published his comments anonymously. In October of 2007, while still publishing anonymously, FRENKEL posted scandalous and defamatory allegations about ALBRITTON on the internet. As set forth in more detail below, FRENKEL’s statements constituted libel and libel per se and were purposefully calculated by FRENKEL and CISCO to damage the reputation and business of ALBRITTON.

In particular, on October 17 and 18, 2007, FRENKEL published statements on the internet that ALBRITTON had "conspired" with the Clerk of the United States District Court for the Eastern District of Texas to "alter documents to try to manufacture subject matter jurisdiction where none existed." At the time he made this statement, FRENKEL was acting in the course and scope of his employment with CISCO and in his official capacity as Director of Intellectual Property Litigation for CISCO. Even more tellingly, at the time he made this statement, FRENKEL had been charged by CISCO with responsibility for management of the very case in which he alleged ALBRITTON had conspired with the Clerk to feloniously alter official documents. A true and correct copy of the defamatory writing distributed by FRENKEL is attached hereto as Exhibit A.

FRENKEL and CISCO have purposefully maximized the dissemination of the defamatory statements and the damage inflicted upon ALBRITTON. In particular, FRENKEL and CISCO published the statements on a web site devoted to intellectual property litigation including the Eastern District of Texas. On information and belief, FRENKEL and CISCO further employed search engine optimization tools and techniques to direct individuals and entities seeking information about ALBRITTON through popular search engines such as "Google" to the defamatory statements. In fact, according to FRENKEL, ALBRITTON's name was the seventh most popular search term directing readers to his site during the week ending on February 15, 2008. Likewise, selecting ALBRITTON's name within the web site leads directly to the defamatory article. On January 30, 2008, FRENKEL boasted that his site had hosted its one hundred thousandth (100,000th) visitor.

V.

DEFAMATION

In publishing the false and libelous statements described above, FRENKEL and CISCO have defamed ALBRITTON in direct violation of Texas law. In particular, FRENKEL and CISCO published to third parties a false and defamatory statement of "fact" referring directly to ALBRITTON that caused actual damages to ALBRITTON. In so doing, FRENKEL and CISCO acted with actual malice or with reckless disregard for the truth or falsity of their representations. At a minimum, CISCO and FRENKEL acted without exercising ordinary care for the truth of the statement or the protection of ALBRITTON's reputation.

Further, FRENKEL's and CISCO's wholly false statement that ALBRITTON "conspired" with the officials of the United States District Court to feloniously alter official documents is libelous per se. More particularly, such an outrageous and unsubstantiated statement invariably tends to injure ALBRITTON's reputation and to expose him to public hatred, contempt, or ridicule; expose ALBRITTON to financial injury; and impeach ALBRITTON's honesty, integrity, virtue or reputation thus exposing him to public hatred and ridicule. *See* Tex. Civ. Prac. & Rem. Code Ann. § 73.001 (West 2008). Likewise, Defendants' statements are libelous per se in that they are of such a character as to injure ALBRITTON in his office, profession or occupation and directly accuse him of the commission of a crime.

VI.

DAMAGES

As a direct and proximate result of the false and defamatory statements of FRENKEL and CISCO, ALBRITTON has endured shame, embarrassment, humiliation, mental pain and anguish. Additionally, ALBRITTON has and will in the future be seriously injured in his business reputation, good name and standing in the community. He will, in all likelihood, be exposed to the hatred, contempt, and ridicule of the public in the general as well as of his business associates, clients, friends and relatives. Consequently, ALBRITTON seeks actual damages in a sum within the jurisdictional limits of this Court.

Furthermore, ALBRITTON is entitled to exemplary damages from FRENKEL and CISCO. ALBRITTON would show the Court that FRENKEL acted with the specific intent to injure ALBRITTON in his reputation and business. At a minimum, FRENKEL acted with conscious indifference to the rights, safety or welfare of ALBRITTON with actual, subjective awareness that such conduct posed an extreme degree of risk of harm to the reputation and well-being of ALBRITTON. Likewise, CISCO is vicariously liable for FRENKEL's outrageous conduct in that it authorized, approved and/or ratified FRENKEL's statements. Moreover, at the time of the defamation, CISCO employed FRENKEL as the director of its intellectual property litigation and gave him specific responsibility for the ESN litigation. As a result, FRENKEL was employed in a managerial capacity and acted in the course and scope of his employment at the time he published the defamatory statements. CISCO has done nothing since the publication of the statements to disclaim them or distance itself from FRENKEL.

VII.

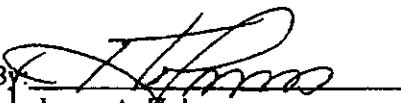
CONCLUSION & PRAYER FOR RELIEF

"Libel," it has been said, "is the sword of the coward; anonymity the shield of a dastard." Having anonymously attacked the integrity and reputation of ALBRITTON and impugned the dignity of the United States District Court for the Eastern District of Texas, the time has come for FRENKEL and CISCO to be called to account for their conduct.

WHEREFORE, PREMISES CONSIDERED, ERIC M. ALBRITTON respectfully prays that CISCO SYSTEMS, INC. and RICHARD FRENKEL be cited to appear and answer for their actions and that, upon final trial of this cause, he have Judgment against them for the full amount of his actual damages together with such punitive damages as may be necessary to deter Defendants from similar outrage in the future, pre-judgment and post-judgment interest at the highest lawful rate and all costs of this proceeding.

Respectfully Submitted,

THE LAW OFFICE OF JAMES A. HOLMES, P.C.

By 
James A. Holmes
State Bar No. 00784290

605 SOUTH MAIN, STE. 203
HENDERSON, TEXAS 75654
(903) 657-2800
(903) 657-2855 (fax)

ATTORNEY FOR PLAINTIFF



SEARCH BLOG | FLAG BLOG | Next Blog-

Create Blog | Sign In

Patent Troll Tracker

THURSDAY, OCTOBER 16, 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

0 comments

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.

Send email

email:TrollTracker

About Me

Troll Tracker

Just a lawyer, interested in patent cases, but not interested in publicity

[View my complete profile](#)



Blogs TrollTracker Reads

[Dennis Crouch's Patently-O Blog](#)

[Peter Zura's 271 Patent Blog](#)

[Patent Prospector](#)

[Michael Smith's EDTX Blog](#)

[Delaware IP Law Blog](#)

[Chicago IP Litigation Blog](#)

[Phillip Brooks' Patent Infringement Updates](#)

[Just a Patent Examiner](#)

[SCOTUSBlog](#)

[Patently Silly](#)

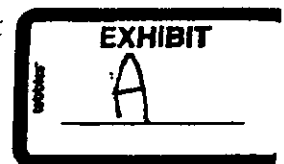
Subscribe Now: Feed Icon



Subscribe in a reader

Google

Add to Google



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

GAF 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 ESN filed its null complaint. Since Cisco's lawsuit was filed 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

[1 comment](#)

TrollSurfing: Monts & Ware, Ward & Olivo, and Their Clients

Similar to surfing the web, I started by checking out a hunch I had about Monts & Ware being behind all sorts of troll cases. Then I trollsurfed through a bunch of cases, and I ended up not only with Monts & Ware (Dallas litigation firm), but also Ward & Olivo (patent lawyers from New York/New Jersey), as a thread behind a bunch of

Blog Archive

▼ 2007 (83)

▼ October (17)

[ESN Convinces EDTX Court Clerk To Alter Documents ...](#)

[Troll Jumps the Gun, Sues Cisco Too Early](#)

[TrollSurfing: Monts & Ware, Ward & Olivo, and Their...](#)

[Orion, the Hunted](#)

[Texas Judge Bans Using Term "Patent Troll" in Trial...](#)

[A Look at the Fortune 100 and Patent Litigation, P...](#)

[Adendum to Part 1, Fortune 100](#)

[A Look at the Fortune 100 and Patent Litigation, P...](#)

[Last Week Wasn't Even the First Time Niro Scavone ...](#)

[Acacia Targets Linux in New Lawsuit Against Red Ha...](#)

[Patent Troll Sues Fish & Richardson](#)

[Bill Gates, Steve Jobs, Hugh Hefner and Larry Flynn...](#)

[Troll Call and Other Patent Stats for September 20...](#)

[Ode to Patent Trolls](#)

[Wednesday Miscellany](#)

[Unveiling TrollTracker's Troll Severity Assessment...](#)

[Patent Reform, Front and Center in the News... and...](#)

► September (27)

► August (20)

► July (11)

► June (3)

► May (5)

Sitemeter

EXHIBIT C

NO. 2007-2502-A

FILED
GREGG COUNTY, TEXAS
FEB 27 2008
DUNCAN DISTRICT CLERK
M
DEPUTY

JOHN WARD, JR.

Plaintiff

V.

**CISCO SYSTEMS, INC. and
RICHARD FRENKEL**

Defendants.

§
§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT

188th JUDICIAL DISTRICT

OF GREGG COUNTY, TEXAS

PLAINTIFF'S FIRST AMENDED PETITION

TO THE HONORABLE COURT:

John Ward, Jr., Plaintiff, complains of Cisco Systems, Inc. and Richard Frenkel, Defendants, and for cause of action shows:

I.

Plaintiff is an individual who has resided in Gregg County, Texas at all times relevant to the causes of action alleged in this pleading.

Defendant Cisco Systems, Inc. ("Cisco") is a corporation organized and existing under the laws of the State of California, with its principal place of business in San Jose, California. It may be served with process by delivering a copy of the petition and a citation to its registered agent, Prentice Hall Corporation System, via certified mail return receipt requested to 701 Brazos Street, Suite 1050, Austin, TX 78701.

Defendant Richard Frenkel ("Frenkel") is an individual who, upon information and belief, resides in the State of California. He may be served with process by delivering a copy of the petition and a citation to him via certified mail return receipt requested at his place of business located at 170 West Tasman Dr., M/S SJC-10/2/1, San Jose, CA 95134-1700.

Venue is mandatory in Gregg County as Plaintiff resided in Gregg County at the time the Defendants published defamatory statements about the Plaintiff. *See* Tex. Civ. Prac. & Rem. Code § 15.017.

Plaintiff intends to conduct discovery under Level III of the Texas Rules of Civil Procedure.

II.

On or about October 18, 2007 Defendant Frenkel made statements to the effect that Plaintiff had conspired with others to alter the filing date on a civil complaint that Plaintiff filed on behalf of Plaintiff's client in Federal Court in the Eastern District of Texas, Marshall Division. Defendant alleged that Plaintiff had engaged in this felonious activity in order to create subject matter jurisdiction against the defendant named in the civil complaint. The defendant in the civil complaint was Cisco Systems, Inc., which also happened to be Defendant Frenkel's employer. Defendant Frenkel is a licensed attorney who was and is employed as Defendant Cisco's Director of Intellectual Property. A true and correct copy of the defamatory writing distributed by Defendant Frenkel is attached to this petition as Exhibit A and incorporated by reference.

III.

The defamatory statements constitute statutory libel in that they tend to injure the reputation of the Plaintiff and expose the Plaintiff to public hatred, contempt, or ridicule, tend to expose the Plaintiff to financial injury, and tend to impeach the Plaintiff's honesty, integrity, virtue, or reputation, exposing the Plaintiff to public hatred and ridicule.

IV.

Defendant Frenkel published the defamatory statements from October 18, 2007 to at least the date of the filing of the instant pleading. The statements were published on a web blog that Defendant Frenkel authored. Defendant Frenkel knew that many people were reading the defamatory statements, and offered the following boast on January 30, 2008:

I have been counting visitors now for a little over 6 months. This morning, around 5am Eastern, visitor #100,000 came to the blog, from Mendoza, Argentina[.]

Defendant Frenkel intentionally concealed his identity on his web blog, and identified himself as “[j]ust a lawyer, interested in patent cases, but not interested in publicity.” Defendant Frenkel was well aware of the fact that Plaintiff represented numerous parties involved in patent infringement lawsuits in the Eastern District of Texas, and Defendant was aware that many litigants and attorneys accessed his web blog for information relating to said district. In fact, Defendant Frenkel provided a web link, via Plaintiff’s name on the site, to the defamatory statements forming the basis, in part, of Plaintiff’s claim.

Based upon information and belief, Defendant Frenkel also used search engine optimization tools and techniques to insure that individuals seeking information about the Plaintiff through popular search engines, such as “Google”, would be directed to the defamatory statements forming the basis of this lawsuit.

Defendant Frenkel has publicly admitted that he engaged in this activity with the full knowledge and consent of his employer Defendant Cisco Systems, Inc. Accordingly, Plaintiff alleges that Defendant is vicariously and directly liable for the intentional torts of Defendant Frenkel.

V.

The defamatory statements set forth in the Defendants' web blog of October 18, 2007 are false.

VI.

Plaintiff has resided in and been licensed to practice law in the State of Texas since November 3, 1995. He has practiced law, almost exclusively in the Eastern District of Texas, since 1997. Prior to the defamatory remarks by the Defendant, the Plaintiff enjoyed an excellent reputation. He has been involved in representing clients in Federal Courts in the Eastern District of Texas since 1997. He has never been disciplined nor had his law license suspended during the twelve years he has been licensed to practice law.

VII.

As a direct and proximate result of Defendant Frenkel's false and defamatory statements, the Plaintiff has endured shame, embarrassment, humiliation, and mental pain and anguish. Additionally, the Plaintiff has and will in the future be seriously injured in his business reputation, good name, and standing in the community, and will be exposed to the hatred, contempt, and ridicule of the public in general as well as of his business associates, clients, friends, and relatives. Consequently, the Plaintiff seeks actual damages in a sum within the jurisdictional limits of this Court.

VIII.

Furthermore, Plaintiff is entitled to exemplary damages from Defendant Frenkel because he acted with the malice required to support an award of exemplary damages. Defendant Frenkel acted with a specific intent to cause injury to the Plaintiff and/or conscious indifference to the rights, safety, or welfare of the Plaintiff with actual,

subjective awareness that his conduct involved an extreme degree of risk of harm to the Plaintiff

Plaintiff also is entitled to exemplary damages from Defendant Cisco. At the time Defendant Frenkel published his defamatory statements he was (and remains) the director of intellectual property at Defendant Cisco Systems, Inc. His acts were committed in his managerial capacity. In fact, they were made in connection with a lawsuit naming his employer as a defendant. In doing the acts described in this petition, he was acting within the scope of his employment.

Alternatively or additionally Defendant Cisco is liable for exemplary damages as it ratified and approved the conduct of Defendant Frenkel with full knowledge that he was acting with malice.

IX.

Plaintiff requests that Defendants be cited to appear and answer, and that on final trial the Plaintiff have the following:

1. Judgment against Defendants for actual damages in a sum within the jurisdictional limits of the Court.
2. Judgment for exemplary damages against Defendants in a sum determined by the trier of fact.
3. Prejudgment and postjudgment interest as provided by law.
4. Costs of suit.

Respectfully submitted,



Nicholas H. Patton
State Bar No. 15631000

Patton, Tidwell & Schroeder, LLP
4605 Texas Boulevard
Texarkana, Texas 75503
Tel: (903) 792-7080
Fax: (903) 792-8233
Email: nickpatton@texaskanlaw.com

ATTORNEY FOR PLAINTIFF

[SEARCH BLOG] | [FLAG BLOG] Next Blog-

Create Blog | Sign In

Patent Troll Tracker

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

[0 comments](#)

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.

Send email

email TrollTracker

About Me

Troll Tracker

Just a lawyer, interested in patent cases, but not interested in publicity

[View my complete profile](#)



Blogs TrollTracker Reads

[Dennis Crouch's Patently-O Blog](#)

[Peter Zura's 271 Patent Blog](#)

[Patent Prospector](#)

[Michael Smith's EDTX Blog](#)

[Delaware IP Law Blog](#)

[Chicago IP Litigation Blog](#)

[Phillip Brooks' Patent Infringement Updates](#)

[Just a Patent Examiner](#)

[SCOTUSBlog](#)

[Patently Silly](#)

Subscribe Now: Feed Icon



[subscribe in a reader](#)

Google

[Add to Google](#)

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

GAF 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 ESN filed its null complaint. Since Cisco's lawsuit was filed 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

[1 comments](#)

TrollSurfing: Monts & Ware, Ward & Olivo, and Their Clients

Similar to surfing the web, I started by checking out a hunch I had about Monts & Ware being behind all sorts of troll cases. Then I trollisurfed through a bunch of cases, and I ended up not only with Monts & Ware (Dallas litigation firm), but also Ward & Olivo (patent lawyers from New York/New Jersey), as a thread behind a bunch of cases. I'm not sure what is going on here, but both have enough connections to be...

Blog Archive

▼ 2007 (83)

▼ October (17)

[ESN Convinces EDTX Court Clerk To Alter Documents ...](#)

[Troll Jumps the Gun, Sues Cisco Too Early](#)

[TrollSurfing: Monts & Ware, Ward & Olivo, and Their...](#)

[Orion, the Hunted](#)

[Texas Judge Bans Using Term "Patent Troll" In Trials...](#)

[A Look at the Fortune 100 and Patent Litigation, P...](#)

[Addendum to Part 1, Fortune 100](#)

[A Look at the Fortune 100 and Patent Litigation, P...](#)

[Last Week Wasn't Even the First Time Niro Scavone...](#)

[Acacia Targets Linux in New Lawsuit Against Red Ha...](#)

[Patent Troll Sues Fish & Richardson](#)

[Bill Gates, Steve Jobs, Hugh Hefner and Larry Flynn...](#)

[Troll Call and Other Patent Stats for September 20...](#)

[Ode to Patent Trolls](#)

[Wednesday Miscellany](#)

[Unveiling TrollTracker's Troll Severity Assessment...](#)

[Patent Reform, Front and Center in the News ... and...](#)

► [September \(27\)](#)

► [August \(20\)](#)

► [July \(11\)](#)

► [June \(3\)](#)

► [May \(5\)](#)

Sitemeter

EXHIBIT D

FILED
GREGG COUNTY, TEXAS

MAR 14 2008

CAUSE NO. 2008-481-CCL2

O'CLOCK M
BARBARA DUNCAN, DISTRICT CLERK
By _____ Deputy

ERIC M. ALBRITTON,

Plaintiff,

V.

CISCO SYSTEMS, INC. &
RICHARD FRENKEL,

Defendant

§
§
§
§
§
§
§
§
§
§

COUNTY COURT AT LAW

NUMBER 2

GREGG COUNTY, TEXAS

**DEFENDANT CISCO SYSTEMS, INC.'S
ORIGINAL ANSWER**

TO THE HONORABLE COURT:

NOW COMES Cisco Systems, Inc. ("Cisco") and files its Original Answer to Plaintiff's Original Petition as follows:

**I.
GENERAL DENIAL**

1. Defendant generally denies each and every substantive allegation in Plaintiff's Amended Petition and demands strict proof thereof as required by law.

**II.
AFFIRMATIVE DEFENSES**

2. For further answer, if necessary, the statements complained of as they relate to Plaintiff are true or substantially true.

3. For further answer, if necessary, the statements complained of by Plaintiff were invited by Plaintiff.

4. For further answer, if necessary, the statements complained of are privileged pursuant to § 73.002 of the Texas Civil Practice & Remedies Code.

5. For further answer, if necessary, any award of damages in this case for the claims alleged would be unconstitutional under Article 1, § 8 of the Texas Constitution and/or the First Amendment to the United States Constitution.

6. For further answer, if necessary, Plaintiff has not suffered any actual, special, consequential or other damages.

7. For further answer, if necessary, Defendants allege that Plaintiff is not entitled to punitive or exemplary damages under the laws of the United States and Texas because: (i) Plaintiff's cause of action is pursuant to statute — § 73.001 et. seq. of the Texas Civil Practices and Remedies Code—and punitive damages are impermissible for the mere violation of a statute. Punitive damages are not warranted and their imposition in this case would violate Article 1, § 8 of the Texas Constitution and/or the First Amendment to the United States Constitution. Moreover, any punitive damages award (and none is warranted) would be subject to all statutory, constitutional, and common law caps and limits, including but not limited to the statutory cap on punitive damages contained in Texas Civil. Practices & Remedies Code § 41.008(b).

WHEREFORE, PREMISES CONSIDERED, Defendant Cisco prays that judgment be entered in its favor, that Plaintiff take nothing by way of his action herein, that Defendant Cisco be awarded its costs of action, and for such other and further relief, both at law and in equity, to which Defendant Cisco may be entitled.

Respectfully submitted,

JACKSON WALKER L.L.P.

By: Charles L. Babcock *w/ permission by Crystal J. Parker*
Charles L. Babcock
State Bar No. 01479500
Crystal J. Parker
State Bar No. 24051432
1401 McKinney, Suite 1900
Houston, Texas 77010
(713) 752-4200
(713) 752-4221 – Fax
Email: cbabcock@jw.com

ATTORNEYS FOR DEFENDANT
CISCO SYSTEMS, INC.

CERTIFICATE OF SERVICE

This is to certify that on this 14~~th~~ day of March, 2008, a true and correct copy of the foregoing document was served via certified mail, return receipt requested upon:

James A. Holmes
605 South Main Street, Suite 203
Henderson, Texas 75654

George L. McWilliams
406 Walnut
P.O. Box 58
Texarkana, Texas 75504-0058

Charles L. Babcock *w/ permission by Crystal J. Parker*
Charles L. Babcock