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

ERIC M. ALBRITTON,	§	
	§	
Plaintiff	§	
	§	
v.	§	**No. 6:08cv00089**
	§	**JURY**
CISCO SYSTEMS, INC. RICHARD FRENKEL, MAULLUN YEN and JOHN NOH,	§	
	§	
Defendant	§	

DEFENDANTS' MOTION IN LIMINE

TO THE HONORABLE COURT:

Defendants Cisco Systems, Inc. ("Cisco"), Richard Frenkel ("Frenkel"), Mallun Yen ("Yen")[1] and John Noh ("Noh")[2] (collectively, "Defendants") hereby file this Motion in Limine, and respectfully show the court:

Defendants require that the court prohibit any testimony or mention, reference or inquiry in the presence of the jury by Plaintiff, his counsel, or any witness called on Plaintiff's behalf regarding the following issues:

MOTION IN LIMINE NO. 1:

EVIDENCE OF DAMAGES NOT DISCLOSED UNDER RULE 26(a)

As the court is aware, Rule 26a(1)(iii) of the FED. R. CIV. P. requires the plaintiff to disclose "a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation

[1] Subject to her Motion to Dismiss.

[2] Subject to his Motion to dismiss

is based, including materials bearing on the nature and extent of the injuries suffered." Plaintiff's initial disclosure on this issue, which has never been amended or supplemented, provides **in its entirety**:

III.

COMPUTATION OF ANY CATEGORY OF DAMAGES

1. Plaintiff does not seek any economic damages. Plaintiff seeks **only** an appropriate award of damages for his mental anguish and punitive damages sufficient to deter Defendants from future misconduct. The amounts of these awards are soundly in the discretion of the jury.

(Exhibit A) (emphasis added).

In lengthy discussions regarding the pretrial order in this case, for the first time it became clear that plaintiff would introduce evidence of reputational damages.

In a defamation case, reputational damages are separate and distinct from mental anguish damages. *Bentley v. Bunton*, 94 S.W.3d 561, 605-07 (Tex. 2002) (reviewing jury verdicts of $150,000 in damages for reputational harm and of $7 million in damages for mental anguish, as separate and distinct from reputational harm); *El-Khoury v. Kheir*, 241 S.W.3d 82, 85 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (upholding jury verdict that awarded plaintiff no damages for reputational harm but reversing jury verdict that awarded plaintiff damages for mental anguish, as separate and distinct from reputational harm).

Evidence of reputational damages or any other damages is prohibited at trial where the party fails to disclose reputational damages. FED. R. CIV. P. 37(c)(1), 26(a), (e), 16(f); *see Edmonds v. Beneficial Mississippi, Inc.*, 212 Fed. Appx. 334, 338 (5th Cir. 2007) (affirming trial court's order excluding evidence that plaintiff failed to disclose to defendant); *24/7 Records, Inc. v. Sony Music Entertainment, Inc.*, 566 F. Supp. 2d 305, 317-18 (S.D.N.Y. 2008) (precluding

evidence on plaintiff's damages theory under Rule 37(c) because plaintiff failed to disclose existence of such damages or evidence of such damages) (citing *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 298 (2d Cir. 2006) (affirming exclusion of lost profits theory of damages that was first introduced in a proposed pre-trial order)).

Evidence of damages that was not disclosed is especially prejudicial to the Defendants because Plaintiff has frustrated discovery on even his mental anguish damages. For example, despite Albritton's abandonment of economic damages, Defendants nevertheless believed his financial health was relevant to his mental health and sought documents and testimony in that regard. The Plaintiff refused to produce any documents and the Defendants' Motion to Compel was denied by the Magistrate Judge (Docket No. 144), and a Motion to Reconsider (Docket No. 152) is pending. The Plaintiff further refused to answer questions at his deposition regarding his financial health, but his counsel agreed that if the motion to compel was granted, plaintiff would resubmit himself for deposition. (Albritton Deposition at pp. 132-34, 156, Exhibit B). This financial information would be relevant to reputational harm, but it has been denied to Defendants. In addition, if reputational harm had been disclosed, Defendants would have conducted discovery of, among other things, Plaintiff's clients.

MOTION IN LIMINE NO. 2:

LATE DISCLOSURE OF WITNESSES

Rule 26(a)(1) requires **initial** disclosure of "the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims..." Initial disclosures under Rule 26 were due on June 2, 2008.

On November 11, 2008, just 9 days before the discovery period closed and more than eight months after the case was first filed, Plaintiff disclosed his wife, Michelle Albritton, father, John Albritton, and colleague and friend, Scott Stevens, as witnesses on the issue of the "impact this matter has had on Plaintiff." Because these witnesses were not timely disclosed, they should be excluded. Fed. R. Evid. 37 (c)(1); *Terrance v. Pointe Coupee Parish Police Jury*, 177 Fed. Appx. 457, 459 (5th Cir. 2006) (holding that the lower court properly excluded testimony of witness because the party had failed to disclose the witness until several months before trial); *Antoinee-Tubbs v. Local 513, Air Transport Div., Transport Workers of America, AFL-CIO*, 190 F.3d 537 (5th Cir. 1999) (holding that the lower court properly excluded affidavits from witnesses as summary judgment evidence where the witnesses had not been disclosed.) The Advisory Committee Notes to Rule 37(c)(1) provide that this exclusion is an "automatic sanction."

MOTION IN LIMINE NO. 3:

COMPUTATION OF DAMAGES

Plaintiff failed to provide any computation of his damages in his disclosures as required under Rule 26. Plaintiff should therefore not be permitted to present as a surprise to Defendants a computation of an amount of damages where Defendants have had no opportunity to conduct discovery regarding such computation. The court should therefore order that Plaintiff may not argue to the jury that he is entitled to any specific dollar amount or range or that damages should be calculated using a certain formula or calculation. *See* FED. R. CIV. P. 37(c)(1), 26(a), (e), 16(f); *see also Veritas Operating Corp. v. Microsoft Corp.*, 2008 WL 657936 at *26 (W.D. Wash. 2008) ("In light of Microsoft's failure to disclose any computation of damages or any other damages analysis under Rule 26(a)(1)(C), and lack of any justification or showing of

harmlessness, the "automatic" sanction of Rule 37(c)(1) must apply. Microsoft may not submit any evidence regarding any "computation" for damages... whether via motion or at trial.")

MOTION IN LIMINE NO. 4:

LIMITATION OF USE OF PRIVILEGED DOCUMENTS

Because this case involved allegations of defamation with respect to a lawsuit, and therefore privileged and work-product material were arguably relevant, the parties entered into two agreements to induce each other to produce privileged documents: (1) the Protective Order that strictly limited the use of the privileged and work-product materials and who could have access to such materials (Docket # 13); and (2) an agreement that the production of privileged materials under the Protective Order did not waive privilege. Defendants agreed to produce certain privileged documents based on these agreements. Defendants would be greatly prejudiced if the court permitted the parties to ignore these agreements and use the privileged materials in open court or in any public document. Defendants produced the documents conditioned upon the parties' protective and non-disclosure agreements, which guaranteed that they could not be used in any other litigation, including the underlying ESN litigation, which is still pending, or litigation in Arkansas regarding the publication at issue in this lawsuit (where no protective order has been entered). The court should not permit Plaintiff to thwart the purpose of these agreements by causing a waiver of privilege.

MOTION IN LIMINE NO. 5:

CLAIMS FOR DEFAMATION WITH RESPECT TO THE OCTOBER 19 ARTICLE

Plaintiff should not be permitted to refer to the October 19 article on the Patent Troll Tracker blog as being defamatory or causing any damages to Plaintiff. In his Original Petition, Plaintiff alleges very specifically that the October 17 and October 18 articles attached to the Complaint as Exhibit A (the Original Petition and exhibits are attached hereto as Exhibit C) were

defamatory. After this case was removed to federal court (Exhibit D), Plaintiff continued to allege that the October 17 and 18 articles were defamatory and made no claim with respect to the October 19 article. Defendants only became aware of Plaintiff's intentions to claim that the October 18 article was defamatory during lengthy discussions regarding the pretrial order in this case. Because Plaintiff failed to plead defamation with respect to the October 19 article, Plaintiff should be foreclosed from now claiming to the jury that the article is defamatory. *See Scott v. Univ. of Miss.*, 148 F.3d 493, 513 (5th Cir.1998), overruled on other grounds, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (affirming lower court's order excluding evidence of post-charge discrimination which was not included in an amended complaint). Consideration of a new claim just weeks before trial would prejudice Defendants because of the lack of discovery on this issue and the inability to file motions with respect to the new claim.

Second, Plaintiff did not timely disclose the October 19 article in discovery and therefore is precluded from now claiming that it is defamatory. FED. R. CIV. P. 37(c)(1) ("If a party fails to provide information... as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless"); *see also* FED. R. CIV. P. 16(f), 26(e). Plaintiff did not complain about the October 19 article until after the discovery cut-off and deadline for motions requiring a hearing. The court should therefore preclude references to the article at trial.

Even if Plaintiff was not barred from raising the October 19 article for these reasons, Plaintiff's new claim with respect to the October 19 article is barred by the one-year statute of limitation. TEX. CIV. PRAC & REM CODE § 16.002(a). The court should therefore preclude references to the article at trial as being defamatory or causing damage to the Plaintiff.

MOTION IN LIMINE NO. 6:

REFERENCE TO DEFAMATION BY OMISSION OR JUXTAPOSITION

Plaintiff should not be permitted to argue to the jury that the articles create a false impression by omitting or juxtaposing material facts because Defendants did not plead this theory of liability; Plaintiff refused discovery, resulting in an order precluding Plaintiff from advancing a new theory; and Plaintiff has not disclosed what facts were omitted or what was misleadingly juxtaposed.

The theory of defamation by juxtaposition or omission was adopted in Texas in *Turner v. KTRK*, 38 S.W.3d 103 (Tex. 2000). In that case, the Texas Supreme Court held that a television broadcast could be found defamatory by: (i) "omitting material facts" or (ii) "misleadingly juxtaposing events." *Id.* at 114. Defendants' newly raised allegations of false impression by omitting or juxtaposing material facts are not proper at trial because this theory was not plead. For this reason alone, the court should preclude references to defamation by omission or juxtaposition.

Second, Plaintiff refused discovery regarding this issue, resulting in an order prohibiting Plaintiff from raising this new issue. After Plaintiff refused to respond to Defendant's interrogatories requesting that Plaintiff identify the statements it contends are defamatory, Defendants filed a Motion to Compel Plaintiff's Interrogatory Responses. (Docket No. 88). After the discovery cut-off and deadline for motions requiring a hearing had ended, Defendants filed an Amended Motion to Compel, requesting that the court limit Plaintiff to the allegations in his pleading since Defendants could no longer seek discovery regarding the allegations. (Docket No. 104). On January 15, 2009, the Magistrate Judge denied the original Motion to Compel as moot and granted the Amended Motion to Compel (Docket No. 144). Plaintiff did not appeal this ruling to this honorable court.

Moreover, even when Plaintiff amended his interrogatory responses on January 24, 2009, five weeks before trial, he never alleged any facts that were allegedly omitted or anything that was misleadingly juxtaposed. The Plaintiff should not be permitted to raise this new theory at trial. *See* FED. R. CIV. P. 37(c)(1), 26(a), (e), 16(f).

MOTION IN LIMINE NO. 7:

OTHER LAWSUITS AGAINST CISCO OR ALLEGATIONS OF OTHER WRONGS OR MISCONDUCT

The court should not permit references to any other legal proceedings or complaints brought by or against any of the Defendants because such charges are irrelevant and thus inadmissible. Defendants further request that the court prohibit any testimony or statements by Plaintiff, his counsel, or any witness called on Plaintiff's behalf regarding alleged wrongs or misconduct by Defendants that are unrelated to the circumstances in this lawsuit. Evidence of conduct regarding other allegations or lawsuits "is not competent to prove the commission of a particular act charged unless the acts are connected in some special way, indicating relevance beyond mere similarity in certain particulars." *See Harrell v. DCS Equipment Leasing Corp.*, 951 F.2d 1453 (5th Cir. 1992) (affirming the lower court's exclusion of a prior judgment because "the possible prejudice of the Colorado judgment outweighed any probative value it might have.") Such statements concerning lawsuits and unrelated occurrences should be excluded because they are irrelevant, immaterial and could only be calculated to prejudice the minds of the jury against Defendants.

MOTION IN LIMINE NO. 8:

CHARLES SILVER'S TESTIMONY

The court should prohibit Charles Silver, Plaintiff's rebuttal expert, from testifying except in rebuttal to Defendants' expert, Charles Herring. Plaintiff failed to timely designate an expert by his deadline of September 22, 2008. On October 24, 2008, Defendants designated Charles Herring, Jr. as their expert and disclosed his expert report. On November 24, 2008, the date the discovery period ended, Plaintiff disclosed Charles Silver as a rebuttal expert to Defendants' designated expert, Charles Herring. (Exhibit E). Therefore, Dr. Silver should not be permitted to testify except in rebuttal to Charles Herring because he was not timely disclosed. *See See* FED. R. CIV. P. 37(c)(1), 26(a), (e), 16(f); *See Heidtman v. County of El Paso*, 171 F.3d 1038, 1040 (5th Cir. 1999) (holding that lower court properly excluded testimony of expert witness who had not been timely disclosed).

Moreover, even Dr. Silver's rebuttal testimony should be limited to his report. Defendants have had no opportunity to take discovery regarding such undisclosed opinions and have had no opportunity to present evidence to refute such opinions, if necessary. Therefore, the court should not permit such testimony. *See Barrett v. Atlantic Richfield Co.*, 95 F.3d 375 (5th Cir. 1996) (holding that lower court properly struck expert witness because the expert's opinions had not been disclosed in accordance with the disclosure deadlines).

MOTION IN LIMINE NO. 9:

ANONYMITY OF THE PATENT TROLL TRACKER.

Defendants request that the court prohibit any testimony or statements by Plaintiff, his counsel, or any witness called on Plaintiff's behalf regarding the anonymity of the articles. Anonymous articles are afforded full Constitutional protection. *McIntyre v. Ohio Elections*

Commission, 514 U.S. 334, 341 (1994) (striking down a statute imposing a fine for distributing anonymous leaflets because "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment"). The United States Supreme Court has recognized that "[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *Id.*

Anonymous speech has been employed to allow important speech on important matters throughout this nation's history. *Id.*; *see, e.g.*, ANONYMOUS, BEOWULF (Signet Classic 1999 ed.) (circa 700-800) (epic poem written by anonymous author between the eighth and ninth centuries); THE FEDERALIST PAPERS (Penguin 1987 ed.) (1788) (series of 85 anonymously published articles advocating ratification of the U.S. Constitution subsequently revealed to be authored by James Madison, Alexander Hamilton, and John Jay); ANONYMOUS, PRIMARY COLORS: A NOVEL OF POLITICS (Random House 1996) (political novel published anonymously but later revealed to be written by journalist Joe Klein).

The fact that the blog was written anonymously is hardly unusual as "internet speech is often anonymous." *See Doe v. Cahill*, 884 A.2d 451, 456 (Del. S. Ct. 2005). As the Delaware Supreme Court noted: "Many participants in cyberspace discussions employ pseudonymous identities, and, even when a speaker chooses to reveal her real name, she may still be anonymous for all practical purposes. For better or worse, then, 'the audience must evaluate [a] speaker's ideas based on her words alone.' 'This unique feature of [the internet] promises to make public debate in cyberspace less hierarchical and discriminatory' than in the real world because it disguises status indicators such as race, class, and age." *Id.* (citations omitted). The fact that the

Patent Troll Tracker was written anonymously is irrelevant and could only be used to prejudice the jury.

MOTION IN LIMINE NO. 10:

CLAIMS OF PRIVILEGE

Defendants request that the court prohibit any testimony or statements by Plaintiff, his counsel, or any witness called on Plaintiff's behalf that Defendants made privilege or work product objections or withheld any information under a claim of privilege or work product. Objections and withholdings based on privilege should not be argued or disclosed to the jury because such objections are matters for the court, and it is well established that counsel may not argue or infer that facts could have been proved but for the objections of the opposing party. *See* FED. R. EVID. 104.

MOTION IN LIMINE NO. 11:

HEARSAY AFFIDAVITS

The court should not permit Plaintiff to refer to hearsay affidavits that have been produced in this case because such hearsay is inadmissible, irrelevant, and could only be calculated to prejudice the jury. *See* FED. R. EVID. 802.

MOTION IN LIMINE NO. 12:

WRONGDOINGS OF OTHER PERSONS IN INTERNET BLOGS

Defendants further request that the court prohibit any testimony or statements by Plaintiff, his counsel, or any witness called on Plaintiff's behalf regarding alleged wrongdoings of persons in internet blogs or the results of such wrongdoing and attempts to arouse bias or prejudice against the media or internet publications generally. For example, the court should preclude any references or comparisons to instances of teenage suicide as a result of bloggers'

harassment. Such evidence is irrelevant and can only serve to divert the jury's attention from the issues in this case. Attempts to offer such testimony or statements concerning such events could be calculated only to influence the minds of the jury unfairly and encourage the jury to decide the case based on passion or sympathy rather than on the evidence.

MOTION IN LIMINE NO. 13:

INSURANCE

Defendants further request that this court prohibit references to whether or not there was any investigation of the claims made the basis of this libel suit by an insurance adjuster, agent or, similar term or whether or not Defendants are or are not covered by insurance. Such evidence is irrelevant to proving the validity or invalidity of the claims in this action and is inadmissible under FED. R. EVID. 411.

MOTION IN LIMINE NO. 14:

THIS MOTION IN LIMINE

Defendants request that the court prohibit references to the fact Defendants have filed this Motion in Limine or to any ruling by the court in response to this motion. Any references that Defendants filed this Motion in Limine are irrelevant and inherently prejudicial, in that they suggest or infer that Defendants sought to exclude proof of matters damaging to Defendants' case. *See* FED. R. EVID. 402, 403.

WHEREFORE, Defendants respectfully request that the court grant and sustain this Motion in Limine either in whole or in part, or in separate individual parts, and that the court enter its order to such effect.

Respectfully submitted,

JACKSON WALKER L.L.P.

By: /s/ Charles L. Babcock
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ATTORNEYS FOR DEFENDANT
CISCO SYSTEMS, INC.

GEORGE MCWILLIAMS, P.C.

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ATTORNEY FOR DEFENDANT
RICK FRENKEL

CERTIFICATE OF SERVICE

This is to certify that on this 18th day of February, 2009, a true and correct copy of the foregoing was served via electronic mail upon:

George L. McWilliams
406 Walnut
P.O. Box 58
Texarkana, Texas 75504-0058
Attorney for Defendant Richard Frenkel

James A. Holmes
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Attorney for Plaintiff Eric Albritton

Patricia L. Peden
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Attorney for Plaintiff Eric Albritton

Nicholas H. Patton
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Attorney for Plaintiff Eric Albritton

/s/ Charles L. Babcock
Charles L. Babcock

EXHIBIT A

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

ERIC ALBRITTON,	§	
	§	
Plaintiff,	§	
v.	§	No. 6:08-CV-89
	§	
CISCO SYSTEMS, INC. and	§	
RICHARD FRENKEL,	§	
	§	
Defendants.	§	

PLAINTIFF'S INITIAL DISCLOSURES

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

COMES NOW, ERIC ALBRITTON, Plaintiff in the above captioned and numbered cause, and discloses the following information pursuant to Rule 26(a)(1), Fed. R. Civ. P., and the Order of the Court:

I.

PERSONS LIKELY TO HAVE DISCOVERABLE INFORMATION RELEVANT TO THE CLAIMS AND DEFENSES OF ANY PARTY

1. The plaintiff, Mr. Eric Albritton, who may be contacted through his attorney, Mr. James Holmes of Henderson, Texas.

2. The various corporate representative(s) of the Defendant Cisco Systems, Inc. whose identities and areas of knowledge and expertise are currently unknown to Plaintiff and who may be contacted through their attorney, Mr. Charles Babcock of Houston, Texas.

3. The Co-Defendant, Mr. Richard Frenkel who may be contacted through his attorney, Mr. George McWilliams of Texarkana, Texas.

4. The Plaintiff's professional colleague, Mr. T. John Ward, Jr., who has knowledge of the facts surrounding the filing of the ESN litigation, the falsity of Defendants' allegations, the Plaintiffs professional reputation and Plaintiff's damages. Mr. Ward may be contacted through his counsel, Mr. Nick Patton of Texarkana, Texas.

5. Mr. David J. Maland, Clerk of the United States District Court for the Eastern District of Texas, 106 William Steger Federal Building, 211 W. Ferguson Street, Tyler, Texas 75702, who has knowledge of the facts surrounding the filing of the ESN litigation, the electronic filing system for the Eastern District of Texas, the reputation of the Court and Plaintiff's abilities and reputation.

6. David Provines, Deputy Clerk of the United States District Court for the Eastern District of Texas, 106 William Steger Federal Building, 211 W. Ferguson Street, Tyler, Texas 75702, who has knowledge of the facts surrounding the filing of the ESN litigation, the electronic filing system for the Eastern District of Texas, the reputation of the Court and Plaintiff's abilities and reputation.

7. Peggy Thompson, Deputy Clerk of the United States District Court for the Eastern District of Texas, 106 William Steger Federal Building, 211 W. Ferguson Street, Tyler, Texas 75702, who has knowledge of the facts surrounding the filing of the ESN litigation, the electronic filing system for the Eastern District of Texas, the reputation of the Court and Plaintiff's abilities and reputation.

8. Shelly Moore, Deputy Clerk of the United States District Court for the Eastern District of Texas, 500 State Line Ave., Texarkana, Texas 75501, who has knowledge of the facts surrounding the filing of the ESN litigation, the electronic filing system for the Eastern District of Texas, the reputation of the Court and Plaintiff's abilities and reputation.

9. Ms. Amie Mathis, legal assistant to Eric Albritton, who has knowledge of the filing of the ESN litigation, the Plaintiff's reputation and the Plaintiff's damages. Ms. Mathis may be contacted through Mr. Albritton's attorney, Mr. James Holmes of Henderson, Texas.

10. Mr. Peter McAndrews of McAndrews, Held & Malloy of 500 West Madison Street, 34th Floor, Chicago, Illinois 60661. Mr. McAndrews is co-counsel with the Plaintiff in the ESN litigation and has knowledge of the filing of the ESN case as well as the Plaintiff's reputation and abilities.

II.

DOCUMENTS AND THINGS IN THE POSSESSION OF PLAINTIFF THAT ARE RELEVANT TO THE CLAIMS AND DEFENSES OF ANY PARTY

1. With the Court's permission, the parties have agreed to make discoverable documents available at the offices of their Counsel.

III.

COMPUTATION OF ANY CATEGORY OF DAMAGES

1. Plaintiff does not seek any economic damages. Plaintiff seeks only an appropriate award of damages for his mental anguish and punitive damages sufficient to deter Defendants from future misconduct. The amounts of these awards are soundly in the discretion of the jury.

IV.

INSURANCE AGREEMENTS

1. None.

Plaintiff makes these disclosures based upon information currently known to him and expressly reserves the right to amend or supplement these disclosures as discovery progresses and the facts of the case become more clearly known to him.

Respectfully submitted,

James A. Holmes (Attorney in Charge)
Texas Bar No. 00784290

THE LAW OFFICE OF JAMES HOLMES, P.C.

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ATTORNEYS FOR THE PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to Charles Babcock, 1401 McKinney, Suite 1900, Houston, Texas 77010, attorney for Cisco Systems, Inc. and Mr. George McWilliams, attorney for Richard Frenkel, P.O. Box 58, Texarkana, Texas 75504-0058, via United States mail on this, the 2nd day of June 2008.

James A. Holmes

EXHIBIT B

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.

A P P E A R A N C E S

FOR THE PLAINTIFF:

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FOR THE DEFENDANT, CISCO SYSTEMS, INC.:

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FOR THE DEFENDANT, RICHARD FRENKEL:

Nicole Peavy, Esq.
George L. McWilliams, Esq.

LAW OFFICES OF GEORGE L. McWILLIAMS

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Texarkana, Texas 75504

Phone: 870.772.2055

ALSO PRESENT:

Doug Rankin - Videographer

P R O C E E D I N G S

(Exhibits 21A - 63 marked)

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

ERIC ALBRITTON,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. BABCOCK:

Q. Would you state your name, sir.

A. Eric Albritton.

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

What -- how are you employed?

A. I'm a lawyer.

Q. And do you practice with a firm?

A. I do.

Q. What's the name of the firm?

A. Eric M. Albritton, PC.

Q. And PC stands for professional corporation, correct?

Q. Okay.

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

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

A. Uh-uh.

Q. Excuse me?

A. No, sir.

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

A. I think it is an S Corp.

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

A. Uh-huh.

Q. Is that a "yes"?

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

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

A. I believe it will.

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

A. No.

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

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

Q. Somewhere in between?

A. Yes, sir.

Q. Was it in the millions?

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

MR. BABCOCK: I did.

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

MR. BABCOCK: Okay.

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

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

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

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

MR. HOLMES: All right. Thank you.

EXAMINATION

BY MR. McWILLIAMS:

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

A. I have no idea.

Q. What's your sense about that?

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

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

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

that someone looking at that complaint that says filed October 15th, 2007 across the top could have concluded that it was filed October 15th, 2007?

A. Nobody could have concluded that I conspired with the United States District Court to alter a document to manufacture subject matter jurisdiction where none existed.

MR. McWILLIAMS: Again, I'm going to have to object to the nonresponsiveness of your answer. I think you have nonresponsively answered it enough that we know what the true answer is. Pass the witness.

MR. HOLMES: Anything further, Mr. Babcock?

MR. BABCOCK: None for me.

MR. HOLMES: I'll reserve mine.

THE VIDEOGRAPHER: This marks the end of tape No. 4.

MR. McWILLIAMS: Before we go off, I want to reiterate what Mr. Babcock said that we're recessing the deposition subject to the motions to compel.

THE VIDEOGRAPHER: Off the record. The time is approximately 4:24 p.m.

(Deposition concluded at 4:24 p.m.)

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

me by _____;

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

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

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

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

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

FOR THE PLAINTIFF:
James A. Holmes, Esq.

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

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

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

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

Certified to by me this 31st of October, 2008.

Tammy Lea Staggs, CSR 7496
Expiration Date: 12/31/2009
Firm No. Dallas: 69 Houston: 373
HG Litigation Services
2501 Oak Lawn Avenue
Suite 600
Dallas, Texas 75219
214.521.1188 Fax 214.521.1034
1.888.656.DEPO

EXHIBIT C

No. 2008-481-CCL2

ERIC M. ALBRITTON,	§	**IN THE DISTRICT COURT**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**GREGG COUNTY, TEXAS**
CISCO SYSTEMS, INC. &	§	
RICHARD FRENKEL,	§	
	§	
Defendants.	§	**____ 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 ($100{,}000^{th}$) 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 FRENNKEL 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

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

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EXHIBIT A

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 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 Thei...
- Orion, the Hunted
- Texas Judge Bans Using Term "Patent Troll" In Tria...
- 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 Flyn...
- 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

THE LAW OFFICE OF JAMES HOLMES

A PROFESSIONAL CORPORATION

BOARD CERTIFIED PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

JH@JAMESHOLMESLAW.COM

DATE: 6-2-05

TO: Mr. Charles L. Babcock – *VIA FACSIMILE: 713.308.4110*
Mr. George McWilliams – *VIA FACSIMILE: 870.772.0513*

TELECOPIER NO: 469-232-4118

FROM: **JAMES A. HOLMES**

NO. OF PAGES (Including Transmittal Sheet):

RE: *Cause No. 6-08-CV-89; Eric Albritton v. Cisco Systems, Inc. and Richard Frenkel*

IF THERE ARE ANY PROBLEMS, PLEASE CALL: (903) 657.2800

MESSAGE: PLAINTIFF'S INITIAL DISCLOSURES

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EXHIBIT D

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

ERIC M. ALBRITTON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**NO. 6:08-CV-00089**
(1)CISCO SYSTEMS, INC., (2)RICHARD FRENKEL, (3)MALLUN YEN & (4)JOHN NOH,	§	
	§	
Defendants.	§	

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

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

I.

PARTIES

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

2. ***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 has been duly served and has placed itself before this Court for all purposes.

3. ***RICHARD FRENKEL ("FRENKEL")*** is an individual who, upon information and belief, resides in the State of California. FRENKEL has been duly served with process and has placed himself before this Court for all purposes.

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

5. ***JOHN NOH ("NOH")*** 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.

II.

VENUE & JURISDICTION

6. This Court has jurisdiction over this dispute pursuant to 28 U.S.C. § 1332 (West 2008), in that Plaintiff and Defendants are citizens of different states and the amount in controversy exceeds $75,000.00.

7. Venue is proper in the Eastern District of Texas in that all or a substantial portion of the occurrences giving rise to Plaintiff's claims occurred in the Eastern District of Texas.

III.

FACTUAL BACKGROUND

8. ALBRITTON is a licensed 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.

9. Throughout his professional career, ALBRITTON has enjoyed a sterling reputation for ethical and responsible legal representation. Neither the State Bar of Texas nor any state or federal court has ever issued any sanctions against ALBRITTON. Likewise, his law license has never been suspended or revoked for any reason. As a result of this reputation, Plaintiff has developed a successful law practice concentrated largely in intellectual property disputes in the Eastern District of Texas.

10. In furtherance of this practice, ALBRITTON filed a patent infringement suit against CISCO on behalf of ESN, LLC on October 16, 2007.

11. FRENKEL is an attorney licensed to practice law in the State of California. He is employed by CISCO as Director, Intellectual Property – Consumer & Emerging Technologies.

12. YEN is an attorney licensed to practice law in the State of California. She is employed by CISCO as Vice President, Worldwide Intellectual Property.

13. NOH is Senior Public Relations Manager for CISCO.

14. In October of 2007 and for a number of months prior thereto, FRENKEL published an internet "blog" purporting to cover patent litigation, particularly in what FRENKEL and CISCO termed the "Banana Republic of East Texas." At that time, FRENKEL's postings could be found at http://trolltracker.blogspot.com. Until shortly before the filing of this suit, FRENKEL purposefully published his comments anonymously.

15. In October of 2007, while still publishing anonymously, FRENKEL posted scandalous and defamatory allegations about ALBRITTON. As set forth in more detail below, FRENKEL's statements constitute libel and libel per se.

16. In particular, on October 17, 2007, FRENKEL posted a blog entitled "Troll Jumps the Gun, Sues Cisco Too Early." In that post, FRENKEL identifies ALBRITTON and "T. Johnny Ward" as local counsel for ESN. Further, in that post FRENKEL claims that ESN filed suit on October 15, 2007, instead of on October 16, 2007. Finally, FRENKEL in this post falsely asserts that ESN subsequently filed an amended complaint "to change absolutely nothing at all, by the way, expect for the filing date of the complaint." In fact, the amended complaint incorporated by reference the patent whereas the original complaint did not.

17. On October 18, 2007, FRENKEL stated as fact 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." FRENKEL further stated as fact that ALBRITTON's misconduct was simply "another example of the abusive nature of litigation in the Banana Republic of East Texas."

18. A true and correct copy of the defamatory writings distributed by FRENKEL is attached hereto as Exhibit A.

19. It is a felony offense to alter court documents.

20. FRENKEL amended his post to delete the comments concerning the "Banana Republic of East Texas," but did not withdraw his allegation that ALBRITTON engaged in a crime until the blog was taken off line in February 2008; as such, FRENKEL continuously published the libelous statements concerning ALBRITTON from October 2007 until February 2008.

21. At the time he made these statements, FRENKEL was acting in the course and scope of his employment with CISCO and in his official capacity as Director, Intellectual Property – Consumer & Emerging Technologies for CISCO.

22. In fact, 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.

23. FRENKEL published the blog with the knowledge and consent of CISCO, including NOH, Senior Public Relations Manager, Corporate Communications and YEN, Vice President Worldwide Intellectual Property.

24. In fact, FRENKEL published the libelous statements on October 18, 2007, at the express request and direction of NOH, CISCO's Senior Public Relations Manager and YEN, CISCO's Vice President, Worldwide Intellectual Property

25. After publishing the libelous statements on October 18, 2007, NOH, Senior Public Relations Manager, Corporate Communications, with the knowledge of YEN, congratulated FRENKEL for making the libelous statements and describing them as "brilliant."

26. FRENKEL published the libelous statements about ALBRITTON and referred to the United States District Court for the Eastern District of Texas as the "Banana Republic of East Texas" despite the fact that CISCO has availed itself of the United States District Court for the Eastern District of Texas by filing an intellectual property lawsuit in this very same district against a foreign competitor.

27. Before FRENKEL published his false and defamatory statements regarding ALBRITTON, FRENKEL and his supervisors, including YEN, had actual knowledge

that the statements were false, entertained serious doubts as to the truth of the statements, possessed obvious reasons to doubt the veracity of the statements and/or purposefully avoided the truth in publishing the statements.

28. After FRENKEL published his false and defamatory statements regarding ALBRITTON, he and YEN obtained additional information from various sources, which confirmed that the statements were false or, at a minimum raised a reasonable doubt as to the accuracy of the statements; nevertheless, FRENKEL, YEN and NOH did nothing to correct or retract the libelous statements.

29. FRENKEL, YEN, NOH and CISCO have purposefully maximized the dissemination of the libelous statements and the damage inflicted upon ALBRITTON by, among other things, continuously publishing the libelous statements until the blog was taken off line in February 2008, by providing links to the libelous statements including a link entitled "Eric Albritton" and by directly disseminating the blog to reporters and other members of the media.

30. FRENKEL, YEN, NOH and CISCO purposely elected to publish the statements on a web site devoted to intellectual property litigation and focused on the Eastern District of Texas. In so doing, Defendants knew that ALBRITTON concentrated his practice on patent litigation in the Eastern District of Texas and intended that litigants and attorneys would have ready access to the libelous representations.

31. On information and belief, FRENKEL 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. FRENKEL, YEN, NOH and CISCO have continuously published the libelous statements

from at least October 18, 2007 through February 2008. On January 30, 2008, FRENKEL boasted that his site had hosted its one hundred thousandth (100,000th) visitor.

IV.

CAUSES OF ACTION

A.

DEFAMATION

32. In publishing the false and libelous statements described above, FRENKEL, YEN, NOH and CISCO have defamed ALBRITTON in direct violation of Texas law. In particular, FRENKEL, YEN, NOH and CISCO published—either directly or through their agents—false and defamatory statements of "fact" referring directly to ALBRITTON that caused actual damages to ALBRITTON. In so doing, FRENKEL, YEN, NOH and CISCO acted with actual malice, gross negligence, reckless disregard and/ or in the absence of ordinary care for the truth of the statement and ALBRITTON's reputation.

33. Further, Defendants' 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).

34. 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.

B.

NEGLIGENCE

35. Both FRENKEL and CISCO failed to use ordinary care in the representation that ALBRITTON had conspired with federal officials to alter official court documents. In particular, neither Defendant used ordinary care to ensure that their statements were true or acted with reckless disregard for the truth of their allegations. Likewise, it was foreseeable to Defendants that their statements, if false, would reasonably be expected to injure ALBRITTON in his reputation and business relations.

C.

GROSS NEGLIGENCE

36. ALBRITTON would show the Court that the conduct of CISCO, FRENKEL, YEN and NOH rises to the level of gross negligence in this State. In particular, CISCO, FRENKEL, YEN and NOH acted with the specific intent to injure ALBRITTON in his reputation and business.

37. At a minimum, CISCO, FRENKEL, YEN and NOH acted with conscious indifference to ALBRITTON's rights, safety or welfare despite an actual, subjective awareness that such conduct posed an extreme degree of risk of harm to ALBRITTON's reputation and business relations.

38. Likewise, CISCO directed, authorized, approved and/or ratified the conduct of FRENKEL, YEN and NOH. Moreover, at the time of the defamation, CISCO employed FRENKEL, YEN and NOH in a managerial capacity, and each of them acted in the course and scope of their employment. CISCO, YEN and NOH have done nothing since the publication of the statements to disclaim them or distance themselves from them..

V.

DAMAGES

39. As a direct and proximate result of the conduct of FRENKEL, YEN, NOH 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.

40. Furthermore, ALBRITTON is entitled to exemplary damages from FRENKEL, YEN, NOH and CISCO. ALBRITTON would show the Court that FRENKEL, YEN, NOH and CISCO acted with the specific intent to injure ALBRITTON in his reputation and business. At a minimum, they 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.

41. Likewise, CISCO is vicariously liable for the outrageous conduct of FRENKEL, YEN and NOH in that it directed, authorized, approved and/or ratified the libelous statements. In like fashion, CISCO has done nothing since the publication of the statements to disclaim them or distance itself from the conduct of FRENKEL, YEN and NOH.

42. Moreover, at the time of the defamation, CISCO employed FRENKEL as Director, Intellectual Property – Consumer & Emerging Technologies 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.

43. Likewise, both YEN and NOH acted at all times in the course and scope of their professional employment with CISCO in directing the libelous postings. As CISCO's Vice President of Intellectual Property Worldwide and its Senior Public Relations Manager, respectively, both YEN and NOH at all times acted as vice-principals of the corporation.

VI.

CONCLUSION & PRAYER FOR RELIEF

44. It has long been said in this State that "libel is the sword of the coward" and "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, FRENKEL, YEN, NOH and CISCO should now be called to account for their conduct.

WHEREFORE, PREMISES CONSIDERED, ERIC M. ALBRITTON respectfully prays that CISCO SYSTEMS, INC., RICHARD FRENKEL, MALLUN YEN and JOHN NOH 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 HOLMES, P.C.

By: /s/
James A. Holmes
State Bar No. 00784290

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ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Original Complaint has been duly served on all parties via the electronic filing system of the Eastern District of Texas on this, the 16th day of June 2008.

/s/
James A. Holmes

EXHIBIT E

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

ERIC M. ALBRITTON, Plaintiff, v. (1) CISCO SYSTEMS, INC., (2) RICHARD FRENKEL, (3) MALLUN YEN and (4) JOHN NOH, Defendants.	§ § § § § § § § § § §	NO. 6:08-CV-00089
EXPERT REPORT OF PROFESSOR CHARLES SILVER		

I, Charles Silver, state as follows:

1. I submit this Expert Report to rebut certain opinions expressed in the Report of Charles Herring, Jr. I take up the opinions in the order he states them. Because Mr. Herring often fails to state grounds for his opinions, my ability to respond to his conclusions is limited. I reserve the right to expand this report in light of changes in Mr. Herring's Report or after receiving additional information. My credentials and a list of the documents I reviewed appear in an appendix.

2. I assume the facts as Mr. Herring asserts them to be. I take no position on the accuracy of his statement of the facts. I add a few facts Mr. Herring does not mention. One is that Cisco Systems, the defendant in the underlying litigation, never challenged the propriety of the decision of the administrative clerk for the Tyler Division of the Eastern District of Texas to change the filing date on the docket to October 16, 2007. Cisco Systems neither asked the administrative clerk to re-set the date to October 15, 2007 nor filed a motion with the court

requesting this relief. Another is that Cisco Systems through its agents or employees learned about the administrative clerk's action soon after it occurred. I also assume a few other facts which I mention below.

3. In my judgment, Mr. Albritton's actions (and those of his paralegal, Amie Mathis) were completely proper under the Texas Disciplinary Rules of Professional Conduct (TDRs). No violation of the TDRs is even arguable. A lawyer (or a person employed by a lawyer) is always free to ask a court's administrative clerk for help with an administrative matter. This is obviously true when the matter is whether a document filed electronically was processed properly. The homepage for the Eastern District of Texas, http://www.txed.uscourts.gov/default.htm, specifically directs lawyers with "filing questions" or "CM/ECF questions" to contact the division where the case was filed. The line under the link for "CM/ECF or PACER login" says "***Please Note:*** For help call the division where the case was filed" (original emphasis). Page 1 of the *Electronic Case Files System User's Manual* (Last revision: April, 2004) states, in bold letters, "**For additional help, please call the division that your case is filed**." A lawyer (or a person acting for a lawyer) with questions about the handling of a complaint filed electronically is supposed to call the division's administrative clerk and ask. That is all Mr. Albritton (acting through Ms. Mathis) did.

4. A lawyer acted similarly in *Garcia v. Garza*, 2006 U.S. Dist. LEXIS 5926 (S.D. Tex—McAllen 2006). A lawyer who misfiled an Adversary Complaint using the United States Bankruptcy Court, Southern District of Texas's CM/ECF system "discovered the error [and] diligently attempted to remedy it with the clerk's office." *Id.* at *13. The court found nothing improper about the contact. To the contrary, the court was impressed by the lawyer's "diligen[ce]" and ruled that the complaint was timely filed, despite the mistake. *Id.* at *14.

Evidently, judges expect lawyers who experience problems with the CM/ECF system to call their administrative clerks, and to do so with dispatch.

5. The worst that could reasonably be said is that the administrative clerk of the Tyler Division made an honest mistake by changing the filing date on the docket administratively, instead of recommending that Mr. Albritton file a motion with the court. (I take no position on whether the clerk made a mistake, but simply assume so for the sake of analysis. According to Shelley Moore, Deputy Clerk for the Texarkana Division, having the clerk at the Tyler Division correct the docket entry was one of two proper means of addressing the mistake. Deposition of Shelley Moore, p. 12:10-15.) Even then, it in no way follows that Mr. Albritton did anything improper. Administrative clerks make mistakes occasionally. A clerk's mistake, assuming one was made, does not change a lawyer's request for assistance into a conspiracy or a violation of the TDRs.

Asserted Violation of TDR 3.04

6. Mr. Herring opines that Mr. Albritton "arguably violated" TDR 3.04(d). Report of Charles Herring, Jr., p. 3. This rule provides that "[a] lawyer shall not … knowingly disobey … an obligation under the standing rules of … a tribunal." The violation occurred, he contends, because Mr. Albritton, acting through an employee, asked the clerk to change an "official record" that bound his client, ESN, LLC. The predicate for this assertion is Mr. Herring's belief that under Local Rule CV-5(a)(3)(B), the filing date in the Notice of Electronic Filing (NEF) was binding on Mr. Albritton's client and the effort to change the docket entry was "arguably inconsistent" with the rule. Report of Charles Herring, Jr., p. 3.

7. There are two problems with this opinion. First, under Rule CV-5(a)(3)(B), "[a] document filed electronically is deemed filed at the date and time stated on the Notice of

Electronic Filing from the court." According to David Maland, "the NEF clearly say[s] 10/16." Deposition of David Maland, p. 59:9-10. If Mr. Herring is right, then, the complaint was filed on October 16th and the docket entry showing October 15th as the filing date was incorrect. A violation of Rule CV-5(a)(3)(B) would therefore have occurred had the mistaken docket entry *not* been changed to reflect the filing date in the NEF.

8. The second problem that Rule CV-5(a)(3)(B) does not govern the propriety of Ms. Mathis' conversation with the administrative clerk. The question is whether Mr. Albritton violated an obligation under a standing rule of the Eastern District of Texas by having Ms. Mathis contact the administrative clerk with the object of having the filing date on the docket changed. Rule CV-5(a)(3)(B) has nothing to say about this. It regulates neither conversations with the court's staff nor the manner in which the date shown in the docket may be changed.

9. To make the matter clearer, suppose Mr. Albritton had filed a motion to amend the filing date in the docket instead of asking the administrative clerk to make the change. Following Mr. Herring's logic, this too would have been a violation of TDR 3.04(d) because it would have contravened Rule CV-5(a)(3)(B). Yet, Mr. Herring believes that such a motion would have been the "better procedure." Report of Charles Herring, Jr., p. 3. Insofar as Rule CV-5(a)(3)(B) is considered, it matters not how a change is made. Either way, a violation of a standing obligation of the tribunal would have occurred.

10. TDR 3.04(d) exists to encourage lawyers to urge clients to conform to court orders requiring identified behaviors or, when a client refuses to comply, to declare the client's refusal openly. Comment 7 to TDR 3.04 provides an example:

> [A] lawyer may acquiesce in a client's position that the sanctions arising from noncompliance [with a judicial order] are preferable to the costs of compliance.

> This situation can arise in criminal cases, for example, *where the court orders disclosure of the identity of an informant to the defendant and the government decides that it would prefer to allow the case to be dismissed rather than to make that disclosure*.

TDR 3.04, Comment 7 (2008) (discussing TDR 3.04(d)) (emphasis added). As the italicized language shows, the point of TDR 3.04 is to encourage compliance with obligations that direct particular behaviors, such as disclosing a witness' name. An official record like an NEF or a docket entry may be binding, but it does not obligate a lawyer or party to act in a particular way. Therefore, it falls outside TDR 3.04.

11. After wrongly contending that Mr. Albritton arguably violated TDR 3.04, Mr. Herring adds related charges that also are incorrect. He suggests that because an employee of Mr. Albritton's firm committed the primary conduct said to violate TDR 3.04, Mr. Albritton also violated TDR 8.04(a)(1), which prohibits a lawyer from using an agent to effect a violation of a TDR, and TDR 5.03(a), which requires a lawyer to take reasonable steps to ensure that a non-lawyer employee acts in conformity with the lawyer's responsibilities. Because there was no violation of TDR 3.04(b), these charges also fail.

Asserted Violation of TDR 8.04(a)(3)

12. Mr. Herring's opines that Mr. Albritton "arguably violated" TDR 8.04(a)(3). Report of Charles Herring, Jr., p. 3. The only discussion of this rule appears on p. 4 of his Report, where he states that the rule "generally prohibits a lawyer from engaging in any conduct that involves [a] misrepresentation." Report of Charles Herring, Jr., p. 4. Although this description of the rule is correct, Mr. Herring neither identifies a misrepresentation made by Mr. Albritton or an employee of Mr. Albritton's firm nor sets out his grounds for believing that TDR 8.04(a)(3) was

transgressed. Consequently, I cannot respond to this opinion. I reserve the right to revise this response.

Asserted Violation of TDR 3.05

13. Mr. Herring opines that Mr. Albritton "arguably violated" TDR 3.05. Report of Charles Herring, Jr., p. 3. The structure of his Report makes it difficult to figure out the nature of the violation alleged. On p. 4, he quotes both TDR 3.05(a), which prohibits a lawyer from "seek[ing] to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure," and TDR 3.05(b), which regulates ex parte communications. He then cites a number of cases and authorities, adding descriptive parentheticals. Yet, his Report contains no sentence explaining how Mr. Albritton (or a person acting on his behalf) arguably violated TDR 3.05. Nor is there a paragraph setting out the grounds for this opinion. I therefore have great difficulty responding to this opinion. I reserve the right to revise this response.

14. As mentioned, TDR 3.05(a) prohibits a lawyer from "seek[ing] to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure." To establish an arguable violation of this rule, Mr. Herring would have to identify a law or applicable rule of practice or procedure that prohibited Mr. Albritton (or a person in his employ) from calling a court's administrative clerk and asking for a change in the filing date. I know of no such law or rule, and Mr. Herring does not identify one. Federal Rule of Civil Procedure 77(c)(2)(D) authorizes a clerk to "act on any [] matter that does not require the court's action," Fed. R. Civ. P. 77(c)(2)(D), and the Eastern District's website and manual invited lawyers with questions about CM/ECF to call the division clerk. If Mr. Albritton wondered whether the clerk had the power to change the docket entry, he was free to call and ask, and he

was free to direct a person in his employ to call and ask. The clerk might respond that a motion was required or that the change could be made administratively. It is the administrative clerk's responsibility to know the answer and to indicate the proper course.

15. I suspect that few lawyers know the answer to the question Mr. Albritton faced. Electronic filing is a recent and evolving practice, and the problem concerning the filing date is arcane. The natural impulse of any lawyer in this situation would likely be to call the clerk and ask whether the clerk could change the date to reflect the actual date the complaint was submitted. Whether the clerk agreed or not, the act of calling the clerk to inquire could not possibly support an inference of impropriety. Nor, if the clerk answered affirmatively, could a lawyer be blamed for requesting the change (assuming the absence of force or fraud, neither of which is said by Mr. Herring to be present).

16. The facts indicate that even the clerks were not sure whether they had the power to change the filing date. According to Mr. Herring, "the Texarkana deputy clerk 'was reluctant to change the date, and referred [Mr. Albritton's assistant] to the Tyler clerk's office.... Under the circumstances, the Tyler administrative clerk agreed to modify the date filed for the complaint on the docket sheet to reflect October 16th as the actual filed date for the complaint...'" Report of Charles Herring, Jr., p. 2 (quoting a statement of David Maland, U.S. District Clerk, Eastern District of Texas). Had the (im)propriety of changing the filing date been obvious, the Texarkana deputy clerk would have given a firm answer, instead of referring the assistant to the Tyler clerk. Likewise, had the correct answer been clearly that a motion was required, the Tyler clerk would also have been decisive.

17. Instead of alleging an arguable violation of TDR 3.05(a), Mr. Herring may have meant to opine that Mr. Albritton "arguably violated TDR 3.05(b)." One cannot be sure, for reasons already explained. TDR 3.05(b) states that a lawyer shall not,

> except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate *ex parte* with a tribunal for the purpose of influencing that entity or person concerning a pending matter other than: (1) in the course of official proceedings in the cause; (2) in writing if he promptly delivers a copy of the writing to opposing counsel or the adverse party if he is not represented by a lawyer; (3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer. .

If Mr. Herring did mean to invoke this part of TDR 3.05, again he did not explain his reasoning. He merely cited some authorities and left the reader the task of applying them to the instant facts. This makes the soundness of his opinion difficult to assess.

18. The first case Mr. Herring cited is *Environmental Defense Fund v. Alexander*, 614 F.2d 474, 481 (5th Cir. 1980). On reading this opinion, I found no reference to TDR 3.05. Consequently, I am uncertain how the *Alexander* case bears on Mr. Herring's opinion that an arguable violation of TDR 3.05 occurred.

19. The facts of *Alexander* did not enlighten me either. The following paragraph describes the ex parte communication that occurred there.

> Buttressed only by factual affidavits filed in this court for the first time, in disregard of our function as an appellate court, one of plaintiff's counsel asserts that he spoke to one of the judge's law clerks who told counsel that the judge did not plan to take evidence on any issue but the authorization for the project at the

> hearing and that all other issues including affirmative defenses would be heard later.

Id., 614 F.2d at 480-481. These facts differ importantly from those at issue here. For one thing, the conversation in *Alexander* involved the trial judge's law clerk, not the administrative clerk. For another, the conversation concerned the manner in which the district court judge would handle a hearing on the merits. This was not a routine matter of case administration such as is normally entrusted to an administrative clerk.

20. The second case Mr. Herring cited is *In the Matter of J.B.K., Attorney, Relator*, 931 S.W.2d 581 (Tex. App.—El Paso 1996, no writ). This case does cite TDR 3.05(b), but the facts again bear no relation to this case. The opinion summarizes the communication at issue:

> After submission of a matter before this Court in which J.B.K. served as counsel for a party and presented oral argument, but prior to the date of issuance of the opinion in that matter, J.B.K. engaged in *ex parte* contact with the Eighth District Court of Appeals by communicating directly with a member of the Court's staff who was his acquaintance. The *ex parte* communication occurred on Monday, February 26, 1996. The opinion was delivered on February 29, 1996. The telephonic communication with the staff member was for the purpose of inquiring, among other things, as to what his "chances" were in the then pending case and whether he should "settle" his case prior to the issuance of the opinion.

Id., 931 S.W.2d at 583. The opinion does not say whether the "staff member" was an administrative clerk, a law clerk, or someone else in the court's employ. (One must infer that the employee, whoever he or she was, held a position other than a purely administrative role.)

21. The court of appeals condemned the conversation, but its reason for doing so bears no connection to this case.

> Private communications between a lawyer in a pending action and a staff member of an appellate court before whom the case is pending concerning the merits of the then pending appeal are "*ex parte* communications" not authorized by law. [Citations omitted.] Accordingly, we find as a matter of law that any attempt to solicit or receive information on the merits of a pending case from a staff member of an appellate court constitutes an impermissible *ex parte* communication with chambers."

Id., 931 S.W.2d at 584. Here, no one requested inside information about the court's likely ruling on a pending matter; no motion or other item calling for a ruling was even pending. Given its facts, *J.B.K.* cannot establish an arguable violation of TDR 3.05(b) by Mr. Albritton (or his employee).

22. *J.B.K.* can, however, generate an inference that *no* violation occurred. On reading the opinion, I saw that the court felt compelled by the Code of Judicial Conduct to report the lawyer's misconduct to the State Bar of Texas because the lawyer's actions raised a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer. As the court explained:

> A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Rules of Professional Conduct should take appropriate action. If the information received by that judge raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, the judge **shall** inform the Office of the General Counsel of the State Bar

> of Texas or take other appropriate action. TEXAS SUPREME COURT, CODE OF JUDICIAL CONDUCT, Canon 3D(2), Amended to Sept. 1, 1994, reprinted at TEX.GOV'T CODE ANN. tit. 2, subtit. G, app. B (Vernon Supp.1996). We find that the allegations set forth above, if true, raise a substantial question as to Counsel's honesty, trustworthiness or fitness as a lawyer.

Id., 931 S.W.2d at 584 (emphasis in original). The TDRs contain an identical provision. TDR 8.03(a) reads as follows:

> [A] lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyers honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.

TDR 8.03(a) (2008). Although I am not an expert in criminal law, the Patent Troll Tracker's assertion that Mr. Albritton conspired with the Eastern District's court clerk to alter a federal record seems to me to allege criminal wrongdoing. See 18 USCS § 1512(c) ("Whoever corruptly … alters … a record … with the intent to impair the object's integrity or availability for use in an official proceeding; or … otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both."[1] If that is right, then a lawyer who knew that such a conspiracy occurred had a duty to report Mr. Albritton to the General Counsel of the State Bar of Texas. To my knowledge, no lawyer filed a report. The natural inference is that all Texas lawyers engaged by Cisco Systems did not find the communication itself problematic.

[1] This may be why David Maland, the United States District Clerk for the Eastern District of Texas, was "concerned" by "the allegation that there had been some collusion between Mr. Albritton and me or my office." Deposition of David Maland, p. 44, 18-24.

23. The complaint alleges that Mr. Richard Frenkel "is an attorney licensed to practice law in the State of California." *Plaintiff's Original Petition*, p. 3. On checking the California disciplinary rules, I found no counterpart to TDR 8.03. One might infer from this that Mr. Frenkel had no duty to report serious misconduct by other lawyers of which he was aware. However, he could have reported, despite having no duty to do so, and reporting would have been the better practice, had he truly thought that serious misconduct occurred. See *Restatement (Third) of the Law Governing Lawyers* § 5(3) ("A lawyer who knows of another lawyer's violation of applicable rules of professional conduct raising a substantial question of the lawyer's honesty or trustworthiness or the lawyer's fitness as a lawyer in some other respect must report that information to appropriate disciplinary authorities.").

24. Nor did Cisco Systems lodge a complaint against Mr. Albritton in the Eastern District of Texas. According to Local Rule AT-2(d)(1)(B) & (C), the trial court "may … take any appropriate disciplinary action against any attorney … for failure to comply with … any [] rule or order of this court;" and "for unethical behavior[.]" The court's contempt power may also have been available. Again given that a conspiracy between a lawyer and an administrative clerk to alter a court record improperly would constitute a crime, Cisco System's lack of action in the Eastern District of Texas poses a quandary. Why did it not bring the alleged misconduct to the court's attention for remediation? The alteration itself was no secret. The Patent Troll Tracker made it known to the world. If, on the other hand, there was no criminal conspiracy, Cisco System's failure to act is understandable, even commendable.

25. Mr. Herring next cited § 113 of the *Restatement (Third) of the Law Governing Lawyers*. Report of Charles Herring, Jr., pp. 4-5. He first quoted the general principle of § 113(1), which states that "[a] lawyer may not knowingly communicate ex parte with a judicial officer before

whom a proceeding is pending concerning the matter, except as authorized by law." The obvious issue under this principle is whether the phone call was "authorized by law." I have explained why, in my opinion, it was.

26. Mr. Herring then quoted part of Comment *c* to § 113: "The prohibition applies to communication about the merits of the cause and to communications about a procedural matter the resolution of which will provide the party making the communication substantial tactical or strategic advantage." He omitted the following sentence, which immediately succeeds the one he quoted: "The prohibition [in § 113] does not apply to routine and customary communications for the purpose of scheduling a hearing or similar communications, but does apply to communications for the purpose of having a matter assigned to a particular court or judge." *Restatement (Third) of the Law Governing Lawyers* § 113, Comment *c*. Because of the many sources that invited lawyers with questions about CM/ECF to contact the division's administrative clerk, the communication at issue was clearly "routine and customary." A communication publicly invited by a court cannot be a prohibited ex parte contact.

27. Mr. Herring also cites several other authorities I have not yet discussed. Most of these references appear in a long footnote. Report of Charles Herring, Jr., p. 5, n. 3. On reading the parentheticals that accompany the citations, I decided that these cases roam too far afield of the main point to be worth pursuing. Mr. Herring also failed to include any analysis explaining the applicability of these cases to the matter at hand. I reserve the right to address them in a supplemental report should Mr. Herring explain their relevance to his opinion.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on:

11/24/08

Date

Charles Silver

Past Testimonial Experiences

Case Name	Cause Number	Court	Subject	Year
Brown Rudnick Berlack Israels et al. v. Commonwealth of Massachusetts			Attorneys' Fees	2003
Phelps Dunbar, LLP v. Brittany Ins. Co. Ltd, et al.,		U.S. Dist. Ct. for the Southern Dist. Of Texas	Insurance Defense Ethics	2004
ESTEVAN LEAL and DENISE LEAL vs.ALLSTATE INSURANCE COMPANY, et al.	CV99-11924	CENTRAL DISTRICT OF CALIFORNIA, SANTA ANA DIVISION, SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY	Insurance Litigation Issues	2004
COOPER & SCULLY, P.C. VS. SCOTT SUMMY; BARON & BUDD, P.C., et al	03-04408-J	DALLAS COUNTY, TEXAS, 191ST JUDICIAL DISTRICT	Professional Responsibility Issues relating to Lateral Attorney	2005
KARIN JACOBS, et al., VS. WILLIAM K. TAPSCOTT, JR., et al.,	3:04-CV-1968-D	UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION	Professional Responsibility Issues relating to Settlement of Litigation	2006
Bergthold v. Winstead Sechrest & Minick, PC (Winstead)	236-214765-05	IN THE DISTRICT COURT OF 236TH JUDICIAL DISTRICT, TARRANT COUNTY, TEXAS	Insurance Defense Ethics	2007
Thomas a. Dardas, et al. v. Fleming, Hovenkamp & Grayson, P.C., et al.	2002-19156	61st Judicial District Court of Harris County, Texas	Professional Responsibility Issues relating to Fee Sharing	2007
IN RE: TRIGEM AMERICA CORPORATION, Debtor.	SA 05-13972-TA, CHAPTER 11	UNITED STATES BANKRUPTCY COURT, CENTRAL DISTRICT OF CALIFORNIA, SANTA ANA DIVISION	Class Action Issues	2007
Jerry Bergthold v. Winstead Sechrest & Minick, P.C.	236-214765-05	236th Judicial District, Tarrant County, TX	Professional Responsibility	2007
Thomas A. Dardas et al. v. Fleming, Hovenkamp & Grayson, P.C., et al.	2002-19156	61st Judicial District, Harris County, TX	Attorneys' Fees	2007

Past Testimonial Experiences

Case Name	Cause Number	Court	Subject	Year
Whiteside v. Atlanta Cas. Co.	4:07-CV-87 (CDL)	U.S. District Court, Middle District of GA	Insurance Defense Ethics	2007

DOCUMENTS REVIEWED

In addition to cases and authorities cited in my report, I also reviewed the documents below which, unless noted otherwise, relate specifically to this case.

- Deposition of Shelley Moore
- Deposition of David Maland
- Deposition of Peggy Thompson
- Plaintiff's Original Petition
- Electronic Case Files User Manual
- Eastern District of Texas webpages
- Report of Charles Herring, Jr.
- Brenda Sapino Jeffreys, John Council and Miriam Rozen, Patent Attorneys Sue Cisco and Blogging In-House Lawyer for Defamation, 03-17-2008 (as reprinted on Law.com)
- Maland Memo Re: Filing Sealed Documents in Patent Cases
- Maland Memo and Exhibits Re: 5:07cv156 ESN LLC v. Cisco Systems, Inc.
- U. S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, LOCAL RULES AND APPENDIXES as of May 9, 2008
- The Attorney's "How To" Guide for – Civil Case Opening –Texas Eastern District Court, January 11, 2008

CONTACT INFORMATION

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ACADEMIC EMPLOYMENTS

UNIVERSITY OF TEXAS SCHOOL OF LAW

Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure	2004-present
Co-Director, Center on Lawyers, Civil Justice, and the Media	2001-present
Robert W. Calvert Faculty Fellow	2000-2004
Cecil D. Redford Professor	1994-2004
W. James Kronzer Chair in Trial & Appellate Advocacy	Summer 1994
Graves, Dougherty, Hearon & Moody Centennial Faculty Fellow	1991-1992
Assistant Professor	1987-1991

VANDERBILT UNIVERSITY LAW SCHOOL

Visiting Professor	2003

UNIVERSITY OF MICHIGAN LAW SCHOOL

Visiting Professor	1994

UNIVERSITY OF CHICAGO

Managing Editor, Ethics: A Journal of Social, Political and Legal Philosophy	1983-1984

EDUCATION

JD 1987, Yale Law School
MA 1981, University of Chicago (Political Science)
BA 1979, University of Florida (Political Science)

PUBLICATIONS

1. "The Impact of the2003 Texas Medical Malpractice Damages Cap on Physician Supply and Insurer Payouts: Separating Facts from Rhetoric," 44 The Advocate 25 (2008) (with David A. Hyman and Bernard Black).

2. "Estimating the Effect of Damage Caps in Medical Malpractice Cases: Evidence from Texas," J. Legal Analysis (forthcoming 2008) (with David A. Hyman, Bernard S. Black, and William M. Sage) (inaugural issue) (peer-reviewed).

3. "Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004," Amer. Law & Econ. Rev. 1 (2008) (with Bernard Black, David A. Hyman, and William M. Sage) (peer-reviewed).

4. "Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions," 57 DePaul Law Review 471 (2008) (with Sam Dinkin) (invited symposium).

5. "Malpractice Payouts and Malpractice Insurance: Evidence from Texas Closed Claims, 1990-2003," 33 Geneva Papers on Risk and Insurance: Issues and Practice 177-192 (2008) (with David A. Hyman, Bernard S. Black, William M. Sage and Kathryn Zeiler) (peer-reviewed).

6. "Physicians' Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims 1990-2003," 36 J. Legal Stud. 59 (2007) (with Bernard Black, David A. Hyman, William Sage, and Kathryn Zeiler) (peer-reviewed).

7. "Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988-2003," J. Empirical Legal Stud. 3-68 (2007) (with Bernard Black, David A. Hyman, William M. Sage, and Kathryn Zeiler) (peer-reviewed).

8. "The Allocation Problem in Multiple-Claimant Representations," 14 S. Ct. Econ. Rev. 95 (2006) (with Paul Edelman and Richard Nagareda) (peer-reviewed).

9. "Dissent from Recommendation to Set Fees Ex Post," 25 Rev. of Litig. 497 (2006) (accompanied Task Force on Contingent Fees, Tort Trial and Insurance Practice Section of the American Bar Association, "Report on Contingent Fees in Class Action Litigation," 25 Rev. of Litig. 459 (2006)).

10. "In Texas, Life is Cheap," 59 Vanderbilt L. Rev. 1875 (2006) (with Frank Cross) (invited symposium).

11. "Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid," 59 Vanderbilt L. Rev. 1085 (2006) (with David A. Hyman) (invited symposium).

12. "A Rejoinder to Lester Brickman: *On the Theory Class's Theories of Asbestos Litigation,"* 32 Pepp. L. Rev. 765 (2005).

13. "Medical Malpractice Reform Redux: Déjà Vu All Over Again?" XII Widener L. J. 121 (2005) (with David A. Hyman) (invited symposium).

14. "Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002," 2 J. Empirical Legal Stud. 207–259 (July 2005) (with Bernard Black, David A. Hyman, and William S. Sage) (peer-reviewed).

15. "Speak Not of Error, Regulation (Spring 2005) (with David A. Hyman).

16. "The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?," 90 Cornell L. Rev. 893 (2005) (with David A. Hyman).

17. "Merging Roles: Mass Tort Lawyers as Agents and Trustees," 31 Pepp. L. Rev. 301 (2004) (invited symposium).

18. "Believing Six Improbable Things: Medical Malpractice and 'Legal Fear,'" 28 Harv. J. L. and Pub. Pol. 107 (2004) (with David A. Hyman) (invited symposium).

19. "We're Scared To Death: Class Certification and Blackmail," 78 N.Y.U. L. Rev. 1357 (2003).

20. Practical Guide for Insurance Defense Lawyers, International Association of Defense Counsel (2002) (with Ellen S. Pryor and Kent D. Syverud) (published on the IADC website in 2003 and revised and distributed to all IADC members as a supplement to the Defense Counsel J. in January 2004).

21. "When Should Government Regulate Lawyer-Client Relationships? The Campaign to Prevent Insurers from Managing Defense Costs," 44 Ariz. L. Rev. 787 (2002) (invited symposium).

22. "Introduction: Civil Justice Fact and Fiction," 80 Tex. L. Rev. 1537 (2002) (with Lynn A. Baker).

23. "Does Civil Justice Cost Too Much?" 80 Tex. L. Rev. 2073 (2002).

24. "Defense Lawyers' Professional Responsibilities: Part II—Contested Coverage Cases," 15 G'town J. Legal Ethics 29 (2001) (with Ellen S. Pryor).

25. "A Critique of *Burrow v. Arce*," 26 Wm. & Mary Envir. L. & Policy Rev. 323 (2001) (invited symposium).

26. "You Get What You Pay For: Result-Based Compensation for Health Care," 58 Wash. & Lee L. Rev. 1427 (2001) (with David A. Hyman).

27. "The Case for Result-Based Compensation in Health Care," 29 J. L. Med. & Ethics 170 (2001) (with David A. Hyman).

28. "Defense Lawyers' Professional Responsibilities: Part I—Excess Exposure Cases," 78 Tex. L. Rev. 599 (2000) (with Ellen S. Pryor).

29. "What's Not To Like About Being A Lawyer?," 109 Yale L. J. 1443 (2000) (with Frank B. Cross) (review essay).

30. "Due Process and the Lodestar Method: You Can't Get There From Here," 74 Tul. L. Rev. 1809 (2000) (invited symposium).

31. "The Aggregate Settlement Rule and Ideals of Client Service," 41 S. Tex. L. Rev. 227 (1999) (with Lynn A. Baker) (invited symposium).

32. "Representative Lawsuits & Class Actions," in Int'l Ency. Of L. & Econ., B. Bouckaert & G. De Geest, eds., (1999) (peer-reviewed).

33. "Preliminary Thoughts on the Economics of Witness Preparation," 30 Tex. Tech L. Rev. 1383 (1999) (invited symposium).

34. "The Lost World: Of Politics and Getting the Law Right," 26 Hofstra L. Rev. 773 (1998) (invited symposium).

35. "Flat Fees and Staff Attorneys: Unnecessary Casualties in the Battle over the Law Governing Insurance Defense Lawyers," 4 Conn. Ins. L. J. 205 (1998) (invited symposium).

36. "I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds," 84 Va. L. Rev. 1465 (1998) (with Lynn A. Baker) (invited symposium).

37. "And Such Small Portions: Limited Performance Agreements and the Cost-Quality/Access Trade-Off," 11 G'town J. Legal Ethics 959 (1998) (with David A. Hyman) (invited symposium).

38. "Mass Lawsuits and the Aggregate Settlement Rule," 32 Wake Forest L. Rev. 733 (1997) (with Lynn A. Baker) (invited symposium).

39. "Professional Liability Insurance as Insurance and as Lawyer Regulation: A Comment on Davis, Institutional Choices in the Regulation of Lawyers," 65 Fordham L. Rev. 233 (1996) (invited symposium).

40. "All Clients are Equal, But Some are More Equal than Others: A Reply to Morgan and Wolfram," 6-3 Coverage 47 (May/June 1996) (with Michael Sean Quinn).

41. "Are Liability Carriers Second-Class Clients? No, But They May Be Soon-A Call to Arms against the Restatement of the Law Governing Lawyers," 6-2 Coverage 21 (Jan./Feb. 1996) (with Michael Sean Quinn).

42. "Bargaining Impediments and Settlement Behavior," in Dispute Resolution: Bridging the Settlement Gap, D.A. Anderson, ed. (1996) (with Samuel Issacharoff and Kent D. Syverud).

43. "The Legal Establishment Meets the Republican Revolution," 37 S. Tex. L. Rev. 1247 (1996) (invited symposium).

44. "Do We Know Enough About Legal Norms?" in Social Rules: Origin; Character; Logic: Change, D. Braybrooke, ed. (1996).

45. "The Professional Responsibilities of Insurance Defense Lawyers," 45 Duke L. J. 255 (1995) (with Kent D. Syverud), reprinted in Ins. L. Anthol. (1996) and 64 Def. L. J. 1 (Spring 1997).

46. "Wrong Turns on the Three Way Street: Dispelling Nonsense About Insurance Defense Lawyers," 5-6 Coverage 1 (Nov./Dec.1995) (with Michael Sean Quinn).

47. "Introduction to the Symposium on Bad Faith in the Law of Contract and Insurance," 72 Tex. L. Rev. 1203 (1994) (with Ellen Smith Pryor).

48. "Does Insurance Defense Counsel Represent the Company or the Insured?" 72 Tex. L. Rev. 1583 (1994), reprinted in Practising Law Institute, Insurance Law: What Every Lawyer and Businessperson Needs To Know, Litigation and Administrative Practice Course Handbook Series, PLI Order No. H0-000S (1998).

49. "Thoughts on Procedural Issues in Insurance Litigation," VII Ins. L. Anthol. (1994).

50. "A Model Retainer Agreement for Legal Services Programs: Mandatory Attorney's Fees Provisions," 28 Clearinghouse Rev. 114 (June 1994) (with Stephen Yelenosky).

51. "Incoherence and Irrationality in the Law of Attorneys' Fees," 12 Tex. Rev. of Litig. 301 (1993).

52. "A Missed Misalignment of Interests: A Comment on Syverud, The Duty to Settle," 77 Va. L. Rev. 1585 (1991), reprinted in VI Ins. L. Anthol. 857-870 (1992).

53. "Unloading the Lodestar: Toward a New Fee Award Procedure," 70 Tex. L. Rev. 865 (1992).

54. "Comparing Class Actions and Consolidations," 10 Tex. Rev. of Litig. 496 (1991).

55. "A Restitutionary Theory of Attorneys' Fees in Class Actions," 76 Cornell L. Rev. 656 (1991).

56. "Elmer's Case: A Legal Positivist Replies to Dworkin," 6 L. & Phil. 381 (1987) (peer-reviewed).

57. "Justice In Settlements," 4 Soc. Phil. & Pol. 102 (1986) (with Jules L. Coleman) (peer-reviewed).

58. "Negative Positivism and the Hard Facts of Life," 68 The Monist 347 (1985) (peer-reviewed).

59. "Utilitarian Participation," 23 Soc. Sci. Info. 701 (1984) (peer-reviewed).

60. "Public Opinion and the Federal Judiciary: Crime, Punishment, and Demographic Constraints," 3 Pop. Res. & Pol. Rev. 255 (1984) (with Robert Y. Shapiro) (peer-reviewed).

AWARDS

Faculty Research Grant, University of Texas, 2005-06

Fellow, Texas Bar Foundation, Elected 1998

Texas Excellence in Teaching Award, 1997

BRAVO Award, State Bar of Texas, 1995

Felix S. Cohen Prize for Legal Philosophy, Yale Law School, 1987

Olin Foundation Grant for Study of Class Actions, Yale Law School, 1986

National Science Foundation Graduate Fellowship, 1980-1983

NOTED ACTIVITIES

Guest Columnist, TortDeform.com

Associate Reporter, American Law Institute Project on Aggregate Litigation (2003-present)

Member, Grants Subcommittee, Law School Admissions Council (2005-2007)

Invited Academic Member, American Bar Association/Tort & Insurance Practice Section Task Force on the Contingent Fee (2003-2007)

Co-Reporter, Project on the Professional Responsibilities of Insurance Defense Lawyers, International Association of Defense Counsel (1994-2002)

Chair, Chair-Elect, and Treasurer, Section on Insurance Law, Association of American Law Schools (1997-1999)

Member, Executive Committee, Section on Professional Responsibility, Association of American Law Schools (1994-1997)

Program Chair, Joint Program on the Professional Responsibilities of Lawyers for Insurance Companies, sponsored by the Insurance and Professional Responsibility Sections of the Association of American Law Schools (1996)

Member, Special Master's Team, *Cimino v. Raymark Industries* (1989)

Member, State Bar of Texas (admitted 1988)

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

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

ORDER GRANTING DEFENDANTS' MOTION IN LIMINE

Came on for consideration Cisco Systems, Inc.'s Motion in Limine. The Court, having considered said Motion and responses, if any, ORDERS as follows:

Motion in Limine No. 1 is hereby:

GRANTED _____

GRANTED AS MODIFIED _____

DENIED _____

Motion in Limine No. 2 is hereby:

GRANTED _____

GRANTED AS MODIFIED _____

DENIED _____

Motion in Limine No. 3 is hereby:

GRANTED _____

GRANTED AS MODIFIED _____

DENIED _____

Motion in Limine No. 4 is hereby:

GRANTED _____

GRANTED AS MODIFIED _____

DENIED _____

Motion in Limine No. 5 is hereby:

GRANTED _____

GRANTED AS MODIFIED _____

DENIED _____

Motion in Limine No. 6 is hereby:

GRANTED _____

GRANTED AS MODIFIED _____

DENIED _____

Motion in Limine No. 7 is hereby:

GRANTED _____

GRANTED AS MODIFIED _____

DENIED _____

Motion in Limine No. 8 is hereby:

GRANTED _____

GRANTED AS MODIFIED _____

DENIED _____

Motion in Limine No. 9 is hereby:

GRANTED _____

GRANTED AS MODIFIED _____

DENIED _____

Motion in Limine No. 10 is hereby:

GRANTED _____

GRANTED AS MODIFIED _____

DENIED _____

Motion in Limine No. 11 is hereby:

GRANTED _____

GRANTED AS MODIFIED _____

DENIED _____

Motion in Limine No. 12 is hereby:

GRANTED _____

GRANTED AS MODIFIED _____

DENIED _____

Motion in Limine No. 13 is hereby:

GRANTED _____

GRANTED AS MODIFIED _____

DENIED _____

Motion in Limine No. 14 is hereby:

GRANTED _____

GRANTED AS MODIFIED _____

DENIED _____

SO ORDERED.