EXHIBIT A

NO. 2007-2502-A

JOHN WARD, JR.	§	**IN THE DISTRICT COURT**
	§	
Plaintiff	§	
	§	
V.	§	**188th JUDICIAL DISTRICT**
	§	
CISCO SYSTEMS, INC. and RICHARD FRENKEL	§	
	§	
	§	
Defendants.	§	**OF GREGG COUNTY, TEXAS**

PLAINTIFF'S FIRST AMENDED PETITION

TO THE HONORABLE COURT:

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

I.

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

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

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

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

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

II.

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

III.

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

IV.

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

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

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

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

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

V.

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

VI.

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

VII.

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

VIII.

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

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

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

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

IX.

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

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

Respectfully submitted,

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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.

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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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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 cases. I'm not sure what's in charge. Maybe both. There's enough here