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

PACKET INTELLIGENCE LLC) (CIVIL DOCKET NO.
) (2:16-CV-230-JRG
VS.) (MARSHALL, TEXAS
) (
NETSCOUT SYSTEMS, INC.,) (
TEKTRONIX COMMUNICATIONS,) (OCTOBER 12, 2017
AND TEKTRONIX TEXAS LLC) (12:19 P.M.

TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE JUDGE RODNEY GILSTRAP

UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: Mr. Paul J. Skiermont
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Mr. Alexander E. Gasser
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Official Reporter
United States District Court
Eastern District of Texas
Marshall Division
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(Proceedings recorded by mechanical stenography, transcript produced on a CAT system.)

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P R O C E E D I N G S

(Jury out.)

COURT SECURITY OFFICER: All rise.

THE COURT: Be seated, please.

All right. Counsel, the jury's at lunch, taking a short recess.

I have before me what appears to be the slides that Mr. Skiermont used in his cross-examination of Mr. Waldbusser related to the Scott Nettles report. And I also have a rough copy of the portion of that -- the cross-examination from the transcript.

Now, we'll continue with what was raised at the bench before Defendants put on their last deposition witness of some six to seven minutes.

Where are we? I -- I understand both sides have been talking. Do we have an issue, and if we do, what is the issue?

Let me hear from Defendants first.

MR. LYONS: Your Honor, we -- we, indeed, do have an issue, and we think a grave one in this case.

What happened during cross-examination is a first slide was put up with a quote from one expert -- one report of Mr. Nettles.

Mr. Nettles has been retained on the issue of validity by NetScout in this case. He's also the expert for

1 Sandvine on both infringement and validity in the Sandvine
2 case.

3 So the first slide referred to his retention as an
4 invalidity expert. But then counsel switched to another
5 exhibit -- or another slide, this is Slide 2, and if you
6 notice, it's a different report. We didn't even notice
7 that, as counsel was moving quickly. And this other report
8 is his infringement report.

9 This is subject to protective order in the Sandvine
10 case. And it's under the protective order because it
11 includes Sandvine confidential information about Sandvine
12 accused products that NetScout was not allowed to look at.

13 And so we've never seen this -- this report before
14 today. We were never allowed to have access to it.

15 And then the next slide that they showed, they
16 pulled up testimony from Dr. Nettles, and confronted them,
17 as you know, with our expert saying that it was
18 inconsistent. Now, this was -- we don't have any context
19 for this. We've only -- you know, we only saw this today.
20 We had no opportunity to prepare for this.

21 THE COURT: Let me -- let me ask you this, Mr.
22 Lyons: You keep saying "we," and it's clear from the record
23 in this case that your firm -- your firm, Morgan Lewis, is
24 counsel for NetScout.

25 It's also clear from the record in this case that

1 Locke Lord is counsel for NetScout. Is this a case where
2 Net -- where Locke Lord knew something that Morgan Lewis
3 didn't know and Locke Lord is not in the trial? Or is this
4 a -- is this not the case?

5 MR. LYONS: That is not the case, Your Honor.

6 THE COURT: Okay.

7 MR. LYONS: Locke Lord -- we're still working with
8 Locke Lord. They're actually in the courtroom, Your Honor,
9 and we've been talking about this issue today and --

10 THE COURT: Well, sometimes when there are multiple
11 law firms involved in litigation, the left hand sometimes
12 doesn't know what the right hand has. And I just want to
13 make sure that's not where this is going.

14 MR. LYONS: That's why it took us a few minutes to
15 raise the issue, Your Honor, because we were trying to do
16 our diligence. But we did confirm that the Locke Lord
17 attorneys did not have this invalidity report and had not
18 seen this passage that was shown to the jury. And --

19 THE COURT: All right. So basically what you're
20 telling me is this has been a surprise that you did not have
21 knowledge of or an opportunity to prepare for during
22 cross-examination?

23 MR. LYONS: It was not only a surprise, but it was
24 a surprise that could only occur by -- based on a violation
25 of your protective order in the Sandvine case that precludes

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