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1 IMPORTANT INFORMATION!!

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3 This realtime transcript is provided for your
4 immediate review of the proceedings and is not
5 provided for, nor meant to be used or cited in any
6 type of court proceedings.

7

8 MR. MCWILLIAMS: This is a housekeeping
9 matter so I avoid interrupting you during your
10 examination. I notice that some privileged documents
11 which have been produced may be used in this
12 deposition and just for the purpose of the record and
13 on behalf of Rick Frenkel, we are not waiving any of
14 the privileges that may be attached to those
15 documents. And would you agree that I don't have to
16 restate that each time a document is used.

17 MR. HOLMES: Yes.

18 MR. MCWILLIAMS: Thank you.

19 MR. GRIFFIN: And that's also true for Cisco,
20 they want to preserve the privilege that has -- for
21 these documents that has previously been stated on the
22 record and I think presented to the court and the
23 court has overruled for the time being those
24 objections but we want to renew them and have a
25 continuing objection.

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1 MR. HOLMES: Very good, gentlemen.
2 EXAMINATION
3 BY MR. HOLMES:
4 Q Mr. Frenkel, would you give me your full
5 name, please?
6 A It's Richard Gregory Frenkel.
7 Q And you go by Rick; is that right?
8 A Yes.
9 Q Is it okay if I call you Richard today?
10 A Yes.
11 Q We've worked around each other, but I'll
12 introduce myself. I'm James Holmes from east Texas.
13 I represent Johnny Ward in this case.
14 Do you understand who I am and who I
15 represent?
16 A You represent Johnny Ward, yes.
17 Q You and I have actually worked around each
18 other a bit in this matter but we've never actually
19 spoken to each other I don't think, have we?
20 A This matter, no; the Albritton matter, yes.
21 Q But I've never had the opportunity to sit
22 around and ask you questions on my mind about what
23 happened or to ask you to explain things to me so that
24 I can understand it?
25 A You personally.

23 aren't you?

24 A I don't remember writing this but it looks
25 like that is speculation.

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1 Q Okay. So do you think you had been thinking
2 during the day why is the complaint online
3 ***fix record***?

4 A I might have been thinking that.

5 Q Can you tell me anything you did to try and
6 find out why the complaint wasn't available online?

7 A No.

8 Q Didn't call the clerk?

9 A No.

10 Q Didn't call Eric or Johnny?

11 A No.

12 Q You didn't call any of Cisco's Texas lawyers,
13 did you, and ask them?

14 A Yes, I did.

15 Q On the 15th?

16 A Yes.

17 Q who did you call?

18 A Baker & Botts.

19 Q who did you talk to there?

20 A I don't remember exactly who I talked to on
21 the 15th but I do recall talking to somebody.

22 Q Nor did you call to find out why the
23 complaint wasn't showing up online ***fix record***?
24 MR. GRIFFIN: Objection. That's
25 attorney-client privileged communication.

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1 MR. HOLMES: I think we're beyond that aren't
2 we.
3 MR. GRIFFIN: Hu.
4 MR. HOLMES: Don't we have a waiver on all
5 the communication that he had when he posted up to the
6 18th.
7 MS. PARKER: There has been no waiver -- no
8 ruling on waiver of testimony.
9 MS. PEDEN: A privilege waiver is a waiver.
10 It documents testimony. It's a subject matter
11 waiver. I think judge collarance has been very clear
12 about that ** [spelling].
13 MR. GRIFFIN: Well, I haven't made all the
14 hearings and all the --
15 MS. PARKER: I have.
16 MR. GRIFFIN: Well, it clearly normally
17 privileged.
18 MR. HOLMES: Clearly normally would be
19 privileged.
20 MS. PARKER: Can you repeat your question.
21 MR. HOLMES: Well --
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22 MR. GRIFFIN: You all, let's try to find out
23 what's right and do the right thing.
24 MS. PARKER: Can you repeat your question.
25 MR. HOLMES: Yeah. I like that resolution.

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1 BY MR. HOLMES:
2 Q First question is you said you called
3 somebody at Baker & Botts, right?
4 A Yes.
5 Q Second question was, are you calling to find
6 out why the complaint is not yet online?
7 MR. GRIFFIN: I object to that as attorney
8 client. That's his thought process, his -- as the
9 attorney why and what he called for and what
10 information he was after. Now, whether that's waived
11 or not we'll have to decide.
12 MS. PARKER: I think the ruling was that what
13 Rick can do at the time of the posting Judge Hendren
14 found what Rick can do at the time of the posting was
15 relevant and he ruled that waiver with respect to
16 documents -- there had been a waiver with respect to
17 documents because that was what Rick knew before the
18 posting was at issue. So his conversation -- you're
19 asking him why he called Baker & Botts?
20 MR. HOLMES: That's the only question I've

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got to so far.

22 MS. PARKER: I think that's a strategy issue
23 and that has nothing to do with what he knew at the
24 time he posted the documents so I don't think it would
25 be under any waiver order.

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1 MR. HOLMES: Well, the next question is going
2 to be what did they tell you so we're going to be
3 right back where we started.

4 MS. PEDEN: If I can just go on the record
5 and say my understanding of Judge Hendren's ruling is
6 we brief these issues about what would be work
7 product, what would be attorney-client privilege and
8 Judge Hendren said that there was a subject matter
9 waiver as to privilege and at least at this point
10 anything that Mr. Frenkel received, sent or was copied
11 on through October 18th is subject to the waiver. I
12 don't think his waiver was limited to documents.

13 MS. PARKER: Can we go off the record. I
14 need to talk with Richard for a minute.

15 MR. HOLMES: Yeah, let's take a break.

16 THE VIDEOGRAPHER: We are off the record at
17 4:22 p.m.

18 (Recess.)

19 THE VIDEOGRAPHER: We are back on the record
20 at 4:40 p.m.

21 MR. HOLMES: Mr. Frenkel, before we get back
22 to my questions and your answers the lawyers have had
23 a discussion off the record. The question on the
24 record I believe from me to you why did you call Baker
25 & Botts on the 15th and have that discussion and the

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1 next questions were going to be about what they told
2 you and Mr. Griffin has raised an objection and I'll
3 let you put your position on the record.

4 MR. GRIFFIN: My objection is that's
5 attorney-client privilege and work-product privilege
6 and it would be -- it goes to his employer and client
7 at the time, Cisco and they do not wish to wave that
8 privilege so we would object to him answering the
9 question.

10 MS. PEDEN: And plaintiff's position is that
11 the issue's already been briefed multiple times to
12 Judge Hendren and Judge Hendren has found that there's
13 been a subject matter waiver and the subject matter
14 waiver is anything Mr. Frenkel wrote received or was
15 copied on at least through the dates of October 18,
16 2007, and 1 of the issues that was briefed to Judge
17 Hendren specifically was the need for testimony which
18 was one of the reasons we asked for subject matter
19 waiver so I think our position is we're going to leave

20 Mr. Frenkel's depo open at the end of the day and
21 we'll raise the issue with Judge Hendren and reserve
22 our rights for fees and cost if necessary.

23 MR. McWILLIAMS: Let me add on behalf of
24 Mr. Frenkel although this is Cisco's privilege he does
25 not intend in any form or fashion to waive that

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1 privilege by any of that testimony and I'm instructing
2 him to follow the instructions of Cisco's counsel.

3 MR. HOLMES: Okay. Very good.

4 BY MR. HOLMES:

5 Q All right. Mr. Frenkel, let's see if we can
6 get back to where we were. We were walking through
7 the list of things that you relied upon in drafting
8 your original October 18th article and we had gotten
9 through the two anonymous e-mails and you had
10 explained to me your conversations with Ms. Yen or
11 Ms. Beckwith. According to Exhibit 5 you also
12 reviewed the original complaint bearing the 10/16 it
13 says stamp. For clarity that's the banner at the top
14 that you're referencing. I'm on page 50. Am I right
15 about that?

16 A In the shuffling of the papers I didn't hear
17 your question.

18 Q Let me do it again. We covered the first
19 three things on page 50. Number four is you say you
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14 Q So that's what you heard?
15 A Right, but now I don't remember if it's -- I
16 heard that before the 18th or after.
17 Q Was there only one conversation before the
18 18th postbetween you and either Ms. Beckwith or
19 Ms. Yen about this?
20 A I don't know if there was only one.
21 Q But your best recollection is that they for
22 sure told you they'd been talking to some people and
23 Eric's office had called the clerk?
24 A Yes.
25 Q And you're not sure whether they told you

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1 anything about Mr. Meek in that information?
2 A My recollection as to when I learned that, I
3 just couldn't even tell you right now.
4 Q Let's do this part again. Anything else that
5 you can remember about that conversation with either
6 Yen or Beckwith?
7 A No.
8 Q Nothing else they told you?
9 A I can't remember anything else right now.
10 Q There are a couple things that are not on
11 this list of things you relied on. Let me run through
12 them with you real quickly. You did mention direct
13 advice of Baker & Botts. Did you receive any direct

14 advise of Baker & Botts in preparing the 18th posting?

15 MR. GRIFFIN: Objection.

16 THE WITNESS: Legally --

17 MR. GRIFFIN: Objection. Attorney-client
18 privilege.

19 MR. HOLMES: Back where we were earlier.

20 MR. GRIFFIN: Yeah.

21 THE WITNESS: I guess I can't answer that.

22 MR. McWILLIAMS: I'm instructing you not to
23 answer it.

24 BY MR. HOLMES:

25 Q You didn't review the NEF?

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1 A I do not think I had seen the NEF by the time
2 I made the October 18th posting, the original
3 October 18th posting, right.

4 Q You weren't relying on any information
5 directly from the clerks because you didn't call them?

6 A I did not call the clerks directly, no.

7 Q The only information you have from the clerk
8 is what you described to me which you received through
9 /AOERT Ms. Yen or Ms. Beckwith?

10 A That's correct.

11 Q You weren't relying on any information you
12 received from any of Cisco's Texas local counsel

13 outside of the Baker & Botts information?

14 MR. GRIFFIN: Objection. That's
15 attorney-client privilege also.

16 MR. McWILLIAMS: Directing the witness not to
17 answer based upon that information.

18 MR. HOLMES: Okay, guys.

19 BY MR. HOLMES:

20 Q You weren't relying on any information you
21 got from either Eric or Johnny, you didn't talk to
22 them?

23 A That's right.

24 Q Without revealing any contents of any
25 communications, based on all the information you had

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1 received when you're about to prepare your
2 October 18th post, did you make a phone call to any
3 Texas lawyers to confirm any of these facts or --

4 A I did not personally make a phone call, no.
5 wait. Wait a second. Repeat your question.

6 Q You're preparing your post of the 18th --

7 A when I was preparing the post of the 18th
8 immediately before preparing that post I did not make
9 any phone calls to any Texas lawyers, that's correct.

10 Q what time are you laying out when you say
11 immediately before?

12 A On the 18th itself after learning about this
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12 Botts?

13 A They may have but I don't remember. I
14 remember that they were -- I don't remember who they
15 told me they called.

16 Q Do you know if anybody at Cisco contacted any
17 of Cisco's lawyers in the marshal area to ask about
18 this filing date situation?

19 MR. GRIFFIN: I would object. Again, that's
20 attorney-client privilege.

21 MR. HOLMES: I'm not asking what anybody said
22 I'm just asking --

23 MR. GRIFFIN: You asked what they called him
24 for and that is work product and attorney client. It
25 would indicate what some of the response, some of the

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1 information would have been.

2 MR. HOLMES: I don't think so but if you guys
3 are going to draw that broad a line around this, I
4 understand but I'm just telling you we're going to be
5 right back out here to finish this because we're not
6 going to get very much further.

7 MR. GRIFFIN: Well, if these are Cisco lawyers
8 that he was calling to get advice for Cisco about this
9 lawsuit or any other lawsuit, any other legal advice
10 we object as attorney-client privilege and work
11 product.

12 MR. HOLMES: Are you going to tell him not to
13 answer those questions.

14 MR. MCWILLIAMS: Based upon Cisco's objection
15 as to privilege, I'm instructing him not to answer.

16 MR. HOLMES: Okay.

17 BY MR. HOLMES:

18 Q Did either Ms. Yen or Ms. Beckwith tell you
19 that there had been a conspiracy between Eric and
20 Johnny and the clerk of the court?

21 A No.

22 Q Did any of them tell you that the clerk was
23 conspiring with them to manufacture subject matter
24 jurisdiction?

25 A I don't remember them using those exact

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1 words. Those were my words if those were my words.
2 It's wittingly or unwittingly conspiring with a
3 non-practicing entity.

4 Q Nobody told you that, though?

5 A No that was my opinion.

6 Q You drew that opinion based on the facts that
7 you saw?

8 A That was my opinion.

9 Q But no one reported that to you as a fact,
10 did they?