

EXHIBIT “C”

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

REPORTER'S TRANSCRIPT

JOHN WARD, JR.)
)
Plaintiff,)
)
vs) No 08-4022
)
CISCO SYSTEMS, INC. AND)
RICK FRENKEL,)
)
Defendants.)

The above-entitled matter came on for telephone hearing on Wednesday, November 4, 2009 at 11:00 a.m. before the HONORABLE ERIN L. SETSER, District Judge.

APPEARANCES

FOR THE PLAINTIFF: PATRICIA L. PEDEN
NICHOLAS PATTON
FOR THE DEFENDANT: CRYSTAL PARKER
RICHARD GRIFFIN

1 MS. PARKER: -- and so it looks like counsel
2 -- you know, it looks like we need to talk with
3 plaintiff's counsel to figure out what that document
4 is. We don't have it so it's hard for me to tell you
5 which one it is.
6 THE COURT: Okay. Well, this is part of the
7 problem. Even before today's conference call, after
8 you saw that the Court ordered the production of the
9 wrong document, you guys should be talking yourselves
10 to figure it out. It shouldn't take getting on the
11 phone with the Court to figure that out. If you --
12 MS. PARKER: Your Honor, I -- go ahead.
13 THE COURT: If you saw that that was the
14 wrong document, make a phone call. You all try to
15 cooperate in this without Court involvement. Make a
16 phone --
17 MS. PARKER: Your Honor, I --
18 THE COURT: -- and say no, this is really the
19 one we need and decide whether there's a dispute about
20 it, okay?
21 MS. PARKER: Your Honor, we would absolutely
22 have done that. We do have an email saying that
23 plaintiff agrees to produce 2, 6, and 13 on the
24 privilege log and not 14. And I had no idea that 14
25 wasn't the one that was at dispute or I absolutely

1 would have called counsel to work it out. And I --
2 THE COURT: Okay. Okay. So, what -- have 2,
3 6, and 13 been provided?
4 MS. PEDEN: I don't believe so, Your Honor.
5 And I'm looking at Ms. Parker's emails, and I think the
6 confusion is is that we asked them to produce the
7 document number 14, and they're referring to their
8 document.
9 THE COURT: Okay.
10 MS. PEDEN: So there's no email that tracks
11 these. There's only four documents on the privilege
12 log, and we produced three of them. And so I think
13 what we ought to do is have Cisco look at the three
14 that we produced, identify the one that's missing, let
15 us know, and we'll give it to the Court.
16 THE COURT: Okay.
17 MR. GRIFFIN: Well, Your Honor, they know
18 what they've produced. If they'll send the one they
19 haven't produced to the Court and not play shell games
20 with us, then we'll know what we're talking about.
21 THE COURT: Well -- I mean, I can't know what
22 you're talking about. You guys do so --
23 MS. PEDEN: (Indiscernible) identify our
24 numbers with Cisco so that -- so that we know exactly
25 what it is they think we haven't produced.

1 THE COURT: Okay. What I'm going to do then
2 is deny that part of the motion to compel, ask you all
3 to confer, figure out if there is a document left that
4 has not been produced. And if you cannot agree on that
5 one document, then you can file another motion to
6 compel. But at this point, I'm going to deny that
7 motion to compel. And I urge you all again to confer,
8 work in good faith on this. Now, if there's a
9 legitimate claim to privilege, then I can understand
10 there's a dispute and you can file another motion to
11 compel regarding that, okay?
12 MS. PARKER: Okay. Thank you.
13 THE COURT: Okay. Now, let's move on -- give
14 me just a second here.
15 Okay. The next set of documents that I have
16 on my list are -- I've sort of grouped them together.
17 It's documents relating to the plaintiff's allegation
18 that Frenkel's statements were purposely calculated to
19 cause damage to the plaintiff's reputation and
20 business, to maximize the dissemination of statements,
21 acted with knowledge that the statements were false or
22 were negligent in failing to determine the truth of the
23 statements, acted with malice. Sort of -- those seem
24 to be sort of all in the same category. As I
25 understand it, the plaintiff is asserting that these

1 THE COURT: But then I thought later on the
 2 court granted a motion in limine saying that Albritton
 3 couldn't present damages as to his reputation because
 4 he didn't provide discovery on the issue.
 5 MS. PEDEN: Because he didn't disclose them
 6 in his disclosures. In truth he -- in truth, Cisco
 7 took six or seven depositions of reputational
 8 witnesses. And we argued (indiscernible) that Cisco
 9 did have discovery. And, in fact, that, you know --
 10 they did. They took discovery of Mr. Albritton's
 11 reputational witnesses. The problem was a violation of
 12 a disclosure.
 13 THE COURT: Well, I just think this is sort
 14 of a tough one. I'm inclined to deny the motion to
 15 compel if, you know, the plaintiff is saying I'm not
 16 going to present any evidence as to lost income,
 17 lost --
 18 MS. PEDEN: We'll stipulate to that, Your
 19 Honor.
 20 MALE: Professional reputation?
 21 MS. PEDEN: That we are not seeking lost
 22 profit damages in this case.
 23 MS. PARKER: So what about professional
 24 reputation?
 25 MS. PEDEN: We're not seeking damages for

1 been taken in this case, correct?
 2 MS. PEDEN: Yes.
 3 THE COURT: And did Cisco's attorneys get
 4 into the issue of how he intended to prove this damage
 5 to his professional reputation?
 6 MS. PEDEN: Yes.
 7 THE COURT: And maybe the -- Cisco's
 8 attorneys probably need to address this, what were his
 9 responses? How's he going to testify at trial that his
 10 professional reputation has been damaged?
 11 MS. PARKER: Your Honor, he had a few things
 12 in his testimony about that issue. One of the major
 13 things that he discussed in his deposition was that he
 14 had lost potential clients. Although it was through
 15 multiple layers of hearsay, he testified that he had
 16 been told that individuals had spoken with prospective
 17 clients who said I won't hire him because of the
 18 articles. And so we think we're entitled to discover
 19 who those clients are, whether they ever hired Ward,
 20 whether they couldn't hire Ward because of conflicts of
 21 interest.
 22 MR. GRIFFIN: Whether he was too busy.
 23 MS. PARKER: Yeah, whether he was too busy to
 24 take those cases. Another thing that's different in
 25 this case about Ward that was not present in the

1 that.
 2 THE COURT: For professional reputation?
 3 MS. PEDEN: Right. I mean, obviously
 4 Mr. Ward was attacked in a -- by opposing counsel in a
 5 litigation. I mean, the facts are what they are.
 6 There's going to be some factual information about this
 7 happening in the course of a litigation, but --
 8 THE COURT: So -- wait a minute, did you say
 9 you are not seeking damages for professional -- injury
 10 to professional reputation?
 11 MS. PEDEN: We are not seeking damages for
 12 his -- for injury -- I don't know how to answer the
 13 Court's question because Mr. Ward's reputation has been
 14 damaged.
 15 THE COURT: So you are seeking damages for
 16 his professional reputation?
 17 MS. PEDEN: We're seeking damages to his
 18 reputation, him as a person. He as a person happens to
 19 be a lawyer. What we are not seeking, and I think what
 20 was at issue in the Albritton case and in the cases we
 21 cited is we're not seeking any damages to his
 22 reputation for lost profits. We are not going to go in
 23 front of the jury and tell them that Mr. Ward lost
 24 business because of these articles.
 25 THE COURT: Okay. Mr. Ward's deposition has

1 Albritton case is Ward has made a claim for outrage
 2 And to support that claim, he has to show that he
 3 suffered mental anguish that was so severe a reasonable
 4 person could not be expected to endure it. And that
 5 kind of claim, I think is relevant to show how much he
 6 worked, if his income, you know, increased by fifty
 7 percent, you know, the year after the articles, that's
 8 probative evidence of whether he was suffering this
 9 terrible mental anguish. Not to mention whether it
 10 actually damaged his reputation in any way.
 11 MS. PEDEN: Your Honor, I have in front of me
 12 Mr. Ward's deposition.
 13 THE COURT: Okay.
 14 MS. PEDEN: At page seven, Cisco asks him,
 15 "Are you claiming damages to T. John Ward, Jr., P.C.
 16 indirectly in this case?" His business. He answered,
 17 "No." At page eight they ask question: "Since October
 18 of 2007, have your paychecks decreased?" Answer "No.
 19 I made more in 2008 than I did in 2007."
 20 THE COURT: Okay. I think that resolves the
 21 income issue. So I'm going to deny the motion to
 22 compel with regard to the tax records, income
 23 statements. As to the client list, in his deposition,
 24 did Cisco ask him when he said that he lost clients,
 25 some people said they wouldn't hire him, did you ask

1 him to identify the potential clients that he lost?
 2 MS PARKER Yes, Your Honor, and he -- with
 3 respect to some he said he didn't know, and with
 4 respect to one he said he would not identify that
 5 person
 6 MS PEDEN So, Your Honor, at page nine of
 7 Mr. Ward's deposition, the question was, "Do you think
 8 your practice has suffered since October 17th and 18th
 9 of 2007?" And then the follow up question, he says,
 10 "Well" -- Ward says, "Well, what do you mean by
 11 suffered?" The follow up question is, "Well, are you
 12 sitting in your office twiddling your thumbs waiting
 13 for the next case to come in?" The answer is, "No, I
 14 stay very busy."
 15 MS PARKER Your Honor, that --
 16 MS PEDEN (Indiscernible) --
 17 MS PARKER (Indiscernible) --
 18 MS PEDEN Ms. Parker, if I may --
 19 THE COURT Please speak one at a time.
 20 MS PEDEN So, Cisco asked a series of
 21 questions and have through this case asking people
 22 whether or not Mr. Ward's business -- whether he's lost
 23 clients. And in response to Cisco's question, some
 24 witnesses have answered truthfully that that's likely
 25 the case. That's a different issue. We have never put

1 tell you they're not hiring you
 2 THE COURT Okay
 3 MS PEDEN There's no basis to offer that
 4 testimony
 5 THE COURT And then are you going to offer
 6 other witnesses to testify on that issue?
 7 MS PEDEN It's hard to say at this
 8 juncture, but I believe that witnesses will testify
 9 that certain people who heard about these articles or
 10 read the articles thought less of Mr. Ward which
 11 translated into not wanting to consider hiring him.
 12 But to be clear, that's not a damages issue. That goes
 13 to whether or not people believed that these articles
 14 were accusation of criminal or unethical behavior. It
 15 goes to the defamatory contents of the articles, not to
 16 damages
 17 THE COURT Well, I don't know that you can
 18 separate it. The jury's not going to be instructed
 19 that it only goes to that issue. I think if a jury
 20 hears that certain people heard about these posts and
 21 thought less of him and didn't want to hire him,
 22 they're certainly going to think that goes to damages.
 23 Do you not agree?
 24 MS PEDEN I -- well, no, because I think
 25 that the way to address that is in jury instructions to

1 that at issue. Those were Cisco's questions trying to
 2 get discovery for Cisco's case to establish that
 3 Mr. Ward hasn't lost clients
 4 THE COURT So, you don't anticipate that
 5 Mr. Ward is going to get on the stand and say I lost
 6 clients? Is that what you're --
 7 MS PEDEN I think -- well, I think that
 8 there are -- I think there is testimony, and certainly
 9 testimony that came out in the Albritton trial from
 10 other witnesses that people who had heard about these
 11 articles thought less of Mr. Ward. So I think that
 12 there may be some testimony about his business, you
 13 know, about whether or not --
 14 THE COURT I'm asking you what he's --
 15 what's within the realms of his testimony.
 16 MS PARKER Your Honor, if I may --
 17 THE COURT Well let her answer that please.
 18 MS PARKER I'm sorry, I didn't hear the
 19 question.
 20 THE COURT I'm talking about what Mr. Ward
 21 is going to testify to. Is he going to testify that he
 22 lost clients?
 23 MS PEDEN No, what Mr. Ward will expressly
 24 testify to is it's impossible for him to know whether
 25 or not he lost clients. People don't call you up and

1 tell the jurors that Mr. Ward is not making a claim for
 2 lost profit damages
 3 THE COURT Well, I just think the scope of
 4 discovery is far broader than that. If there's going
 5 to be testimony offered that certain people who heard
 6 about these posts thought less of him and would not
 7 hire him, I think the defendant's entitled to know who
 8 those people are. That's a vague statement that Cisco
 9 cannot defend.
 10 MS PEDEN Well, and the truth is, Your
 11 Honor, that they know who has hired Mr. Ward.
 12 THE COURT I'm not talking about who has
 13 hired. You told me there's going to be testimony that
 14 certain people heard about these posts, thought less of
 15 him and would not hire him. Do you know who those
 16 people are?
 17 MS PEDEN Yes, and so does Cisco
 18 THE COURT Cisco, do you agree?
 19 MS PARKER No
 20 MR. GRIFFIN No, Your Honor. We have no
 21 idea. And we don't know who's hired him. We know --
 22 THE COURT Well, I'm not going to get into
 23 who's hired him. I think what's at issue is who didn't
 24 hire him because of these posts. So I'm not going to
 25 require the plaintiff to provide his financial