

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

JOHN WARD, JR.

§

§

§

v.

§

C.A. NO. 08-4022

§

JURY TRIAL DEMANDED

§

CISCO SYSTEMS, INC AND
 RICK FRENKEL

**SUBJECT TO HIS MOTION TO DISMISS FOR LACK OF PERSONAL
 JURISDICTION - RICK FRENKEL'S RESPONSE TO PLAINTIFF'S MOTION FOR
 DISMISSAL WITHOUT PREJUDICE**

TO THE HONORABLE COURT:

Subject to his motion to dismiss for lack of personal jurisdiction, Rick Frenkel ("Frenkel") files this response to Plaintiff John Ward, Jr.'s ("Ward") motion to dismiss without prejudice and would show the court as follows:

I. INTRODUCTION

Frenkel seeks his attorneys fees, costs and expenses expended in responding to this lawsuit. This is the second time that Ward has sued Frenkel and the second time he has nonsuited after Frenkel has been put to considerable expense in responding to the lawsuits. As the court is aware, Ward originally brought this identical case in a Texas state court before nonsuited and filing the instant action. There was no basis for suing Frenkel in Arkansas, a point that Ward now does not contest. Under these circumstances, Frenkel should be compensated. He would agree to forego his fees and expenses if Plaintiff agrees that the dismissal is with prejudice.

II. THE COURT SHOULD AWARD FRENKEL HIS COSTS, EXPENSES AND ATTORNEYS FEES

Frenkel filed a motion to dismiss for lack of personal jurisdiction (PACER Doc. # 12-13) and an answer subject thereto (PACER Doc. # 11). Thus, Ward's voluntary dismissal motion is governed by Rule 41(a)(2) which provides that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." The general rule in this Circuit is that "if dismissal without prejudice is permitted, the permission should ordinarily be properly conditioned in the areas of costs, expenses, attorney's fees and the like." *Kennedy v. State Farm Mutual Automobile Insurance Co.*, 46 F.R.D. 12, 14 (E.D. Ark. 1969).

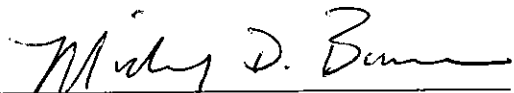
The day that the Texas state court suit was nonsuited, this action was filed in Arkansas, even though Ward's pleading suggests that the focus of the suit centers around activities in Texas and California, not Arkansas. In any event, Frenkel's attorneys prepared and filed a motion to dismiss for lack of personal jurisdiction (which Plaintiff has not contested) and an answer. Those pleadings will be of no value to Frenkel should he be sued for a third time as Ward continues to shop for a forum of his liking. Frenkel should therefore be compensated and his attorneys will submit affidavits regarding their fair and reasonable charges for services relating to this case at the direction of the court. See *Belle-Midwest, Inc. v. Missouri Prop. & Cas. Ins. Guar. Ass'n*, 56 F.3d 977, 978-79 (8th Cir. 1995) (stating that [i]n granting a motion for voluntary dismissal, district courts typically impose the condition that plaintiff pay the defendant the reasonable attorney's fees incurred in defending the suit" and noting that, "this Court has held that under certain circumstances, it is an abuse of discretion for a district court not to condition a voluntary dismissal upon plaintiff's payment of costs and attorney's fees if the case is refiled.")

Frenkel, of course, does not wish to be sued again, and if Ward will agree to dismissal with prejudice, then Frenkel will waive his claims for costs, expenses and fees.

III. CONCLUSION

Frenkel requests that the court condition the voluntary dismissal without prejudice upon the payment by Plaintiff to Frenkel of costs, expenses and fees reasonable and necessarily incurred in responding to this lawsuit or, in the alternative, dismiss the claims against Frenkel with prejudice, and for such further relief at law or in equity to which he might be entitled.

Respectfully submitted,

By: 

Michael D. Barnes
WRIGHT, LINDSEY & JENNINGS, LLP
Arkansas Bar No.: 88071
200 West Capitol Avenue, Suite 2300
Little Rock, Arkansas 772201-3699
(501) 212-1228
(501) 376-9442—Fax
Email: mbarnes@wlj.com

and

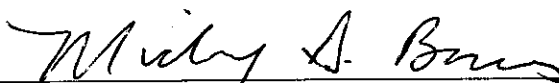
George L. McWilliams
Arkansas Bar No: 68078
GEORGE L. MCWILLIAMS, P.C.
406 Walnut
P.O. Box 58
Texarkana, Texas 75504-0058
(903) 277-0098
(870) 773-2967—Fax
Email: glmlawoffice@gmail.com

ATTORNEYS FOR DEFENDANT
RICK FRENKEL

CERTIFICATE OF SERVICE

This is to certify that on this 25th day of April, 2008, a true and correct copy of the foregoing was served electronically, upon:

- Richard E. Griffin – rgriffin@jw.com
- Nicholas H. Patton – nickpatton@texarkanalaw.com
- Patricia L. Peden – ppeden@pedenlawfirm.com



Michael D. Barnes