

# EX. B

JILLIAN POWELL, MARCH 27, 2009

Page 1

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

JOHN WARD, JR., \*  
Plaintiff, \*  
VS. \* CIVIL ACTION NO.:  
CISCO SYSTEMS, INC. AND RICK \*  
FRENKEL, \*  
Defendants. \* 08-4022

\*\*\*\*\*

ORAL VIDEOTAPED DEPOSITION OF  
JILLIAN POWELL

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ANSWERS AND DEPOSITION OF JILLIAN POWELL, produced as  
a witness at the instance of the Plaintiff, taken in the  
above-styled and -numbered cause on the 27th day of March,  
2009, A.D., beginning at 10:38 a.m., before Kelly Hassell,  
a Certified Shorthand Reporter in and for the State of  
Texas, in the offices of Baker Botts, L.L.P., located at  
2001 Ross Avenue, Suite 1100, Dallas, Texas, in accordance  
with the Federal Rules of Civil Procedure and the agreement  
hereinafter set forth.

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JILLIAN POWELL, MARCH 27, 2009

Page 13

1 A An hour.

2 Q And where did that meeting occur?

3 A In a conference room at Baker Botts.

4 Q So it was here?

5 A Yes.

6 Q Was Mr. Babcock present at that meeting?

7 A No.

8 Q Or Ms. Parker?

9 A Yes.

10 Q Can you tell me what you discussed at that  
11 meeting, please.

12 A The procedures for the deposition.

13 Q Did you discuss any substantive questions I might  
14 ask you?

15 A Yes.

16 Q And what were those?

17 MR. CHEAVENS: I'm going to instruct the  
18 witness not to answer. That's privileged.

19 MS. PEDEN: With Mr. -- with Ms. Parker  
20 present, it's privileged?

21 MR. CHEAVENS: We have a joint client.

22 MS. PEDEN: Do you have a joint defense  
23 agreement?

24 MR. CHEAVENS: Not in writing.

25 MS. PEDEN: Do you have one that's an

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JILLIAN POWELL, MARCH 27, 2009

Page 14

1 understanding?

2 MR. CHEAVENS: Yes. Sure. The substance of  
3 those communications are privileged and I'll instruct the  
4 witness not to answer, so --

5 MS. PEDEN: Okay. So what privileges are  
6 you claiming, Mr. Cheavens?

7 MR. CHEAVENS: Attorney/client privilege and  
8 work product privilege.

9 MS. PEDEN: How long has this joint defense  
10 agreement been in existence?

11 MR. CHEAVENS: Since I first learned about  
12 this lawsuit in the Albritton case.

13 MS. PEDEN: When was that?

14 MR. CHEAVENS: I don't know. I think when  
15 we were first served with a document subpoena in the  
16 Albritton case last summer.

17 MS. PEDEN: Okay. I think we might need to  
18 take a recess and call chambers. Let me just say on the  
19 record that I think having opposing counsel in a witness  
20 prep session right before the witness is to be deposed  
21 about her testimony waives attorney/client privilege.  
22 Cisco's request for admissions filed in this case  
23 identifies Baker Botts as a third party. They refuse to  
24 provide discovery that's in Baker Botts's possession  
25 because they're a third party. I just think it's an

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JILLIAN POWELL, MARCH 27, 2009

Page 93

1 Q What do you mean by "not in that detail"?

2 A Well, all I remember is she said a civil  
3 complaint had been filed.

4 Q Did Ms. LaFitte tell you that Eric Albritton  
5 signed a civil cover sheet stating that the complaint had  
6 been filed on October 15th?

7 A Not in that much detail, no.

8 Q Did you tell anyone that Eric Albritton signed a  
9 civil cover sheet stating that the ESN complaint had been  
10 filed on October 15th of 2007?

11 A I don't remember.

12 Q Is there anything you can look at to refresh your  
13 recollection?

14 A I don't know.

15 Q You said that you discussed the filing of the ESN  
16 complaint with Ms. LaFitte, right?

17 A Yes.

18 Q Did you understand that the complaint in the ESN  
19 case had been filed after midnight?

20 A It had -- it had been filed before midnight. It  
21 had been filed before midnight is what she told me, I  
22 believe. I don't remember exactly.

23 Q Is it possible that Ms. LaFitte told you that  
24 ESN's counsel had logged on to the system and started  
25 uploading documents before midnight, but did not officially

JILLIAN POWELL, MARCH 27, 2009

Page 94

1 file until after midnight?

2 MR. BABCOCK: Object to the form of the  
3 question.

4 A Can you repeat the question?

5 (Requested portion read.)

6 A I don't remember exactly.

7 Q (BY MS. PEDEN) You don't remember Ms. LaFitte  
8 using the words "officially filed after midnight"?

9 A No.

10 Q Did Ms. LaFitte tell you that the ESN complaint  
11 had been officially filed before midnight?

12 A Ms. LaFitte said that it had been filed and  
13 stamped before midnight. No, I -- I don't remember  
14 exactly. I don't remember exactly.

15 MS. PEDEN: Counsel, do you object to me  
16 showing the witness her E-mail that -- that records her  
17 recollection of her testimony -- or her conversation with  
18 Ms. LaFitte?

19 MR. BABCOCK: If they're privileged, I do,  
20 if you're asking me.

21 MS. PEDEN: It's designated as privileged,  
22 although it's --

23 MR. CHEAVENS: Well, this was the document  
24 produced in the Albritton case pursuant to the stipulation  
25 there, including the protective order?

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JILLIAN POWELL, MARCH 27, 2009

Page 95

1 MS. PEDEN: Yes, it's the E-mail that  
2 Ms. Powell wrote that records the factual information that  
3 she learned from Ms. LaFitte.

4 MR. BABCOCK: If we -- if we designated it  
5 as privileged in the Albritton case, then yes, I do object.

6 MS. PEDEN: Mr. Cheavens?

7 MR. CHEAVENS: This is Cisco's privilege.  
8 You've heard what he said.

9 MS. PEDEN: Well, there's a work product  
10 privilege out there too, which I think --

11 MR. CHEAVENS: Okay. Pursuant to the  
12 instructions of our counsel -- our client, we invoke the  
13 privilege. I think the document you're talking about was  
14 produced under a stipulation and it is pursuant to a  
15 protective order in the other case.

16 MS. PEDEN: Right. I understand your  
17 position. My -- my position is that, you know --

18 MR. CHEAVENS: And you want to violate the  
19 protective order?

20 MS. PEDEN: No. You know, I didn't just  
21 hand her the document. I'm conferring with counsel about  
22 the document. I think the document contains only factual  
23 information that she learned from a third party. It  
24 memorializes a conversation with a third party. I'm not  
25 sure that it was -- that it's properly claimed as

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JILLIAN POWELL, MARCH 27, 2009

Page 96

1 privileged and the witness is having a hard time  
2 recollecting the conversation and I think that document  
3 would help her refresh her recollection and move things  
4 along.

5 MR. CHEAVENS: The problem is it's under the  
6 protective order.

7 Q (BY MS. PEDEN) Ms. Powell, when you talked to  
8 Ms. LaFitte, did you discuss the fact that ESN's attorneys  
9 had contacted the clerk's office?

10 A She mentioned that they had contacted the clerk's  
11 office.

12 Q Did she tell you that ESN's counsel contacted the  
13 clerk's office to explain that they had actually filed the  
14 complaint after midnight?

15 A She said they had completed the filing after  
16 midnight.

17 Q And did you understand that ESN's counsel had  
18 called the clerk's office to ask about the docket entry?

19 A I can't remember.

20 Q But you understood that ESN's counsel had called  
21 to ask the court clerk about the same filing that you were  
22 calling to ask the court clerk about; is that right?

23 A Yes.

24 Q Did Ms. LaFitte tell you who called the clerk's  
25 office from ESN's side?