

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

**JOHN WARD, JR.**

**Plaintiff**

**VS.**

**CISCO SYSTEMS, INC.**

**Defendant**

**CASE NO. 08-4022**

**JULY 29, 2009**

**12:20 P.M.**

**TELEPHONE CONFERENCE  
BEFORE THE HONORABLE JIMM LARRY HENDREN  
U. S. DISTRICT JUDGE  
FAYETTEVILLE, ARKANSAS**

**APPEARANCES BY TELEPHONE**

**MR. NICK PATTON**  
Patton, Tidwell, & Schroeder  
P. O. Box 5398  
Texarkana, TX 75505

**FOR THE PLAINTIFF**

**MS. PATRICIA PEDEN**  
Attorney at Law  
610 16<sup>th</sup> Street, Suite 400  
Oakland, CA 94612

**FOR THE PLAINTIFF**

**MR. GEOFFREY CULBERTSON**  
Attorney at Law  
P. O. Box 5398  
Texarkana, TX 75505

**FOR THE PLAINTIFF**

**MR. CHARLES L. BABCOCK**  
**MR. RICHARD E. GRIFFIN**  
**MS. CRYSTAL J. PARKER**  
Jackson & Walker  
1401 McKinney, Suite 1900  
Houston, TX 77010

**FOR THE DEFENDANT**

*Prepared by:*  
**THERESA SAWYER**  
Certified Court Reporter  
35 East Mountain Street, Fifth Floor  
Fayetteville, AR 72701  
(479-444-7876)

*(Proceedings recorded by Stenomask; transcript produced from dictation)*

1 JULY 29, 2009

2  
3 THE COURT: I apologize for this problem here. We had  
4 a little difficulty getting folks together, but I had wanted to  
5 have a conference call in Ward versus Cisco, and I understand  
6 that now at this moment, we have Nick Patton, Patricia Peden,  
7 and Geoff Culberton on the line for Ward. Is that correct, Mr.  
8 Patton?

9 MR. PATTON: That is correct, Judge.

10 THE COURT: All right. And I understand that for the  
11 defendant Cisco, we have on the line Mr. Chip Babcock, and I'm  
12 wondering if Crystal Parker and Richard Griffin are also there.  
13 Mr. Babcock, are you there?

14 MR. BABCOCK: I'm here, and Ms. Parker and Mr. Griffin  
15 are sitting right next to me.

16 THE COURT: Okay. Well, good afternoon. Thank you  
17 for making yourself available on such short notice, but I called  
18 because I missed you folks. Seems like I haven't talked to you  
19 in awhile. And, of course, I'm joking about that. But I have  
20 received a letter from Judge Bryant under date of July the 28<sup>th</sup>  
21 of 2009, copied to, I believe, all of you folks, indicating  
22 there's some effort underway to combine Ward versus Cisco with  
23 Albritton versus Cisco for a joint mediation in front of Judge  
24 Faulkner on August 28, and the indications in that letter are  
25 that that is agreeable, and was agreed to by both sides in Ward

1 versus Cisco.

2           Now, as you know, we have been -- and by the way, I  
3 have with me Courtney Gilbert, who is my lawyer helping me with  
4 this case. But you were kind enough, pursuant to my order of  
5 July the 8<sup>th</sup> that was filed July the 9<sup>th</sup>, Document Number 81,  
6 Cisco did submit the requested documents for in camera review,  
7 and we have got our hip boots on and trying to wade through it  
8 because it's rather extensive.

9           As you know, too, we have a trial date that is  
10 approaching, I believe it's August the 31<sup>st</sup>, and that's prob-  
11 lematical for a number of reasons, not the least of which, I  
12 suppose, is what might happen with this mediation. So given, if  
13 my understanding of that is correct, it raises a question in my  
14 mind.

15           I recall from previous discussions that the status,  
16 shall we put it, if I may use it -- describe it that way, the  
17 status of discovery is not the same, to my understanding, in  
18 Albritton versus Cisco as in Ward versus Cisco. One of the  
19 reasons, I suppose, is because we have not completed this in  
20 camera review. And so I guess my question is, what effect does  
21 this decision, joint decision by these parties to go this  
22 mediation, combining the two cases for that purpose, what affect  
23 does that have on the need for us to expedite our review, or is  
24 our review necessary.

25           It would seem to me that in order for a combined

1 mediation to be useful and thorough, that the cases ought to be  
2 on substantially the same footing with respect to discovery.  
3 Now, I probably don't understand this as well as you do, so I've  
4 called to just inquire about that. Obviously, if the mediation  
5 can go forward without us having to complete this work, because  
6 it is a rather arduous task and one we're trying to look at  
7 carefully, I would prefer that. We do have other things we can  
8 do. So I wanted to get your thoughts on that.

9           Let me inquire, first of all, Mr. Patton for the  
10 plaintiff, do I have an understanding of what is going to  
11 happen? Is that correct, on August the 28<sup>th</sup>, that the parties  
12 have agreed to go to mediation, with both cases being under  
13 discussion at that mediation on August 28?

14           MR. PATTON: Judge, we discussed that, talked about  
15 doing it together, and then last week a situation has arisen.  
16 As you know, Judge, Ms. Peden and I have two clients, and it's  
17 difficult for me to talk about this, Judge, without revealing  
18 attorney-client privileged matters, so I'll try to stay as far  
19 away from that as I can. But I think it is safe to say that the  
20 situation as it exists at this minute is that the cases should  
21 not be mediated together, that it would be detrimental, we feel,  
22 to the chances of the cases settling.

23           And what has happened with the emails back and forth,  
24 Judge, is things have kind of been crossing each other, Bill  
25 with Crystal, justifiably assuming that we were going under the

1 old schedule. Judge Faulkner apparently did not know that there  
2 had been a change in thought processes, maybe is the way to put  
3 it. So what we would like is to go ahead and mediate before  
4 Judge Bryant whenever you feel that, Judge, it's okay.

5           You are correct that the Albritton case basically is  
6 -- I would say is completely through discovery, and I'd say  
7 very, very close, is it not, Patty, that all the motions have  
8 been attended to. We're nowhere close to that in the Ward case,  
9 Judge, and I -- you had mentioned, made mention of the fact of  
10 them being on the same tracks. What has been done, they are not  
11 on the same tracks. Albritton basically is ready for trial;  
12 Ward is not.

13           THE COURT: Okay. Well, that, as you know, is a  
14 little different than what Bryant said. Bryant's letter said  
15 that that was going to be done, and that's why I made this call.  
16 It seemed a little curious, given the different postures of the  
17 cases, and I wanted to check that out first of all.

18           Well, let me turn to Mr. Babcock, or whoever, on the  
19 defense side. Mr. Babcock, what say you about it?

20           MR. BABCOCK: Well, the first I heard that there was  
21 a change of position in mediating them both together was  
22 sometime late yesterday. Be that as it may, you know, we've  
23 already had one mediation of both cases before Judge Faulkner  
24 many, many months ago that was not successful.

25           And the only issues I raised for the Court are

1 practical ones, and that is that I'm not sure that Cisco would  
2 settle one of the cases without settling the other, and the  
3 second practical problem is, they are, of course, in California,  
4 and we've been having a lot of trouble getting all of the  
5 lawyers, Ms. Peden, who herself is from California, Mr. Patton,  
6 myself, Mr. Griffin, George McWilliams, who is in the Albritton  
7 case on behalf of Mr. Frenkel, and Judge Faulkner together in  
8 one place at one time. And we've been talking for over six  
9 months -- over six weeks -- about a date for this mediation, and  
10 finally got August 28<sup>th</sup> agreed to in both cases. You know,  
11 obviously, we -- nobody can make -- force anybody to mediate.

12           And so if Mr. Ward, for whatever reasons that Nick  
13 can't disclose, doesn't want to mediate, then with the schedule  
14 we've agreed to, then I'm not sure there's a whole lot we can do  
15 about it other than, you know, we're doubling the cost, and in  
16 my view, we're making it less likely the cases will settle  
17 rather than more likely.

18           THE COURT: Well, again, I know nothing about the  
19 notion about the combined mediation other than what was provided  
20 to me via Judge Bryant's letter. He had said, looking at his  
21 letter, that he had been attempting to set the matter for a  
22 settlement conference and had had difficulties getting dates  
23 that were agreeable to all concerned. And then he said he had  
24 been contacted by Judge Faulkner, and Judge Faulkner said that  
25 apparently the parties had made this agreement to combine them

1 and mediate together, and that's really all I know.

2           As I mentioned at the outset of this conversation,  
3 when I saw that, it raised an immediate question in my mind as  
4 to what effect, if any, would that have on our efforts to review  
5 these in camera matters, and also to address our trial date,  
6 which I agree, from what I can see here and what we see in these  
7 papers, that this case it not going to be ready to try on August  
8 the 31<sup>st</sup>. So I think that's probably something I need to  
9 mention.

10           Do you agree with that, Mr. Babcock? If it doesn't  
11 settle, do you really -- do you think it's going to be ready to  
12 go to trial on the 31<sup>st</sup> of August?

13           MR. BABCOCK: Judge, we're obviously going to abide by  
14 whatever you do, but I think Mr. Patton and I agreed several  
15 weeks ago that the schedule should be modified, and I believe we  
16 filed a motion to that --

17           THE COURT: Yeah, there's a Motion to Continue, but,  
18 you know, it's just almost painful for me to consider that. I  
19 never thought I'd hear myself suggesting to you that perhaps  
20 your Motion to Continuance is good and ought to be granted.

21           MR. BABCOCK: Yeah. Our position, I think, is, number  
22 one, I'm willing to abide by the agreement Mr. Patton and I  
23 made, moving the dates. Having said that, my view is a little  
24 different than Mr. Patton's, and that is that both the Albritton  
25 and the Ward case involved the same publications. Complete

1 depositions were taken in the Albritton case. I have offered to  
2 have them made applicable to the Ward case. That offer has not  
3 been accepted. And, frankly, I could try the case on the 31<sup>st</sup> if  
4 the Court wanted me to. But I'm willing -- whatever everybody  
5 wants to do is fine with me.

6 THE COURT: Mr. Patton, any further comments?

7 MR. PATTON: No, Judge, other than the fact that we've  
8 been discussing back and forth for months now depositions and  
9 dates, and we currently are doing that. In fact, there have  
10 been some email responses in just the last few days.

11 THE COURT: All right. Well, it seems to me that when  
12 it's made clear to Judge Bryant that apparently there is no  
13 agreement to go jointly before Judge Faulkner, he's probably  
14 going to want to be back in touch with you to see about going  
15 ahead and scheduling a settlement conference in this case alone.

16 Now, am I to understand from what you've said, Mr.  
17 Babcock, that if in fact there is no agreement to mediate them  
18 jointly before Judge Faulkner, that you nonetheless will go  
19 forward with the mediation in the Albritton case as scheduled on  
20 the 28<sup>th</sup>?

21 MR. BABCOCK: Yes, Judge. We've been ordered by Judge  
22 Shell to do that, so we will certainly go forward in the  
23 Albritton case.

24 THE COURT: And I assume, as I just said, that Judge  
25 -- I don't see why Judge Bryant would cease his efforts to set



1 up a settlement conference, but I'll leave that to him. But I  
2 do think that he needs to be apprized by one or both of you that  
3 the situation is not as he thought it was, and that it's not  
4 going to occur. So I think you've answered my question. I  
5 think what we will need to do then is go ahead with our in  
6 camera review here. I will take another look at the motion for  
7 the continuance. It's complicated by other matters that we have  
8 on tap here in our chambers. So it's quite likely, I would say,  
9 that we will agree that this case is going to have to be  
10 continued for the reason that it doesn't appear like to me it's  
11 going to be ready, and --

12 CONFERENCE OPERATOR: Excuse me, this is the  
13 conference operator. I apologize for the interruption. I  
14 understand that some assistance has been re-asked of me. Would  
15 you like me to call a participant?

16 THE COURT: No, ma'am, we have everybody. We finally  
17 got everybody together, and we're just about to conclude our  
18 business. But thank you very much for checking back.

19 CONFERENCE OPERATOR: Thank you very much. And,  
20 again, I apologize for the interruption.

21 THE COURT: Yes, ma'am. Thank you.

22 CONFERENCE OPERATOR: Your welcome.

23 THE COURT: Okay, so I think that's where we are.  
24 We'll go ahead and deal with these matters. I think there are  
25 some other motions, a Motion to Dismiss and other things that

1 we'll try to get to as quickly as we can. All right, anything  
2 else that we can deal with? If not, I thank you very much.  
3 Anything from the plaintiff? Anything else?

4 MR. PATTON: Not a thing, Judge.

5 THE COURT: From the defendant?

6 MR BABCOCK: No, Your Honor. We're good.

7 THE COURT: All right. Thank you very much.

8 (WHEREIN THE TELEPHONE CONFERENCE WAS CONCLUDED.)

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COURT REPORTER'S CERTIFICATE

I, THERESA SAWYER, do hereby certify that the foregoing is a true and correct transcript from the record of proceedings in the above-entitled matter.

/S/ Theresa Sawyer  
THERESA SAWYER  
CERTIFIED COURT REPORTER, #235  
TRANSCRIBER

AUGUST 21, 2009  
(Date)