

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

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FOR THE PLAINTIFF

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FOR THE PLAINTIFF

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FOR THE PLAINTIFF

MR. CHARLES L. BABCOCK
MR. RICHARD E. GRIFFIN
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FOR THE DEFENDANT

Prepared by:
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(Proceedings recorded by Stenomask; transcript produced from dictation)

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 8th that was filed July the 9th, 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 31st, 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 28th, 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 28th 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 31st. 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 31st 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 31st 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 28th?

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)