

# EXHIBIT C

HIGHLY CONFIDENTIAL

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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NETWORK APPLIANCE, INC., A  
DELAWARE CORPORATION,

PLAINTIFF,

vs.

No. C 03-05665 MHP

BLUEARC CORPORATION, A  
DELAWARE CORPORATION,

DEFENDANT.

COPY

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HIGHLY CONFIDENTIAL

VIDEOTAPED DEPOSITION OF

MARK E. NUSBAUM

Friday, April 8, 2005

WILKINS & ASSOCIATES  
CERTIFIED SHORTHAND REPORTERS  
(925) 674-1480

Reported By:  
HOLLY MOOSE, CRR-RDR-CRP  
**CSR NO. 6438**

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P R O C E E D I N G S

THE VIDEOGRAPHER: Good morning. We're on the video record at 10:04 a.m. Today's date is April 8<sup>th</sup>, 2005. My name is Jason Butko. I'm your videographer, representing DMS Legal Video of San Mateo, California. Phone number is 1(888)338-4612.

We're located today at 525 Market Street in San Francisco, California. And this case is appearing before the U.S. District Court, Northern District of California in the case captioned "Network Appliance versus BlueArc Corporation," case number C 03-05665 MHP.

Our court reporter today is Holly Moose, representing Wilkins & Associates.

This is the beginning of tape number 1, Volume I of the deposition of Mark E. Nusbaum.

Would counsel please identify yourself and who you represent, starting with the questioning attorney.

MR. LIVORNESE: Yes. Don Livornese, representing Network Appliance.

MS. STANTON: Shana Stanton, representing BlueArc Corporation.

THE VIDEOGRAPHER: Can the court reporter please swear in the witness.

(Witness sworn).

THE VIDEOGRAPHER: You may proceed.

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MARK E. NUSBAUM,  
having been duly sworn,  
was examined and testified as follows:

**EXAMINATION BY**

MR. LIVORNESE: Q. Good morning, Mr. Nusbaum.

A. Good morning, sir.

Q. Could you please spell your name for the  
record, please.

A. M-A-R-K, E-D-W-A-R-D, N-U-S-B-A-U-M.

Q. Okay. And with whom are you employed?

A. I'm employed by the intellectual property law  
firm of Nixon Vanderhye, PC, in Arlington, Virginia.

MR. LIVORNESE: I'm going to have the -- well,  
let me ask the court reporter, do you have your own  
exhibit stickers or ...

THE REPORTER: (Nods head).

MR. LIVORNESE: You do. Okay. I'd appreciate  
it if you could mark this as Exhibit 718.

(Plaintiff's Exhibit No. 718  
marked for identification).

MR. LIVORNESE: Q. Have you seen this notice  
before?

A. I have not.

MR. LIVORNESE: Counsel, is the witness here  
pursuant to this notice of deposition?

1 MS. STANTON: Yes.

2 MR. LIVORNESE: That's all we have for the  
3 notice.

4 MS. STANTON: Mark this as Exhibit 719.  
5 (Plaintiff's Exhibit No. 719  
6 marked for identification).

7 MR. LIVORNESE: Q. Is this a copy of an  
8 expert report that you prepared in this case,  
9 Mr. Nusbaum?

10 A. Certainly appears to be.

11 Q. Did you prepare an expert report in this case?

12 A. I did indeed.

13 Q. Could you please look at Exhibit A of this  
14 exhibit. What is Exhibit A?

15 A. Exhibit A is a document entitled "Curriculum  
16 Vitae of Mark E. Nusbaum," and it is a document which  
17 summarizes my career, focusing on the Patent and  
18 Trademark Office.

19 Q. Is the information in Exhibit A current up  
20 through today?

21 A. It's -- it's current in the sense that it's --  
22 to the best of my knowledge, it's accurate as of today.

23 Q. Okay. All right. Could you please describe  
24 your educational background after high school, please.

25 A. I received a Bachelor of Science degree with

1 honors from -- intellectual engineering with honors from  
2 the University of Maryland in 1969.

3 I received a juris doctor degree in 1974 from  
4 American University's Washington College of Law.

5 Q. I'm sorry, what year was that?

6 A. That was in 1974.

7 Q. Okay. And where did you work after you  
8 graduated?

9 A. I worked at the United States Patent and  
10 Trademark Office.

11 Q. Okay. Did you work at the Patent Office while  
12 you were in law school?

13 A. I worked from 8:30 to 5 and approximately  
14 three days a week went to law school from 6 to 10.

15 Q. Was that during the entire tenure of your law  
16 school career?

17 A. That's correct, from 19 -- from about 1970 to  
18 1974.

19 Q. And how long did you work at the Patent  
20 Office? Until what year?

21 A. Until July of 1986.

22 Q. Where were you employed after July of 1986?

23 A. I began working for the law firm of Nixon  
24 Vanderhye, the firm where I currently work.

25 Q. And you've been there ever since?

1 expert, the Cheriton article describes,"  
2 quote, "'providing control messages.'"

3 MS. STANTON: I'm going to object as asked and  
4 answered. I believe he's made it clear that he can't  
5 identify an instance where he wasn't -- he was not [sic]  
6 relying exclusively on the expert.

7 MR. LIVORNESE: Well, I think from his memory  
8 he can't, but that's the reason I want to have him go  
9 through each individual instance where he used it,  
10 because that may refresh his recollection.

11 THE WITNESS: I'm not relying exclusively on  
12 Dr. McKusick for that.

13 MR. LIVORNESE: Q. Looking at page 48, the  
14 first full paragraph begins,

15 "Relying on defendant's technical  
16 expert, such control messages as are used  
17 in the V kernel system."

18 A. I was not relying exclusively on Dr. McKusick  
19 for that either.

20 Q. You were relying on your own background as  
21 well?

22 A. In part.

23 Q. The same with respect to the next paragraph.  
24 The sentence begins,

25 "With respect to claimed," quote,

1           "'communication bus'" -- strike that.

2           Begins "With respect to the claimed  
3           communication" -- strike that.

4           "With respect to the claimed," quote,  
5           "'communication bus,'" close quote, "that  
6           provides for the interconnection of said  
7           processor units, relying on defendant's  
8           technical expert."

9           Do you see that?

10          A.    Yes.  And I was not relying exclusively on  
11          Dr. McKusick for this.

12          Q.    Okay.  I have the same question with respect  
13          to the last paragraph where you're talking about  
14          independent claim 7.

15          A.    I was not relying exclusively on Dr. McKusick  
16          for that as well.

17          Q.    Okay.  Turning to page 50, the bottom partial  
18          paragraph.  You say "relying in part on defendant's  
19          technical expert."

20          Is it your testimony that this was -- you were  
21          relying in part upon your own experience as well?

22          A.    Yes.

23          Q.    Okay.  Turning to page 51, okay, bottom full  
24          paragraph, it begins,

25          "Relying on defendant's technical



1 expert, for example, the file server and  
2 printer server peer-level facilities."

3 Do you see that?

4 A. Yes.

5 Q. Okay. Were you relying exclusively on  
6 defendant's technical expert?

7 A. I was not.

8 Q. Okay. And in the next sentence, it says,  
9 "For example, relying on defendant's  
10 technical expert, the operating system."

11 Do you see that?

12 A. Yes.

13 Q. Were you relying exclusively on defendant's  
14 technical expert?

15 A. I was not.

16 Q. Okay. If you turn to page 52, the last  
17 paragraph before it says "Other Testimony," do you see  
18 that? It begins,

19 "For the reasons set forth above,  
20 relying on defendant's technical expert."

21 It may require you to look up above to see  
22 what was said.

23 A. I was not relying exclusively on Dr. McKusick.

24 Q. Okay. Are you a person of ordinary skill in  
25 the art to which the claims in the '037 patent are

1 directed?

2 A. I certainly have had many years in the Patent  
3 and Trademark Office and examining the technology to  
4 which the claims of the '037 patent are directed, and I  
5 was determined by the Patent and Trademark Office to  
6 have a master's degree level of understanding of the  
7 general computer system technological area and was a  
8 senior examiner in this art area. But I do not  
9 personally consider myself a person of ordinary skill in  
10 this art.

11 MR. LIVORNESE: Why don't we take a break.

12 MS. STANTON: Okay.

13 THE VIDEOGRAPHER: We're off the record at  
14 11:50 a.m.

15 (Discussion off the record).

16 THE VIDEOGRAPHER: We're back on the record at  
17 12:09 p.m. You may proceed.

18 MR. LIVORNESE: Q. I know you said this  
19 earlier, but could you tell me what your undergraduate  
20 degree was in.

21 A. Bachelor of Science in electrical engineering.

22 Q. Okay. Did you ever take any advanced courses  
23 in engineering past the bachelor degree level?

24 A. I took some in-house courses at the Patent and  
25 Trademark Office relating to computers and

1 microprocessor technology, but no formal graduate-level  
2 course.

3 Q. Did you ever obtain any type of master's  
4 degree in engineering?

5 A. I did not, other than receiving the  
6 recognition that I mentioned in the Patent and Trademark  
7 Office with respect to PTO determination that the  
8 technology that I examined require at least a master's  
9 degree in order to understand and that I had indeed  
10 mastered that technology.

11 Q. Have you ever taken any academic courses in  
12 computer science?

13 A. During my time period at the University of  
14 Maryland, I surely did, including at least one course  
15 that I recall on machine and assembly language  
16 programming.

17 Q. You don't have a bachelor's degree in computer  
18 science, though, do you?

19 A. I do not.

20 Q. Do you have any degrees in computer  
21 engineering?

22 A. The degree program that I went through with  
23 the University of Maryland was entitled Bachelor of  
24 Science degree in electrical engineering.

25 Computers were discussed, but the title of the

1 program was not formally computer engineering.

2 Q. Do you have a degree in computer software  
3 engineering?

4 A. I do not.

5 Q. Do you have any practical commercial -- let me  
6 ask it this way: Have you ever worked in industry?

7 MS. STANTON: Objection. Ambiguous.

8 THE WITNESS: I worked as -- in a consulting  
9 engineering firm as a summer employee during the time  
10 frame when I was at the University of Maryland. And  
11 then, as I testified, after graduating, I went directly  
12 to the Patent and Trademark Office.

13 MR. LIVORNESE: Q. Other than that, do you  
14 have any -- do you have any experience -- strike that.

15 Other than that, do you have any experience  
16 working in industry?

17 MS. STANTON: Objection. Asked and answered.

18 THE WITNESS: To the extent that my present  
19 job as a patent attorney can be characterized as working  
20 in industry, perhaps. But that's the extent of it.

21 MR. LIVORNESE: Q. Do you consider yourself a  
22 technical expert in the technology that's at issue in  
23 the '037 patent?

24 A. I consider myself an expert in examining the  
25 technology that's -- that's at issue, in light of my

1 many years in the Patent and Trademark Office examining  
2 computer system technology, the computer software that's  
3 inherent in those computer systems. But I do not  
4 consider myself a technical expert in the technology.

5 Q. Have you ever designed a network file system?

6 A. I have not.

7 Q. Have you ever implemented a network file  
8 system?

9 A. I have not.

10 Q. Have you ever done any troubleshooting on a  
11 network file system?

12 A. I have not.

13 Q. Have you ever tested a network file system?

14 A. I have not.

15 Q. Have you ever written any evaluations of  
16 network file systems?

17 A. I have not.

18 Q. Have you ever done any design or  
19 implementation of a kernel operating system?

20 A. I have not.

21 Q. Are you familiar with the ISO protocols?

22 A. I have heard of the ISO protocols. I've heard  
23 about ISO protocols in the context of the '037 patent.

24 Q. Have you ever designed or implemented any of  
25 these protocols?

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CERTIFICATE OF REPORTER

I, HOLLY MOOSE, CSR No. 6438, Certified Shorthand Reporter, hereby certify that the witness in the foregoing deposition was by me duly sworn to tell the truth, the whole truth and nothing but the truth in the within-entitled cause;

That said deposition was taken down in shorthand by me, a disinterested person, at the time and place therein stated, and that the testimony of the said witness was thereafter reduced to typewriting, by computer, under my direction and supervision;

I further certify that I am not of counsel or attorney for either or any of the parties to the said deposition, nor in any way interested in the event of this cause, and that I am not related to any of the parties thereto.

DATED: April 15, 2005

Holly Moose

HOLLY MOOSE, CSR NO. 6438