

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

ERIC ALBRITTON,

PLAINTIFF.

v.

(1) CISCO SYSTEMS, INC., (2) RICHARD  
FRENKEL, (3) MALLUN YEN and (4) JOHN  
NOH,

DEFENDANTS.

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CIVIL ACTION NO.: 6:08-CV-89

**JURY TRIAL DEMANDED**

**DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S CROSS-MOTION FOR  
SUMMARY JUDGMENT**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendants CISCO SYSTEMS, INC., RICHARD FRENKEL, MALLUN YEN<sup>1</sup> AND JOHN NOH<sup>2</sup> request the Court to strike Plaintiff's untimely Cross-Motion for Summary Judgment filed on December 15, 2008 and in support of same would show the court as follows:

1. At the parties' request, this Court extended the dispositive motions deadline to November 26, 2008, the day before Thanksgiving. (Docket No. 95). Defendants served the Plaintiff with their Motion for Summary Judgment ("Motion") on November 26, 2008 before 5:00 p.m.

2. In response to Defendants' Motion, Plaintiff filed Plaintiff's Response to Defendants' Motion for Summary Judgment ("Response"), which was filed on December 15, 2008 and served on December 16, 2008 under the Local Rules. While the Response purports in its title to be only a "Response to Defendants' Motion for Summary Judgment," embedded in the

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<sup>1</sup> Subject to her Motion to Dismiss.

<sup>2</sup> Subject to his Motion to Dismiss.

response is a “cross motion” that moves: (1) for a finding that Albritton is a private figure (Responses p. 7 and 19); (2) for a finding that Frenkel’s Oct. 17 and 18 posts are defamatory *per se* (Response p. 7); and (3) for a finding that Frenkel’s statements are not rhetoric, hyperbole or opinion (Response p. 8) (referred to collectively as the “Cross Motion.”)

3. The Court should strike Plaintiff’s Cross Motion because (1) it is untimely; (2) Defendants did not move for summary judgment on whether the publication was defamatory and therefore, Plaintiff’s request for a finding that the articles are defamatory *per se* is not a cross-motion; and (3) it does not comply with the requirements for a motion for summary judgment.

4. Plaintiff’s Cross Motion should have been filed on or before November 26, 2008, the deadline for dispositive motions. All three points that Plaintiff has moved for summary judgment on have by the nature of the Plaintiff’s claims been issues in this case since its inception. None of these issues were initially raised in Plaintiff’s Motion. For these reasons alone, the Court should strike the Cross Motion.

5. Moreover, Defendants did not move for summary judgment on whether the publication was defamatory, and therefore Plaintiff’s request for a finding that the articles are defamatory *per se* is not a cross-motion. As such, it should have been raised before the deadline for dispositive motions.

6. The Cross Motion also fails to comply with the formal requirements of a Cross Motion. Local Rule CV-10(a)(2) requires that all filings must have a “caption containing... a statement of the character of the document clearly identifying each included pleading” and advises: “do not include a motion and a response... in the same document.” Here, Plaintiff has both failed to state the character of the document and has included a motion in its response. Therefore, the Court should strike the Cross Motion.

7. For these reasons, Defendants respectfully request that the Court strike Plaintiff's Cross Motion and deny the relief requested therein.

Respectfully submitted,

JACKSON WALKER L.L.P.

By: /s/ Charles L. Babcock

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**CERTIFICATE OF SERVICE**

This is to certify that on this 24<sup>th</sup> day of December, 2008, a true and correct copy of the foregoing was served upon:

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