

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC ALBRITTON : DOCKET NO. 6:08CV89
:
VS. : TYLER, TEXAS
: JUNE 5, 2008
CISCO, ET AL : 1:35 P.M.

SCHEDULING CONFERENCE
BEFORE THE HONORABLE MICHAEL H. SCHNEIDER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY, TRANSCRIPT
PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

1 THE COURT: All right. We have a Scheduling
2 Conference scheduled next. This is Case Number 6:08cv89. The
3 matter is styled Eric Albritton versus Cisco Systems, Inc. and
4 Richard -- it looks like Frenkel.

5 I'm going to ask that we get started here by having the
6 parties make an announcement as to your being prepared for
7 this hearing, and we'll begin with the Plaintiff.

8 MR. HOLMES: Good morning, Your Honor. James Holmes
9 for the Plaintiff Eric Albritton. We're ready to proceed.

10 THE COURT: Good afternoon. How are you doing?

11 MR. HOLMES: Thank you, sir.

12 MR. BABCOCK: Your Honor, Charles Babcock with
13 Crystal Parker, my colleague, and we're prepared to go forward.

14 THE COURT: Nice to see you again, sir.

15 MR. BABCOCK: Nice to see you, Judge. Here for
16 Cisco.

17 THE COURT: All right.

18 MR. MCWILLIAMS: Your Honor, George McWilliams for
19 Richard Frenkel and we're ready to proceed.

20 THE COURT: Good afternoon, Mr. McWilliams. Mr.
21 McWilliams, I like the way you draw up your answer. That's a
22 nice way. I wish everybody would do that in federal court. It
23 would sure make it easier to compare what -- who's answered.

24 MR. MCWILLIAMS: Your Honor, I have to give
25 Mr. Babcock credit for that because I followed his example on

1 that.

2 THE COURT: I see.

3 MR. BABCOCK: And I'll have to defer to Ms. Parker on
4 that.

5 THE COURT: All right. And, Ms. Parker, you're going
6 to defer to Mr. Holmes, is that right? That way we just spread
7 it all the way around.

8 MR. HOLMES: I hope I get some credit somewhere as
9 the guy that started all this.

10 THE COURT: Yeah. Okay. I have received your
11 proposed Scheduling Order and I'll talk about that in just a
12 minute, but I want to talk about a few things, mainly get you
13 to talk about a few things to help me get oriented on the case
14 and so forth.

15 Let me just check here. First of all, as far as
16 procedure goes in here or etiquette or whatever, this is an
17 informal conference, although we want it to be productive.
18 You're not required to stand at all, and in fact, it doesn't
19 make me any difference here in this proceeding. If I tell
20 you don't stand, some lawyers get real uncomfortable, so you
21 can stand if you want to but you don't have to.

22 But the main thing we have to kind of keep in mind,
23 since we have more people than the normal two that we have
24 here, is that when we do talk sitting down, there's a
25 tendency sometimes to talk over some way or else at the same

1 time. So if we can -- as long as we can keep the
2 conversation separate, we'll go ahead and try that. And if
3 you want to stand, you can stand.

4 Now, the first thing I want to get clear here
5 procedurally is the operative pleadings. My information is,
6 and you can correct me on this, but the operative pleading
7 for the Plaintiff is your first -- is your petition, is that
8 correct, that you filed?

9 MR. HOLMES: It is, Your Honor.

10 THE COURT: All right, sir.

11 MR. HOLMES: I anticipate us filing a federal
12 complaint since we have now been removed.

13 THE COURT: All right. I was going to ask you to do
14 that but we'll get to that in just a second.

15 All right. Then I see we have the answer by Cisco but
16 that was the answer that was filed in the state court. I
17 don't have, I don't think, a federal answer, right?

18 MR. BABCOCK: That's correct, Your Honor.

19 THE COURT: All right. Then, of course, I've already
20 acknowledged Mr. McWilliams' answer in the federal suit. So
21 what I would like to request, if you would be so courteous to
22 do, is to go ahead and file another one, Mr. Holmes. How much
23 time is a reasonable time to do that for you? I mean, five
24 o'clock or --

25 MR. HOLMES: Today is Thursday, Your Honor?

1 THE COURT: Yeah.

2 MR. HOLMES: Until the end of next week.

3 THE COURT: Let's say -- what is today in numbers?

4 The 5th? Can you get it in by the 15th?

5 MR. HOLMES: Yes, sir.

6 THE COURT: All right. Then will the Defendants
7 waive service on that and he can just send it through normal
8 courses?

9 MR. BABCOCK: Just send it to me would be fine, Your
10 Honor.

11 MR. MCWILLIAMS: Yes, sir.

12 THE COURT: And to you, Mr. McWilliams?

13 MR. MCWILLIAMS: Yes, sir.

14 THE COURT: Okay. Then we'll do that and ask that
15 you respond to that, and how much time do you need to get back
16 with him?

17 MR. BABCOCK: I think a week would be sufficient.

18 THE COURT: Okay. We'll round that off and give that
19 another ten days, so that would be what, the 25th?

20 MR. BABCOCK: Yes, Your Honor.

21 THE COURT: Okay. That would help me and I think
22 we can make some progress there.

23 Okay. What I want to do is to go over and just go down
24 some questions here. You've obviously had some type of
25 conference or you wouldn't have been able to put together

1 this Proposed Scheduling Order. Tell me, if there's anyone
2 who would volunteer the information, who had a meeting or
3 discussion and when was that and where?

4 MR. HOLMES: Your Honor, James Holmes. It was more a
5 series of meetings and discussions.

6 THE COURT: All right.

7 MR. HOLMES: Mr. Babcock and I particularly have been
8 on the phone I know six, eight times perhaps discussing
9 everything from the schedule to scope of discovery and
10 privilege and logistics. Mr. McWilliams and I have not had as
11 extensive discussions because he's been detained in a three
12 week trial.

13 THE COURT: I see.

14 MR. HOLMES: And he has leaned I think largely on Mr.
15 Babcock, so we have done the very best we could to accommodate
16 his schedule, but we have had extensive meet and confers.

17 THE COURT: Okay. Well, that's encouraging. Let me
18 ask you this, have any of you ever worked together on a
19 lawsuit? And that can be Defendants and Defendants.

20 MR. HOLMES: I have never worked with either of these
21 gentlemen.

22 MR. BABCOCK: I have worked with Mr. McWilliams
23 before but not Mr. Holmes.

24 THE COURT: All right. Mr. McWilliams, you say that
25 you haven't worked with Mr. Babcock, right?

1 MR. MCWILLIAMS: Your Honor, Mr. Babcock and I have
2 worked together for many years, and I have not with Mr. Holmes.
3 And I apologize for being tied up in trial the last three
4 weeks, but we do have a joint defense agreement so Mr. Babcock
5 carried the water for me very well.

6 THE COURT: Where were you in trial?

7 MR. MCWILLIAMS: In Bowie County.

8 THE COURT: Are you in trial right now?

9 MR. MCWILLIAMS: We're done.

10 THE COURT: I see. All right. Thank you.

11 Well, hopefully, since it's the first time that each of
12 you have worked with Mr. Holmes, that can develop into a
13 foxhole friendship or whatever you call it when you're under
14 the same pressures sometimes, and what's better than that,
15 though, I think is some type of a good professional
16 experience in working together. And from your reputations
17 and my personal knowledge of some of you here, I don't think
18 that's going to be an issue, that you will work hard to make
19 sure that we keep our eye on the ball, and that is to get
20 around to the issues that will decide the lawsuit.

21 Now, are each of you -- I'm going to go ahead and show
22 you here, your presence. Are you going to be the lead
23 counsel in this as best you can see?

24 MR. HOLMES: Yes, Your Honor.

25 MR. BABCOCK: And I will be for Cisco, Your Honor,

1 Babcock.

2 THE COURT: All right. Good.

3 MR. MCWILLIAMS: And I will for Mr. Frenkel.

4 THE COURT: All right. Good. Now, do we have any
5 pending cases pending in this matter? I say pending cases,
6 similar cases or related cases pending?

7 MR. HOLMES: Your Honor, there is -- I don't know if
8 I would call it a related case, but Johnny Ward has a suit
9 pending against these same Defendants.

10 THE COURT: Where is that case?

11 MR. HOLMES: I think that case is still in Arkansas.

12 MR. BABCOCK: Arkansas, right.

13 THE COURT: How did it get in Arkansas? I'm sorry.
14 For some reason I was thinking it was filed in your -- in Gregg
15 County.

16 MR. HOLMES: I'm not involved in that case, Your
17 Honor. My understanding is there was an initial pleading filed
18 somewhere in Texas that was dismissed and the case was refiled
19 in Arkansas. I really don't know much about it beyond that.

20 THE COURT: I see, but there is a -- does it grow out
21 of the same incident?

22 MR. HOLMES: It does.

23 THE COURT: All right. Then there's an underlying
24 lawsuit from which the subject of the --

25 MR. HOLMES: Exactly.

1 THE COURT: -- liable or whatever, the conversation
2 or the publication in issue.

3 MR. HOLMES: Yes, sir.

4 THE COURT: There is another lawsuit on that.

5 MR. HOLMES: And that suit is pending in federal
6 court in Texarkana.

7 THE COURT: Okay. That is in Texarkana?

8 MR. HOLMES: Yes, sir.

9 THE COURT: Okay. Who will volunteer to get me the
10 information on those suits, the numbers and so forth?

11 MR. BABCOCK: Your Honor, I know a little bit more
12 about the Arkansas case.

13 THE COURT: All right.

14 MR. BABCOCK: Because I am counsel in that one. What
15 happened was John Ward filed a lawsuit in Gregg County
16 substantially similar, if not identical, to the case that Mr.
17 Albritton filed also in Gregg County.

18 The day before we removed this case to this court, Mr.
19 Ward, through his counsel, non-suited the Gregg County case
20 and obtained an order from the Court granting non-suit. And
21 that same day of the non-suit, Mr. Ward filed a lawsuit in
22 the Western District of Arkansas, Texarkana Division.

23 The Defendants were the same and the publication was
24 the same publication that has been complained about here, or
25 one of the two publications that has been complained about

1 here.

2 The Defendant Frenkel, also represented by Mr.
3 McWilliams, filed a motion to dismiss for lack of personal
4 jurisdiction. The Defendant Cisco filed a motion to dismiss
5 for improper venue, and alternatively, for discretionary
6 transfer of venue to this court.

7 Then Mr. Ward non-suited or has attempted to non-suit
8 Mr. Frenkel from the case. Mr. Frenkel, who had answered,
9 filed an objection to that and said that I've been sued
10 twice now and non-suited apparently twice, and either the
11 dismissal should be with prejudice so I don't have to keep
12 hiring lawyers to defend me, or my attorney's fees should be
13 compensated by Mr. Ward.

14 The Judge -- Judge Barnes was originally assigned to
15 the case and he recused himself and the new judge has
16 scheduled oral argument on the objection to the non-suit,
17 and that's scheduled for August 4th in Texarkana.

18 Once that's out of the way, then I presume that Judge
19 Hendren will rule on the motion to transfer. And our intent
20 would be, if it's transferred to this court, would be to
21 seek to consolidate that case into this one since it
22 involves the same fact witnesses, same discovery and the
23 same publication, or one of the same publications.

24 THE COURT: Okay. Well, I guess that kind of gives
25 me enough information to get started on. Anything you would

1 add, Mr. Holmes?

2 MR. HOLMES: All I would add, Your Honor, is that
3 obviously, because of Mr. Ward's relationship with -- family
4 relationships, we're going to have some real concerns -- I have
5 real concerns for my client about those two cases being
6 consolidated and eventually perhaps tried together. We will
7 flesh all those out for the Court at the appropriate time, but
8 just as a heads-up, we are not going to be amenable to having
9 those cases consolidated and tried together.

10 THE COURT: All right.

11 MR. BABCOCK: And I might add, Your Honor, that I
12 have not talked to Mr. Holmes about it and he may convince me
13 that he's right about that, so -- but if you talk about present
14 intention, that is our present intent. But we haven't filed
15 anything yet and maybe we won't, as eloquent as he sounded.

16 THE COURT: All right. Well, let's do talk about
17 something. That brings up something that, frankly, I guess I
18 haven't really thought about. One of the allegations or part
19 of the fact pattern here talks about the Eastern District of
20 Texas itself as an identifiable -- I guess we'll call it an
21 entity, for lack of a better word. And the allegation in there
22 is that the clerk of the District Court here conspired with
23 the -- with the Plaintiff or Plaintiffs, I guess the Plaintiff
24 in this case. I'll leave it limited to my case.

25 Now, in one way the clerk is -- I don't employ him but

1 I certainly could vote on his retention or hiring him. And,
2 believe me, I'm not -- this suit has tremendous interest
3 just academically, if I can be academic, to me and it is
4 something that I would enjoy, but I'm just -- I want people
5 to be real honest about how you feel about all that. And it
6 doesn't -- it doesn't -- I wouldn't take it as flattery if
7 you said well, I'm going to leave it here, and I wouldn't
8 take it the other way either. You have your clients to deal
9 with on these issues. Then I guess I just have to take a
10 look at it myself. But I think we ought to not dodge it and
11 talk about it a little bit.

12 MR. HOLMES: And, Your Honor, if I may, the parties
13 have done exactly that. Mr. Babcock and I discussed this very
14 early on after the removal and we were still in the throws of
15 discussions on my side about potential motions for remand. And
16 I don't want to speak too much for Mr. Babcock, but I believe
17 we reached a consensus that both parties were comfortable
18 having this case proceed in this court and in Your Honor's
19 court. There's certainly no concern on our part.

20 MR. BABCOCK: Yes, Your Honor, that is consistent.
21 We did talk about it early on, and from Cisco's standpoint we
22 are delighted to be in the Eastern District of Texas and
23 specifically in your court. There is no thought of recusal,
24 and in fact, I think I said in writing that we are not going to
25 move to recuse.

1 THE COURT: And I wouldn't take it -- I mean, I hope
2 y'all know that I would not be insulted by that at all. I can
3 understand. You have your clients to worry about and -- but I
4 can tell you right now from my point of view, it's just a very
5 interesting case, you know, so we can go from there.

6 If I get to the point where I see that it is not or
7 something, I'll be -- I'm going to do my best to make sure
8 that I bring that up in a timely manner, but right now it's
9 not a problem with me.

10 MR. BABCOCK: Thank you, Your Honor.

11 THE COURT: Go ahead, Mr. McWilliams.

12 MR. MCWILLIAMS: Your Honor, I just wanted to
13 underscore that for Mr. Frenkel. We have a consensus among all
14 counsel that we are all very comfortable here.

15 THE COURT: Okay. We're past step one then. Now,
16 the second of 97 questions I have here -- I don't have that
17 many, but we've got a fence around those cases that are related
18 and so far -- is that case in Judge Folsom's court with Cisco,
19 is that progressing toward trial? Anybody know that?

20 MR. HOLMES: I think that it is, Your Honor.

21 THE COURT: All right.

22 MR. HOLMES: My client could probably --

23 MR. ALBRITTON: I'm probably the person who knows the
24 most about that, Your Honor, and it is progressing. It has
25 been set for -- it has a Markman Hearing set and a trial date

1 set.

2 THE COURT: Is that Mr. Albritton?

3 MR. ALBRITTON: Yes, sir.

4 THE COURT: I didn't recognize you out there. All
5 right. That's Eric Albritton.

6 MR. ALBRITTON: Thank you, Your Honor.

7 THE COURT: All right. So we're not getting in each
8 other's way on that so far. So I think I have a pretty good
9 idea of the facts in the case just from reading the petition,
10 but I'll let you go ahead and make any kind of opening
11 statements you would like to make here and then we'll move
12 along right after that. Any observations you would like to
13 make from the start?

14 MR. HOLMES: I don't think so, Your Honor. I
15 think -- no, sir.

16 THE COURT: Anything generally?

17 MR. BABCOCK: The only thing I wanted to point out,
18 and again, this is something Mr. Holmes and I -- you would
19 think we talk to each other every day but not quite that often.
20 But there was an issue or a concern, in any event, early on
21 about whether or not Cisco was going to claim that
22 Mr. Frenkel's postings were outside the course and scope of his
23 employment, and there is no issue on that. When we file the
24 federal answer, that will be clearer.

25 That does not mean, however, that Cisco was happy about

1 the statement that the Court brought up about how the --
2 that the Eastern District of Texas, either wittingly or
3 unwittingly, may have assisted counsel for a non-practicing
4 entity in manufacturing subject matter jurisdiction and then
5 made the comment about the Banana Republic. Cisco didn't
6 know about that ahead of time, and if they had, they
7 wouldn't have allowed it. But in any event, they weren't
8 happy about it.

9 It is true that that particular unfortunate phrase was
10 only up on the Internet for 24 hours and then it was
11 modified and taken away. But nevertheless, it is what it is
12 and it's there and it's attached to their pleading and
13 that's what it is. So that's the only thing I wanted to
14 make clear.

15 THE COURT: All right. Mr. McWilliams?

16 MR. MCWILLIAMS: I would have nothing further, Your
17 Honor.

18 THE COURT: Okay. Now, let's see here, we have -- we
19 don't have any anticipated -- well, we've talked about the
20 possibility of some other people coming in here.

21 Okay. What kind of disclosures have you made or do you
22 plan to make, starting out with the Plaintiff? How are you
23 in that regard?

24 MR. HOLMES: Your Honor, this is another one of those
25 issues that we've conferred about extensively, because as you

1 can imagine, we not only have lawyer clients in all three
2 corners but we have underlying litigation and then ongoing
3 litigation here.

4 THE COURT: Right.

5 MR. HOLMES: And relationships between our lawyer
6 clients and other lawyers. So the biggest issue we've been
7 working through is how to deal with attorney-client privilege
8 and work product privileges on the underlying documents.

9 We have come a long way, at least in the initial stage,
10 of preparing our respective disclosures. It will be another
11 week before Mr. Albritton has clearance from his client for
12 a limited waiver of privilege so that we can produce the
13 documents that we know are relevant, and I understand on
14 Cisco and Mr. Frenkel's side, they're in the process of
15 resolving the same issues.

16 We have not actually exchanged much documentation at
17 this point, although I have a few documents from Cisco, but
18 we do anticipate by this time next week or early the
19 following week exchanging most everything that we at this
20 time can identify as being relevant and discoverable.

21 THE COURT: Okay. I guess under the rules you have
22 technically 14 days after this hearing or something like that.
23 Do we need to set a time or do you have any feelings on that?

24 MR. HOLMES: I'm comfortable -- Mr. Babcock told me
25 this morning we'll have them next week and Mr. Albritton is

1 working with his client. I would feel more comfortable, Your
2 Honor, if we didn't, just in case his client sees a problem
3 that we have not foreseen. It might avoid us coming back to
4 the Court. But I think we'll have it done pretty quickly.

5 THE COURT: All right. And will there be -- have you
6 talked about any electronic -- any ESI problems, as they call
7 them?

8 MR. HOLMES: I don't think we're going to have any at
9 this time, Your Honor. We discussed that and we don't see it
10 coming in.

11 THE COURT: All right. Well, we probably need to --
12 well, I didn't have a place for a privilege log on this
13 Scheduling Order, but that's easy for me to put it in there. I
14 didn't put it in because most of the time it's not an issue.

15 MR. HOLMES: It will be in this case, Your Honor.

16 THE COURT: Okay.

17 MR. BABCOCK: If I could -- if I could elaborate on
18 what Mr. Holmes has said about the privilege issue, the problem
19 is that this posting related or these two postings that are at
20 issue in this lawsuit related to the filing of the ESN lawsuit
21 against Cisco.

22 At least from Cisco's side and Mr. Frenkel's side,
23 there were communications with Baker Botts, which was the
24 law firm that was retained to represent Cisco in that
25 matter. And as you might imagine, there was -- there was

1 some back and forth about the issue of subject matter
2 jurisdiction, whether the case had been filed on
3 October 15th before the patent issued on the 16th, and
4 that's clearly privileged. I mean, Frenkel, the client, a
5 lawyer for the client in-house communicating with Baker
6 Botts, but it's also relevant to this lawsuit as to what
7 Mr. Frenkel knew at the time he made the posting on
8 October 17th and October 18th.

9 And I understand from Mr. Holmes that there's similar
10 documentation on the other side where Mr. Albritton and Mr.
11 Ward, who is not a party, were talking to their client ESN
12 and their lead counsel, which was from Chicago, about these
13 things.

14 So both sides have got things that are relevant, and I
15 think it's going to be important for us to come up with a --
16 kind of a fence around what the limited scope of the waiver
17 is going to be, because Cisco is willing to have a limited
18 waiver along the lines of communications regarding the
19 circumstances of the filing of the ESN versus Cisco case and
20 the communications with the clerk.

21 And Mr. Holmes and I have been working on language and
22 it may be something slightly different than that, but it
23 would be something like that. But we would like Your
24 Honor's approval so that there's no dispute later on about
25 oh, the waiver is broader than that because there's this

1 other litigation going on, and we don't want -- and other
2 counsel other than Mr. Albritton are involved. I'm not
3 involved for Cisco in that case.

4 THE COURT: Why don't we do it this way, let's take a
5 shot at -- or you two take a shot at the language you like and
6 I'll approve it and we'll just see how that works and hope and
7 try our best to make that work. If it doesn't work, we'll come
8 back and retool.

9 MR. HOLMES: I think that's going to be what we need
10 to do, Your Honor, because there are simply some of these
11 documents that we're not going to know until we lay hands on
12 them if they're inside the fence, so to speak, or outside. My
13 guess is there are going to be a number sitting right on top of
14 it, and I'm just not going to be comfortable without guidance
15 from the Court on how to handle this.

16 THE COURT: You may not be comfortable with the
17 guidance you get from the Court. You guys are closer to it and
18 you're going to know it, but we'll work it out.

19 All right. What I didn't -- I said I didn't need to
20 get into the facts too much. I would like to know what you
21 see as the main legal issue in here. Do we have -- is there
22 a unique issue on the degree to which a blogger has -- a
23 blogger has a First Amendment privilege or what's -- what do
24 you see as being the big issue?

25 MR. HOLMES: Again, we have discussed this pretty

1 extensively, Your Honor. I think from my perspective we see
2 the case as a private entity with a claim against a nonmedia
3 defendant. I think there will be some question about it, to
4 the extent he may wish to be characterized as a media
5 defendant, that the Court is going to have to deal with.

6 I think there will also be legal issues regarding the
7 standard of proof for our case, will it be actual malice,
8 strict liability or negligence, and I think beyond that
9 there will be some issues of actual malice that relate to
10 punitive damages and the calculation of damages.

11 I don't think the facts are going to be much in dispute
12 and I suspect we will ferret out who said what and why they
13 said it pretty thoroughly, but I think the thornier issues
14 will be sort of categorizing the parties and determining
15 what legal standard is applicable.

16 THE COURT: Well, let me ask you and get your input.
17 When I say yours, I'm talking to anybody here, about how that
18 might influence the scheduling. Is there -- you know, the
19 traditional way you do a lawsuit is kind of like we're doing
20 now, have a Scheduling Conference, set down your discovery map,
21 where you're going with that. Then you move for your summary
22 judgment when your discovery is closed and at some point in
23 time you have some type of comprehensive settlement conference
24 or ADR method. But on this is there -- what is the value, if
25 any, of determining some basic legal issues before we get

1 started on it, or would you rather develop the discovery and
2 then get some rulings from the Court on that?

3 MR. HOLMES: From the Plaintiff's perspective, Your
4 Honor, I prefer the traditional approach, develop some
5 discovery, frame those issues. We might even resolve some on
6 our own.

7 THE COURT: Okay. I like it when you resolve them on
8 your own.

9 MR. BABCOCK: It would be nice if we could resolve
10 all the issues, but I anticipate what I'm about to say won't be
11 resolved because it's fundamental to the case.

12 One of the things that the Court can and is instructed
13 to do in the first instance is to determine whether the
14 publication is defamatory in the first instance. The Texas
15 Supreme Court case of Musser versus Smith sets out the
16 rules.

17 I think that the October 17th blog, in our view, is
18 susceptible to a motion that is not dependent upon discovery
19 that raises the issue of whether or not that first blog is
20 defamatory at all, so that would be something. There may be
21 other aspects of that that would be susceptible to motion
22 with respect to the October 18th posting, which again raises
23 the issues of is it defamatory in the first instance. So
24 that's one issue that wouldn't -- that wouldn't require
25 discovery.

1 The other issue, which probably would require a little
2 discovery but not much, and which is an issue of law, is the
3 status of the Plaintiff. Are they public figures, limited
4 purpose public figures, or are they private plaintiffs under
5 the law? And in Miller versus TransAmerica Press 621 Fed 2d
6 721, and modified on rehearing, I think 623 Fed 2d
7 something -- I know that only because I argued that case.
8 That's how old I am. And the Court -- the Fifth Circuit
9 there said the status of the plaintiff is pervasive and
10 should be decided as soon as possible. So that would be --
11 that would be an early matter.

12 As for the status of the Defendants, the Defendants
13 will contend for sure that they are media Defendants and
14 whatever the First Amendment gives them by way of special
15 dispensation, they are entitled to it.

16 I will tell the Court that one of the things that makes
17 this case interesting is that there is little to no law in
18 Texas on that issue, although there is law favorable to the
19 Defendants in California on that issue.

20 It may not be as important as it would be in other
21 states because in our state, under the Texas Supreme Court
22 decision in Casso versus Bran the status of the Defendant as
23 a media or nonmedia Defendant is unimportant, because in
24 that case the Texas Supreme Court said that the New York
25 Times versus Sullivan actual malice standard applies,

1 whether or not the Defendant is a media Defendant.

2 So it may not be as important as it would be in other
3 states, although one of the defenses that Mr. Frenkel has
4 asserted is a statutory privilege under Texas law, which is
5 restricted to media. So it is restricted to other
6 periodicals. So the question is whether he's a periodical
7 within the meaning of the statute, so those issues are
8 there.

9 I don't know that that would be as susceptible to
10 summary judgment without discovery. I think there will have
11 to be a little bit of discovery on that.

12 Finally, on the scope of discovery, there will be a
13 huge issue I think on damages, but on liability I think
14 there's limited discovery necessary, probably Mr. Albritton
15 and Mr. Ward and then one or two clerks, whoever were
16 involved in the docket entry switching from October 15 to
17 October 16.

18 So that's everything I have to say, probably too much.

19 THE COURT: That's fine. Thanks. Anything anyone
20 wants to add on that? Mr. McWilliams?

21 MR. MCWILLIAMS: Your Honor, I would just underscore
22 what Mr. Babcock said. As the Court can see, there are huge
23 differences between the parties on the law here, and I think as
24 Mr. Babcock has pointed out, there's some very critical issues
25 that do not require extensive discovery for the Court to

1 decide.

2 THE COURT: All right.

3 MR. BABCOCK: Judge, I forgot one thing but it is
4 very important. I should have mentioned it first, and that is
5 this Banana Republic issue, because Mr. Holmes and I have
6 talked about it and it is going to implicate the breadth of
7 discovery and it will implicate it in this way.

8 Our view is that when Mr. Frenkel, however
9 ill-advisedly, talks about the Banana Republic of -- what
10 does he say? The Banana Republic of East Texas, that is
11 classic opinion, rhetoric or hyperbole, and therefore, not
12 actionable.

13 There's a second reason, of course, why these
14 Plaintiffs -- this Plaintiff cannot prevail on that claim,
15 because it doesn't have anything to do with them. If the
16 Eastern District of Texas is being operated in an improper
17 manner, that's something else, not --

18 THE COURT: It's just about me, reflects on me.

19 MR. BABCOCK: It might be about you, but not about
20 him. And the reason why that's going to impact discovery is
21 that Mr. Holmes is going to send me a list of things that he
22 wants, but one of the things that we talked about is he wants
23 everything where anybody at Cisco was ever talking about the
24 Eastern District of Texas. And I think what he's hoping is
25 there will be a bunch of critical stuff that says Judge

1 Schneider is a bum and we don't like Judge Ward and Judge
2 Folsom is an idiot, which there isn't any of, I don't think.
3 But still, that's what they would like to see. We don't think
4 that's part of the case, but if we've got to prove that --

5 THE COURT: Just remember, it's too late for me to
6 recuse.

7 MR. BABCOCK: I know. We're beyond that. But if
8 that's an issue in the case, in other words, if we're going to
9 have to, on the defense side, try to show that the practices
10 and procedures in the Eastern District of Texas are outside the
11 norm or there are things that certain courts do that are not
12 appropriate or at least other parts of the country might deem
13 inappropriate, then that will impact a lot of discovery that
14 we're going to have to do.

15 To us, that's a nonissue, and if Mr. Holmes and I can't
16 work it out, we may -- I may, on Cisco's behalf, very well
17 may come to you with a limited motion for summary judgment
18 and say, Judge, we don't think that this statement is
19 actionable for these reasons. It's either opinion, rhetoric
20 or hyperbole, or not of and concerning the Plaintiff, which
21 is an essential element.

22 So as I said, that is an issue that will affect a lot
23 of things, so I'm glad I didn't totally forget it.

24 THE COURT: All right.

25 MR. HOLMES: Your Honor, it's sort of like the old

1 joke where the punch line was they have lab rats because there
2 are just some things lawyers won't do. Well, Mr. Frenkel did
3 not accuse Mr. Albritton of, in isolation, committing some
4 egregious act. He accused us of conspiring with the clerk of
5 the court. In our mind, that makes a tremendous difference in
6 the scope of the discovery because if he's not only accused me
7 of an affirmative wrong act but he's also accused me of being
8 in cahoots with a known bad actor, which he is characterizing
9 our clerk's office in the Eastern District to be, then that
10 does reflect on me.

11 We have had discussions about this. I'm hopeful we'll
12 find some way to work through it. But Mr. Babcock is
13 correct, it may be a thorny issue because we have a very
14 different view. We were accused of being a participant in a
15 conspiracy with what they're casting to be a known bad
16 actor, and that all sort of splashes over on my client and
17 we feel like we will have to have some discovery on it.

18 THE COURT: All right. Let's try to move along here.
19 I think -- okay. So you mentioned that you have -- you're in
20 the process of exchanging or making your disclosures. What
21 would you -- how many depositions are you going to need and how
22 many can you be firm about here today?

23 MR. HOLMES: In addition to the parties, Your Honor,
24 we propose 40 -- 30 hours of deposition per side. I think
25 that's more effective than selecting an arbitrary number of

1 witnesses, because many of these depositions may be very, very
2 brief.

3 THE COURT: You say that's in addition to the
4 parties?

5 MR. HOLMES: Yes, sir. And we also agreed between
6 ourselves that no individual deposition would exceed seven
7 hours.

8 THE COURT: All right. Any other limitations you can
9 think of that you think in this case is appropriate? Unlimited
10 interrogatories or written discovery, I'll say, on
11 authenticating documents. I mean, there's no need to put any
12 limits on those. We won't count those against you is my point
13 on those, any authentication issues.

14 MR. HOLMES: Your Honor, on those interrogatories, we
15 had proposed on substantive interrogatories that neither side
16 was particularly interested in more than I think 20, 20
17 interrogatories, 20 requests for admissions.

18 THE COURT: I'll give you 25 each, okay? Just to
19 keep it consistent with all my other cases. And that's a good
20 way to say it, your substantive interrogatories or written
21 requests for admissions, so forth.

22 MR. MCWILLIAMS: Your Honor, just so we're clear,
23 would that be 25 for Cisco and 25 for Defendant Frenkel?

24 THE COURT: I pretty much limit that to the side, but
25 you can tell me what the differences would be. How do you --

1 how do you see it?

2 MR. MCWILLIAMS: I think we can probably live with 25
3 to the side. If we have a problem, we can come back to the
4 Court.

5 THE COURT: Okay. Why don't we shoot for that, try
6 to put a fence there on that. And you pretty much have the
7 same interests right now. We'll wait and see, though,
8 especially if you have a consensus on whether or not he was
9 within the course and scope of his employment, so forth.

10 Okay. Now, have you done anything to talk about
11 resolving this matter?

12 MR. HOLMES: We have discussed it, Your Honor.
13 We have made a couple of proposals to the Defendants. We have
14 not, obviously, had any particular success, but maybe we've got
15 the ball rolling, I hope, in a productive direction.

16 THE COURT: Well, when I saw this thing filed, I
17 almost called you on the phone and said come on, let's -- let's
18 get together and see what we can do on the case. But I frankly
19 got busy and it slipped my mind. You're very important to me,
20 don't get me wrong. It's just that I just haven't gotten
21 around to it.

22 But is there any value in expanding the scope of that
23 to include maybe a comprehensive discussion? If you want to
24 keep it separate, that's fine with me, but I just -- just
25 seeking out opportunities here.

1 MR. HOLMES: We would be happy to sit down with the
2 Court, Your Honor, and discuss resolution. I think at this
3 point I would prefer if we did it separate from the other case.

4 THE COURT: All right.

5 MR. HOLMES: But I'll visit with Mr. Albritton about
6 that. As far as our case, we're happy to sit down any time.

7 THE COURT: Well, of course, that's -- and I
8 appreciate your answer and that's what I would say too, but I'm
9 trying to advance the ball a little bit. What's the other side
10 say about that? Do you have any specifics on that?

11 MR. BABCOCK: Yes, Your Honor. First of all, in
12 terms of prior efforts, there was a mediation, sort of an
13 informal one, maybe right after the lawsuit was filed before
14 the answers were even filed and before it was removed to your
15 court, presided over by the gentleman back on the wall there,
16 by Judge Parker.

17 THE COURT: Oh, is that right?

18 MR. BABCOCK: And it was not successful. I was,
19 unfortunately, unable to be there because I was on vacation
20 with my family, so that's why it had a chance of success. If I
21 had been there, it definitely would have fallen apart. Then
22 Mr. Holmes and I have had some talks but they haven't gone
23 anywhere.

24 From Cisco's standpoint, if there's going to be
25 resolution, it makes total sense to us to resolve both cases

1 and we -- I don't know if we all have to be in the same room
2 hugging each other, but in terms of temporal sequence and
3 getting it all resolved at one time, Cisco doesn't see much
4 advantage in getting this one resolved and still having to
5 fight the Ward case, particularly if it's coming, as we
6 expect, down here anyway. So from our view, we would like
7 to connect them in some way. Maybe if we get four rooms
8 instead of three rooms, but we would like to link them up
9 somehow.

10 THE COURT: I see. Yes, sir.

11 MR. MCWILLIAMS: Your Honor, I might add, I had sort
12 of the same thought you had. I've practiced law in the Eastern
13 District for nearly 42 years and my first inclination was to
14 pick up the phone and say isn't there some way to resolve this.
15 These guys are my friends and I hope they'll be friends after
16 this.

17 And I really underscore what the Court said that if
18 there is any way possible that we could resolve this, I
19 think my client and I think Cisco would make every effort
20 possible.

21 And I agree with Mr. Babcock, I would hate to try to
22 resolve this and then have the same litigation and the same
23 parties and the same issues have to be fully developed, and
24 that's why I would like, if at all possible, to get us all
25 under the same roof.

1 THE COURT: Well, let me ask you this, if I were to
2 take just a few minutes -- how is everybody's time here?
3 Anybody have to be home before midnight tonight?

4 MR. HOLMES: Not me, Your Honor.

5 THE COURT: I would like permission just to talk with
6 each of you separately, not about the case itself, about the
7 settlement here. I mean about the terms of the -- not even the
8 terms of the settlement, about the possibility of meeting for
9 settlement. How does that grab you? Does that grab anybody?

10 MR. HOLMES: I think that's a good idea, Your Honor.

11 MR. BABCOCK: It's fine with us, Your Honor.

12 MR. MCWILLIAMS: Yes, sir.

13 THE COURT: Who wants to go first?

14 MR. HOLMES: Since it's usually our burden, we will,
15 Your Honor.

16 THE COURT: Why don't you meet me around at the
17 office around there and the staff here can take a break. It's
18 about time to take a break. And we'll, over a bottle of water
19 or something, sit down and talk just a few minutes about what
20 some of your concerns are, not about the -- again, I represent
21 that I am not going to get into the facts of the case. I just
22 basically want to see what your ideas are about how we move
23 this forward to talk, okay?

24 MR. HOLMES: Yes, sir.

25 THE COURT: All right. Thanks.

1 (Recess.

2 THE COURT: All right. Let's see, this was a 30
3 minute hearing, is that right?

4 MR. BABCOCK: That's what you told us, Judge.

5 THE COURT: That's great. I'm keeping my schedule.

6 Okay. Let's get back to your schedule here. We had
7 talked about -- I had mentioned a privilege log, and do you
8 have a date that you would like to have each side present
9 their privilege log? Let me throw out September 1. Is that
10 too far or too close?

11 MR. BABCOCK: I think that's fine, Judge.

12 THE COURT: All right. September 1, 2008. All
13 right. And then the next thing is the deadline to join
14 parties. I'm going to leave that, okay? Look at your list
15 there and see if there's anything else I need to change down
16 here.

17 MR. BABCOCK: Judge, all these dates I think are fine
18 with the parties. I think we -- Mr. Holmes and I went through
19 them fairly -- in a fair amount of detail.

20 THE COURT: Let me add one or two here then. On your
21 last page over there where you have motions in limine due --

22 MR. BABCOCK: Yes, Your Honor.

23 THE COURT: Okay. Well, I've got a confusing note
24 here. I can't read my own notes. Let's move that up a week to
25 the 16th and then have your objections to the motions in limine

1 filed on the 23rd.

2 Then down here where it says mediation date, I'm going
3 to leave that blank right now because I want to talk to you
4 about that. From my talks with you, it's my opinion that I
5 think that you need to talk and I think you need to talk
6 right now, and I would be remiss if I -- if we miss this
7 opportunity.

8 I'm going to say that I would like for you to mediate
9 within the next two weeks, and I would like for you to -- I
10 have a mediator in mind that has helped me a lot, especially
11 on the very few patent cases I have. I mean, he's no
12 nonsense, understands the courtroom. It's Judge Faulkner
13 out of Dallas. Anybody have a problem with that?

14 MR. HOLMES: No, sir. In fact, that was our
15 recommendation.

16 THE COURT: All right.

17 MR. HOLMES: We're very comfortable with Judge
18 Faulkner.

19 THE COURT: Can the Defendants live with that?

20 MR. MCWILLIAMS: Your Honor, I think that's fine. I
21 think Mr. Babcock might want to check with --

22 MR. BABCOCK: I don't have any problem with it.

23 THE COURT: Now, we'll need somebody there -- let me
24 just get this clear with the Defendants. We need somebody
25 there at a high level. I mean ready to walk in and call the

1 shots, not having to call back and get on the phone to somebody
2 junior. And so I don't want -- Judge Faulkner can tell me
3 whether or not somebody came there with authority. I mean,
4 that's legal for him to tell me that and I will find out.
5 Sometimes it doesn't do good to bring the top person in because
6 they're not really the person that makes the decision. But,
7 Mr. Babcock, I want you to bring somebody in that will and can
8 make the decision. Can you represent that you can do that?

9 MR. BABCOCK: Yes, Your Honor, we will for sure do
10 that.

11 THE COURT: All right. Now, obviously it depends on
12 Judge Faulkner's schedule. He's a very busy man. I would say
13 that -- who will take the rowing oar, the lead oar in going out
14 and contacting him?

15 MR. HOLMES: Your Honor, I would be glad to. I will
16 actually see him on Monday at another mediation, a case I'm
17 just tangentially involved in.

18 THE COURT: Can you try to reach him this afternoon?

19 MR. HOLMES: Yes, sir.

20 THE COURT: All right. If you can reach him this
21 afternoon and find out if he can do it within ten days, and if
22 not, the closest he can do it to ten days, not in July though.
23 It has to be before July.

24 MR. MCWILLIAMS: Your Honor, I might throw my hat in
25 the ring for August too. I've got a vacation scheduled, so if

1 we can do it before July or August, I would appreciate it.

2 THE COURT: That's right. Mr. McWilliams and I are
3 going on vacation together. We're going fishing up in Canada
4 at that time. But anyway, so July is really important. I mean
5 June is.

6 MR. HOLMES: I'm sorry, Your Honor. In the event
7 that Judge Faulkner can't see us in that time frame, is there
8 someone else I should contact or do we need to report that to
9 you?

10 THE COURT: Why don't you report that to me and then
11 we'll get on the phone with the two -- not two, the three
12 parties, but do that right away. And I'll leave you my cell
13 phone number here. Call me. And I'm not going to say that on
14 the record here, but anyway, I'll give it to you and you can
15 call me and we'll find somebody. Be thinking as a backup who
16 you would want and I'll be thinking of somebody too.

17 But I hope we can do that, and I'll call him this
18 afternoon too but I won't follow up with a call to either of
19 y'all on it. I'll just talk with him about it. All right.
20 I will sign that order.

21 Now, you did mention something about you were working
22 on a Protective Order. I do have an order that's just a
23 standard order but that's not -- that's just a suggestion.
24 If you have your own separate order that you agree on, I'll
25 sign that.

1 MR. BABCOCK: Yes, Your Honor, we have talked about
2 it and I think it's your order with a couple of wrinkles that
3 we have agreed to. So if I can approach the bench and tender
4 that to the clerk.

5 THE COURT: Please. Thank you.

6 All right. I'll go ahead and sign this now and I'll
7 get you a copy over the ECMF. What is it?

8 THE CLERK: ECF.

9 THE COURT: ECF, okay. June 5, 2008.

10 Now, let's do this. Let's review what all we've
11 accomplished today or what we've gone over today. Anybody
12 make any notes on it so we can make sure we have a pretty
13 clear understanding of where we are?

14 MR. HOLMES: Yes, sir.

15 THE COURT: I did not make any notes so -- I mean, I
16 made some and once you say them --

17 MR. HOLMES: I have my homework, Your Honor, to be
18 Plaintiffs are to file an amended complaint by June the 15th.
19 There will be no formal service. Defendants will answer by
20 June 25th.

21 I will contact Judge Faulkner this afternoon and report
22 back to you on his availability for some date in the next
23 ten days, but at a minimum, some date in June so we can meet
24 before July 1st.

25 The parties will exchange initial disclosures. We left

1 the deadline for that open, but under the rules it would be
2 14 days from today. I think we'll probably be able to meet
3 that, barring some problem.

4 We will continue to work together to submit to the
5 Court a proposed order on the scope of the waiver of the
6 attorney-client privilege that we agree is going to guide
7 our production of documents in this case.

8 Each side will receive 25 interrogatories, requests for
9 admissions, 30 hours of deposition time in addition to
10 depositions of the parties, and unlimited interrogatories
11 and depositions on written questions to authenticate
12 documents.

13 We also discussed a number of issues, such as the
14 involvement of the Court, parallel litigation, fundamental
15 issues of the case and the Protective Order.

16 MR. BABCOCK: Privilege log.

17 MR. HOLMES: And privilege log by September 1, yes.

18 MR. BABCOCK: And motions in limine.

19 MR. HOLMES: Yes, motions in limine to be filed by
20 January 16, 2009. Objections by January 23rd, 2009.

21 Yes, the Court also inquired about the cause number and
22 identifying information on the parallel litigation. That is
23 included in the Defendants' filing, so it should be in the
24 record.

25 THE COURT: Fair enough.

1 MR. HOLMES: That's all I have, Your Honor.

2 THE COURT: All right. Anything else to add?

3 MR. BABCOCK: Nothing further, Your Honor.

4 THE COURT: All right. We'll see you and good luck
5 on your discovery and we will then -- I'll be in touch with
6 Judge Faulkner as well. And if you'll check up here, I can --
7 as soon as we go off the record here, I'll give you my cell
8 phone number, okay?

9 MR. HOLMES: Yes, sir.

10 THE COURT: Thank you.

11 MR. BABCOCK: Thank you, Your Honor.

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21 I certify that the foregoing is a correct transcript from
22 the record of proceedings in the above-entitled matter.

23

24

Jan Mason

Date

25