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CISCO SYSTEMS, INC.

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12

13 ILLINOIS COMPUTER RESEARCH, LLC,  
Plaintiff and Counterclaim Defendant,

14 vs.

15 FISH & RICHARDSON P.C.,  
Defendant, Counterclaimant and Third  
16 Party Plaintiff,

17 vs.

18 SCOTT C. HARRIS,  
Third-Party Defendant and  
19 Counterclaimant

20 vs.

21 FISH & RICHARDSON P.C.,  
Defendant, Counterclaimant, Third  
22 Party Plaintiff and Counterclaim  
Defendant  
23

Miscellaneous Action No.  
CV 5:08-mc-80075-JF (HRL)

**CISCO SYSTEMS, INC.'S REPLY  
TO ICR'S AND HARRIS'  
RESPONSE TO FRENKEL'S AND  
CISCO'S MOTION TO QUASH  
ICR'S SUBPOENA FOR  
DOCUMENTS AND TESTIMONY**

**DATE: MAY 13, 2008  
TIME: 10:00 A.M.  
COURTROOM 2**

Hon. Magistrate Judge Howard Lloyd

1 **I. STATEMENT OF ISSUES – N.D. CAL. CIVIL L.R. 7-4(A)(3)**

2 Whether Richard Frenkel (“Frenkel”), a non-party witness, should be compelled to testify  
3 and produce documents.

4 **II. INTRODUCTION**

5 Cisco Systems, Inc. (“Cisco”) submits this Reply to Illinois Computer Research LLC’s  
6 (“ICR”) and Scott C. Harris’ (“Harris”) Response to Frenkel’s and Cisco’s Motions to Quash  
7 ICR’s Subpoena for Documents and Testimony (“Response”). As the employer of Frenkel, Cisco  
8 agrees with and joins in Frenkel’s Reply to the Response, filed concurrently herewith and fully  
9 incorporated herein by reference. Accordingly, Cisco will not repeat all of the facts and arguments  
10 presented in that Reply here, but will set forth its position and provide additional reasons why this  
11 Court should grant Cisco’s and Frenkel’s Motions to Quash and for Protective Order.  
12

13 Cisco takes this opportunity to respond to and refute a false statement made by Issuers in  
14 their Response. It is not true that “Cisco promptly muzzled [Frenkel] by insisting that his [Patent  
15 Troll Tracker website (“PTT”)] could continue to operate ‘by invitation only.’” Response p. 3. To  
16 the contrary, Cisco did not “muzzle” Frenkel, and the decision to make the PTT available by  
17 invitation only is his alone.  
18

19 **III. FRENKEL AND CISCO ARE NOT REQUIRED TO SUBMIT A PRIVILEGE LOG**  
20 **BEFORE THE COURT RULES ON FRENKEL’S OBJECTIONS TO THE SCOPE**  
21 **OF THE SUBPOENA (REPLY TO RESPONSE AT PP. 7-10; 21-22)**

22 As discussed in Section V of Frenkel’s Reply, Frenkel and Cisco need not submit a  
23 privilege log unless and until the court rules on Frenkel’s objections to the scope of the subpoena.  
24 Cisco agrees with and fully incorporates herein Section V of Frenkel’s Reply.

25 **IV. THE FACT THAT FRENKEL WAS ACTING AS A REPORTER DOES NOT**  
26 **“DOOM” CISCO’S PRIVILEGE CLAIMS (REPLY TO RESPONSE AT PP. 21-22)**

27 Issuers argue that Cisco “cannot maintain any claim of attorney-client privilege” because  
28

1 Frenkel is a reporter. Response p. 21. Issuers misunderstand Cisco's privilege claims and  
2 underestimate the reach of their subpoena request nos. 1, 3, and 4. Indeed, Cisco seeks protection  
3 under the Attorney Client Privilege and/or the Work Product Rule because some or all of the  
4 documents in Frenkel's care, custody, or control which are responsive to the following requests are  
5 protected from disclosure:  
6

- 7 1. Communications with Kathi Lutton concerning Scott Harris, Raymond P.  
8 Niro, NSHN, James B. Parker, Courtney Sherrer, Fish and Richardson or the  
9 relevant lawsuit;
- 10 3. Communications with Fish or its counsel concerning Scott Harris, NSHN,  
11 James B. Parker, Courtney Sherrer, Raymond P. Niro or the relevant lawsuit,  
12 including without limitation, an identity of the individuals from Fish with  
13 whom communications were made and the substance of those  
14 communications; and
- 15 4. All lawsuits where Fish was retained by Cisco for representation, including  
16 any in which Kathi Lutton filed an appearance.

17 Regardless of whether Frenkel is considered a reporter or not, he is a Cisco employee who  
18 has – because of his role as a lawyer for Cisco – documents that are covered by the Attorney Client  
19 Privilege and the Work Product Rule in his care, custody, or control. If forced to comply with  
20 Issuers' subpoena request nos. 1, 3, and 4, Frenkel would reveal protected information, as  
21 discussed in Section IV.A of Cisco's Motion to Quash Subpoena. Friedman Decl. ¶¶ 4-5. That is  
22 why Cisco seeks protection under the Attorney Client Privilege and Work Product Rule.

23 Issuers have not, and cannot, explain – much less prove – how subpoena request nos. 1, 3,  
24 and 4 are exempt from the protections afforded to Cisco by the Attorney Client Privilege and the  
25 Work Product Rule, or how such protections were waived. Accordingly, the Court should quash  
26 the subpoena with respect to subpoena request nos. 1, 3, and 4.  
27  
28

1 Dated: April 29, 2008

MORGAN, LEWIS & BOCKIUS LLP

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By /s/ Howard Holderness

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Howard Holderness

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Attorneys for Movant  
CISCO SYSTEMS, INC.

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6 Dated: April 29, 2008

JACKSON WALKER L.L.P.

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By /s/ Charles L. Babcock

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Charles L. Babcock

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