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22 Attorneys for Respondent
23 RICHARD FRENKEL

24 UNITED STATES DISTRICT COURT
25 NORTHERN DISTRICT OF CALIFORNIA

26 ILLINOIS COMPUTER RESEARCH, LLC,
27 Plaintiff and Counterclaim Defendant,

28 vs.

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

vs.

SCOTT C. HARRIS,
Third-Party Defendant and
Counterclaimant

vs.

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

Miscellaneous Action No.
CV 5:08-mc-80074-JF (HRL)

**RICHARD FRENKEL'S PARTIAL
OPPOSITION TO *EX PARTE*
APPLICATION BY ILLINOIS
COMPUTER RESEARCH LLC AND
SCOTT C. HARRIS PURSUANT TO
LOCAL RULE 6.3 FOR ORDER
SHORTENING TIME FOR HEARING
ON MOTION OF ILLINOIS
COMPUTER RESEARCH LLC AND
SCOTT C. HARRIS UNDER
FED.R.CIV.P. 45 TO COMPEL
RICHARD FRENKEL'S DEPOSITION
AND DOCUMENT PRODUCTION IN
APRIL 2008**

Hon. Magistrate Judge Howard Lloyd

1 Non-party Richard Frenkel ("Frenkel") respectfully submits this memorandum in
2 partial opposition to the *Ex Parte* Application Pursuant to Local Rule 6.3 for Order
3 Shortening Time for Hearing on Motion of Illinois Computer Research LLC and Scott C.
4 Harris under Fed.R.Civ.P. 45 to Compel Richard Frenkel's Deposition and Document
5 Production in April 2008 ("Application to Shorten Time") filed by Illinois Computer
6 Research, L.L.C. ("ICR") and Scott C. Harris ("Harris") (collectively, "Applicants") on
7 April 11, 2008.

8 Frenkel and his employer Cisco Systems, Inc. ("Cisco") (collectively,
9 "Respondents") informed Applicants, through counsel, that they would not insist upon the
10 35-day rule contained in Local Rule 7-2(a) for Applicants' motion to compel if (i) a
11 hearing date acceptable to the Court and all counsel could be agreed upon and (ii)
12 Frenkel's and Cisco's motion to quash and for protective order (filed on the same day as
13 the motion to compel and assigned to this court, No. CV 5:08-mc-80075-JF (HRL)) could
14 be heard at the same time. Babcock Decl. ¶ 2. Counsel for Frenkel and Cisco are
15 available on April 22, 2008, the date requested in the *ex parte* Application to Shorten
16 Time.¹ Babcock Decl. ¶ 2. Therefore, if the Court is available to hear Frenkel and
17 Cisco's motions to quash and for a protective order at the same time, Respondents have no
18 objection to April 22, 2008.

19 With that said, there is certainly no basis for saying, as Applicants do at page 2 of
20 the Application to Shorten Time, that hearing these matters in the ordinary course will
21 "cause [Applicants] substantial harm." The above-entitled action, currently pending in the
22 United States District Court for the Northern District of Illinois, Eastern Division, Case
23 No. 07 C 5081 (the "Chicago case"), was filed on September 10, 2007, and the sole
24 remaining defendant, Fish & Richardson, P.C. ("Fish"), answered on October 16, 2007.²

25
26 ¹ This was not one of the dates discussed when Applicants' counsel and Frenkel and
Cisco's counsel were discussing agreed dates. Babcock Decl. ¶ 3.

27 ² We request the Court to take judicial notice of all pleadings and supporting materials and
28 orders of the Chicago Court in the Chicago case. FED. R. EVID. 201

1 Just last week, the Court in the Chicago case (“the Chicago Court”) granted a defense
2 motion for leave to file an amended counterclaim and third-party complaint. Babcock
3 Decl. ¶ 4, Ex. A-1. The Chicago Court’s minute order states that “[d]ate to add additional
4 parties and to amend pleadings extended to 5/21/2008.” *Id.* In addition, by separate
5 minute order, the Chicago Court warned that “[i]f proceeding with depositions at this
6 point is premature, and depositions must be reopened following the naming of additional
7 parties, Plaintiff’s counsel will be required to pay the cost for the reopened depositions.”
8 Babcock Decl. ¶ 5, Ex. A-2. Discovery is to be completed by September 30, 2008.
9 Babcock Decl. ¶ 6, Ex. A-3.

10 Applicants state that they seek this expedited treatment “in order to comply with
11 the scheduling order in the [Chicago] case” (Application to Shorten Time p. 3) and that
12 “initial expert reports are due on June 30, 2008.” *Id.* Applicants do not explain what
13 possible testimony Frenkel would have germane to an expert report nor do they explain
14 what sort of expert they have retained. Nor do they explain how the current schedule will
15 hold given new parties being added to the case.

16 The Applicants’ motion to compel is currently set for hearing in this Court on May
17 13, 2008, a date which is convenient to Respondents’ counsel Babcock but not
18 McWilliams (who will be in trial). The Frenkel and Cisco motions are currently set
19 before this court on June 17, 2008. If the court wishes to move up the hearing date for the
20 Cisco and Frenkel motions to May 13, 2008 so that all the motions may be heard at the
21 same time, Respondents will not object to a hearing on May 13, 2008 despite
22 McWilliams’ unavailability.

23 In any event, Applicants’ purported reason they will suffer “substantial harm” is
24 meritless. This Court has held that the fact that a discovery deadline may pass before a
25 motion to compel is heard this “in no way precludes the court from ordering the discovery
26 to go forward, assuming the court concludes the motion to compel is granted.” *New*
27 *Medium Technologies, L.L.C. v. Barco, N.V.*, No. C 07-80226 MISC JF (RS), slip op. at 1
28

1 (N.D. Cal. Sept. 27, 2007) (denying motion to shorten time to hear motion to compel the
2 deposition of a non-party witness in a case pending in United States District Court for the
3 Northern District of Illinois); *see Silicon Graphics, Inc. v. ATI Technologies, Inc.*, No. C
4 07-80276 JF (RS), slip op. at 2 (N.D. Cal. Dec. 13, 2007); *Silicon Graphics, Inc. v. ATI*
5 *Technologies, Inc.*, No. C 07-80283 JF (PVT), slip op. at 2 (N.D. Cal. Dec. 28, 2007).
6 Babcock Decl. ¶¶ 7-9, Exs. A-4, A-5, A-6. The deadline for filing initial expert reports
7 in the Chicago case has not expired and likely will not expire before this Court hears
8 Applicants' Motion to Compel on May 13, 2008 or even June 17, 2008. Because
9 Applicants have presented no other exigent circumstances that would compel this Court to
10 disregard Local Rule 7-2(a), their Application to Shorten Time should be denied.


11 Moreover, even if the Chicago Court maintains the June 30, 2008 deadline for
12 initial expert reports, Applicants do not cite any evidence, such as a declaration from one
13 of their experts, that the 48 days between the Court's hearing on the Motion to Compel
14 and the June 30, 2008 deadline is insufficient time for Applicants' experts to incorporate
15 Frenkel's deposition testimony into their reports. Without such evidence, Applicants have
16 not demonstrated that they will suffer "substantial harm." Thus, there is no need for this
17 Court to disregard the usual, 35-day briefing schedule contained in Local Rule 7-2(a).

18 In conclusion, if the Court is available to hear Frenkel and Cisco's motions to
19 quash and for a protective order at the same time as Applicants' motion to compel,
20 Respondents have no objection to the Court hearing all such pending motions on April 22,
21 2008. However, if the Court will not hear all such pending motions on April 22, 2008,
22 Respondents respectfully request that the Court deny the Application to Shorten Time for
23 all the foregoing reasons, and further request that the Court consider the Motion to
24 Compel, opposition thereto, and argument of counsel, as well as Frenkel, and Cisco's
25 Motion to Quash and Motion for Protective Order at the noticed hearing on May 13, 2008
26 in accordance with Local Rule 7-2(a).

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Dated: April 15, 2008

MORGAN, LEWIS & BOCKIUS LLP

By 

Howard Holderness

Attorneys for Respondent
RICHARD FRENKEL

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Dated: April 15, 2008

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By Charles L. Babcock
Charles L. Babcock

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Dated: April 15, 2008

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CERTIFICATE OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is One Market St., Spear Tower, San Francisco, CA 94105.

On April 15, 2008, I served on the interested parties in said action the within document(s) as indicated on the attached service list:

RICHARD FRENKEL'S PARTIAL OPPOSITION TO *EX PARTE* APPLICATION BY ILLINOIS COMPUTER RESEARCH LLC AND SCOTT C. HARRIS PURSUANT TO LOCAL RULE 6.3 FOR ORDER SHORTENING TIME FOR HEARING ON MOTION OF ILLINOIS COMPUTER RESEARCH LLC AND SCOTT C. HARRIS UNDER FED.R.CIV.P. 45 TO COMPEL RICHARD FRENKEL'S DEPOSITION AND DOCUMENT PRODUCTION IN APRIL 2008

- (Via Overnight Delivery – Federal Express) by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for overnight delivery
- by transmitting **via facsimile** the document(s) listed above on this date.
- by causing the documents to be delivered by electronic mail addressed as set forth below.
- by causing the documents to be delivered by hand to the offices of the interested parties.

I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct. Signed April 15, 2008, in San Francisco, California.



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