

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MULTIVEN, INC., a Delaware corporation

No. 5:08-cv-05391 JW (HRL)

Plaintiff,

v.

CISCO SYSTEMS, INC., a California corporation

Defendant.

James Ware
**[PROPOSED] ORDER ADOPTING
MAGISTRATE JUDGE'S REPORT AND
RECOMMENDATION ON PLAINTIFF'S
AND COUNTERDEFENDANTS'
PRODUCTION OF DOCUMENTS**

CISCO SYSTEMS, INC., a California corporation, and CISCO TECHNOLOGY, INC., a California corporation

Counterclaimants,

v.

MULTIVEN, INC., a Delaware corporation, PINGSTA, INC., a Delaware corporation, and PETER ALFRED-ADEKEYE, an individual

Counterdefendants.

On June 22, 2010, Magistrate Judge Lloyd entered a Report and Recommendation on Plaintiff's and Counterdefendants' Production of Documents ("Report and Recommendation", Docket No. 241). Pursuant to Federal Rule of Civil Procedure 72(b), the Report and Recommendation set July 6, 2010 as a deadline for any party to file objections to it. That date

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1 having passed, and no objections having been filed, this Court now addresses the question whether
2 to adopt the Report and Recommendation.

3 Having thoroughly reviewed the Report and Recommendation as well as all other papers
4 relevant to this action, and having reviewed the Magistrate Judge's factual findings for clear error
5 and his legal conclusions, if any, *de novo*, it is hereby **ORDERED**:

6 The Court adopts and affirms the Report and Recommendation, as set forth here:

7 **BACKGROUND**

8 Multiven, Inc. ("Multiven"), a provider of service and maintenance support for router and
9 networking systems, sued defendant Cisco Systems, Inc., a leading provider of Internet Protocol-
10 based networking technologies, alleging violations of the Sherman Antitrust Act as well as related
11 state claims. Cisco Systems, Inc., along with related-entity Cisco Technology, Inc. (collectively,
12 "Cisco"), then counterclaimed against Multiven as well as Pingsta, Inc. ("Pingsta") and Peter
13 Alfred-Adekeye ("Adekeye"), a former Cisco employee and current Chief Executive Officer of
14 Multiven and Pingsta (collectively, "Counterdefendants"). Cisco's counterclaims allege copyright
15 infringement, violation of the Computer Fraud and Abuse Act, false advertising in violation of the
16 Lanham Act, plus similar state claims.

17 Last year, Cisco served two sets of Requests for the Production of Documents on Multiven-
18 as-Plaintiff ("Plaintiff Multiven") and Counterdefendants. (Docket No. 196 at 6.) Since that time
19 and with no end in sight, the producing parties have been reviewing and producing documents to
20 Cisco on a rolling basis in accordance with an apparent agreement to do so (although Cisco denies
21 the existence of this agreement). (Docket No. 203 at 2-3.)

22 With discovery in full swing, Cisco served deposition notices and subpoenas in January
23 2010 for (1) Multiven's custodian of records; (2) Multiven's Federal Rule of Civil Procedure
24 ("FRCP") 30(b)(6) deponent; (3) Adekeye; (4) Adekeye's wife Deka Yussuf ("Yussuf"); (5)
25 Pingsta's custodian of records; and (6) Pingsta's FRCP 30(b)(6) deponent. (*Id.* at 3.) These
26 subpoenas requested substantially the same documents as those requested by Cisco's two earlier sets
27 of Requests for Production of Documents served months before. (*Id.*) As depositions approached,
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1 Cisco filed a motion to compel the production of these documents (Docket No. 196), which this
2 Court granted in part and denied in part. (Docket No. 240.)

3 Nevertheless, Plaintiff Multiven and Counterdefendants are nowhere near finished with their
4 review and production of documents responsive to Cisco's requests. And with the September 27
5 discovery deadline looming, something must be done.

6 DISCUSSION

7 A. The Timing of Production and Retention of a Third Party Vendor

8 Despite their efforts, it has become clear to this Court that Plaintiff Multiven and
9 Counterdefendants cannot complete their review and production of documents with enough time
10 before the close of discovery to allow Cisco time to actually do anything with them. Plaintiff
11 Multiven and Counterdefendants so far have insisted on a review process that guarantees that they
12 will not finish this extensive project in any reasonable amount of time. Early on, Plaintiff Multiven
13 and Counterdefendants rejected the idea of using an outside vendor to help search and narrow their
14 electronically-stored information on account of the cost. So up to now Plaintiff Multiven and
15 Counterdefendants have not used search terms to narrow the amount of data to be reviewed.
16 Instead, they have been using approximately five attorneys to review every bit of that giant mass of
17 information for responsive documents. Knowing[] this, it is no surprise that counsel for
18 Counterdefendants stated that it would take, at a minimum, two or three more months to finish the
19 document review. This is far too long and a new method for this review and production is needed.

20 To that end, and regardless of Plaintiff Multiven's and Counterdefendants' earlier
21 misgivings, Cisco requests an order directing the parties to retain a third party vendor to assist with
22 the further collection, search, review, and production of documents. Cisco has even offered to pay
23 for half of the cost of doing so, and Plaintiff Multiven and Counterdefendants are amenable to this
24 option.¹ (Docket No. 207 at 10; Docket No. 224 at 4.) Given the parties' desire and willingness to
25 retain a third party vendor to expedite this prolonged process, this Court will not stand in their way.

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28 ¹ Although ordinarily the Court might suggest that Plaintiff Multiven and Counterdefendants pay for
a court-ordered third party vendor since it is they who are slow in producing documents, Cisco has
offered to cover half of the cost. The Court has no problem with this arrangement, though.

1 Because something must be done, this Court recommends that the District Court order the parties to
2 promptly retain a third party vendor to assist with this increasingly perilous situation.

3 **B. The Appointment of a Special Master**

4 In addition to the sluggishness of Plaintiff Multiven's and Counterdefendants' review and
5 production of documents, this Court is pessimistic about the parties' ability to resolve further
6 discovery issues without some sort of judicial intervention. Indeed, the parties have already resorted
7 to this Court to resolve a number of discovery disputes. And the moving papers related to Cisco's
8 recent motion to compel (Docket No. 196) indicate that there are several more problems on the
9 horizon.

10 First, Cisco contends that Plaintiff Multiven's and Counterdefendants' document collection
11 protocol is flawed. (Docket No. 221 at 2.) Cisco states, for example, that Yussuf owns a MacBook
12 computer which arguably could contain relevant documents, but counsel for Plaintiff Multiven and
13 Counterdefendants have not forensically imaged this computer's hard drive. (*Id.*) Cisco also claims
14 that other email addresses mentioned by Adekeye in his depositions have not been searched by
15 Plaintiff Multiven and Counterdefendants. (*Id.*) While counsel for Plaintiff Multiven and
16 Counterdefendants have said that these sources would be searched in due course if necessary, Cisco
17 has not found this response encouraging.

18 Second, even with the retention of a third party vendor, the parties have indicated that there
19 may be difficulties related to how best to narrow the scope of the document review. The parties
20 specifically identified problems surrounding the numerous document requests, the selection of
21 appropriate search terms, and the de-duplication of documents.

22 Third, the parties disagree about the scope and production of privilege logs. Neither side has
23 produced one so far (although Cisco states that it plans to do so by June 30), and Plaintiff Multiven
24 and Counterdefendants do not believe that it is necessary to log every communication with outside
25 counsel as they say Cisco requested. (Docket No. 221 at 3-4; Docket No. 224 at 4.)

26 In light of the past failures of the parties to resolve discovery issues amicably and given that
27 the final months of discovery are here and are likely to include further disagreement, this Court
28 suggested that it might be appropriate for a Special Master to be appointed to resolve further

1 discovery disputes. The parties agreed, consented to a Special Master, and expressed a desire to use
2 Special Master George C. Fisher, previously appointed by the District Court in this case. The Court
3 believes this to be the most effective course of action and, accordingly, recommends that the District
4 Court expand Special Master Fisher’s duties to include full authority to choose a third party vendor
5 (if the parties cannot agree on one), craft a search protocol, establish deadlines, and otherwise
6 resolve any future discovery disputes or objections in this case pursuant to FRCP 53.

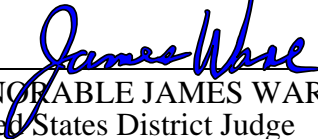
7 **RECOMMENDATION**

8 For the foregoing reasons, this Court recommends as follows:

- 9 1. Per the parties’ agreement, that the District Court order the parties to retain a third party
10 vendor to assist with the further collection, search, review, and production of documents and
11 that Cisco pay for half of the cost and Plaintiff Multiven and Counterdefendants pay for the
12 other half; and
- 13 2. That the District Court expand Special Master Fisher’s duties to include full authority to
14 choose a third party vendor (if the parties cannot agree on one), craft a search protocol,
15 establish deadlines, and otherwise resolve any future discovery disputes or objections in this
16 case pursuant to FRCP 53.

17 **IT IS SO ORDERED.** The Court will issue a separate Order of Appointment for the
Special Master.

18 Dated: July 9, 2010

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 HONORABLE JAMES WARE
 United States District Judge

United States District Court
For the Northern District of California