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SAME-DAY DELIVERY TRANSCRIPT

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1 UNITED STATES DISTRICT COURT
 2 EASTERN DISTRICT OF TEXAS
 3 SHERMAN DIVISION
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 6 ERIC ALBRITTON] CASE NO. 6:08CV89
 7 VS.] 9 AM, SEPTEMBER 17, 2009
 8 CISCO SYSTEMS, INC.] TYLER, TEXAS
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11 REPORTER'S SAME-DAY DELIVERY TRANSCRIPT OF JURY TRIAL

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13 VOLUME 4 OF ^ 000, PAGES 1 THROUGH ^ 000

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17 THE HONORABLE RICHARD SCHELL, U.S. DISTRICT JUDGE, PRESIDING

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24 PROCEEDINGS REPORTED USING COMPUTERIZED STENOTYPE,
 25 TRANSCRIPT PRODUCED USING COMPUTER-AIDED TRANSCRIPTION.

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14 MS. PEDEN: RIGHT. AND IN THAT SUMMARY JUDGMENT
15 PAPER, THE DEFENDANTS ARGUED THAT WE HAD THE BURDEN OF PROVING
16 FALSITY BECAUSE THE ISSUE WAS A MATTER OF PUBLIC CONCERN, AND
17 THEY SPECIFICALLY ARGUED THAT THE OCTOBER 18TH ARTICLE REPORTED
18 ON A MATTER OF PUBLIC CONCERN, THE INTEGRITY OF THE COURT'S
19 ELECTRONIC FILING SYSTEM, AND THE CLERK'S STEWARDSHIP OF THAT
20 SYSTEM. THAT WAS THEIR EXPRESS ARGUMENT, WHICH IS THE SAME
21 ARGUMENT I BELIEVE THEY'RE MAKING TODAY. AND --

22 THE COURT: OKAY. I THOUGHT THEIR ARGUMENT IN
23 CONNECTION WITH THE MOTION FOR SUMMARY JUDGMENT WAS THAT THERE
24 WAS A PUBLIC CONTROVERSY -- THAT THE BLOG ADDRESSED THE PUBLIC
25 CONTROVERSY ABOUT ABUSE OF THE PATENT SYSTEM BY NONPRACTICING

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1 ENTITIES FILING LAWSUITS IN THE EASTERN DISTRICT OF TEXAS.

2 MS. PEDEN: NO, I DON'T BELIEVE THAT THAT'S WHAT
3 DEFENDANTS CONTEND, AND WE DID THAT BATTLE IN DISCOVERY. WE
4 ASKED FOR THAT DISCOVERY. THEY DIDN'T GIVE IT TO US -- AND --
5 BECAUSE THAT WASN'T THEIR -- I BELIEVE THAT WASN'T THEIR
6 POSITION.

7 THE COURT: MR. MORAN, WAS THAT YOUR POSITION IN
8 CONNECTION WITH THE MOTION FOR SUMMARY JUDGMENT, THAT THE
9 PUBLIC CONCERN HAD TO DO WITH THAT ISSUE?

10 MR. MORAN: LET ME SEE IF I CAN CLARIFY THAT, YOUR
11 HONOR.

12 THE COURT: OKAY.

13 MR. MORAN: WHAT WE'RE TALKING ABOUT HERE THIS
14 AFTERNOON IS THE CHARACTER OF THE SPEECH. THE SUMMARY-JUDGMENT
15 MOTION WAS DIRECTED TO WHETHER OR NOT THE PLAINTIFF WAS A

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16 PUBLIC FIGURE, AND THE COURT HELD THAT MR. ALBRITTON WAS NOT A
17 PUBLIC FIGURE; HE WAS A PRIVATE FIGURE.

18 THE COURT: YES.

19 MR. MORAN: ONE OF THE ELEMENTS OF CONSIDERATION IN
20 THAT DETERMINATION OF THE STATUS OF THE PLAINTIFF -- NOT THE
21 CHARACTER OF THE SPEECH, WHICH IS WHAT WE'RE TALKING ABOUT
22 NOW -- IS WHETHER OR NOT THERE WAS A PUBLIC CONTROVERSY THAT
23 MR. ALBRITTON MAY HAVE PLAYED MORE THAN A TANGENTIAL ROLE IN.
24 AND YOUR HONOR RULED THAT HE REALLY WASN'T INVOLVED IN THAT
25 PUBLIC CONTROVERSY, IF THERE WAS A PUBLIC CONTROVERSY. WE'RE

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1 TALKING --

2 THE COURT: WAIT A MINUTE. DID I SAY THAT? I THINK
3 WHAT I SAID ON PAGE 10 -- MAYBE I MISREAD WHAT YOU HAD IN YOUR
4 BRIEF, BUT -- THERE WAS A LOT OF BRIEFING ON THIS. BUT I
5 THOUGHT THAT YOUR POSITION WAS THAT THE PUBLIC CONTROVERSY WAS
6 ABUSE OF THE PATENT SYSTEM BY NONPRACTICING ENTITIES IN THE
7 EASTERN DISTRICT OF TEXAS.

8 MR. MORAN: ABSOLUTELY. THERE'S NO DOUBT ABOUT
9 THAT. IT'S PART OF, WE SAID, A PUBLIC CONTROVERSY AT THE TIME.

10 THE COURT: OKAY. BUT YOUR POSITION IS -- AND I --
11 I'LL HEAR FROM MS. PEDEN, BUT I TEND TO AGREE THAT WHAT GOES ON
12 IN OUR CLERK'S OFFICE IS A MATTER OF PUBLIC CONCERN.

13 MR. MORAN: ABSOLUTELY, AND THAT'S WHAT WE'RE SAYING
14 NOW. WE ARE TALKING ABOUT THE CHARACTER OF THE SPEECH. AND
15 THE PATENT TROLL TRACKER BLOGS ARE SUBSTANTIALLY ABOUT THE
16 PUBLIC INTEGRITY OF THE DOCKETING SYSTEM, THE FILE SYSTEM, THE
17 CONDUCT --

18 THE COURT: OKAY.

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19 MR. MORAN: -- ACTIONS OF THE CLERK, AND SO THAT'S
20 WHY WE SAY THE SPEECH IS A MATTER OF PUBLIC CONCERN.

21 THE COURT: OKAY.

22 MS. PEDEN, YOU DON'T DISAGREE WITH THAT, DO YOU?

23 MS. PEDEN: I DON'T DISAGREE THAT THAT'S THEIR
24 POSITION. IT WAS BRIEFED IN A SUMMARY-JUDGMENT BRIEFING, AND
25 NOT JUST IN THE CONTEXT OF THE PRIVATE FIGURE -- PUBLIC

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1 FIGURE/PRIVATE FIGURE CONTEXT. IT WAS BRIEFED ON THE CHARACTER
2 OF THE SPEECH ON THE ISSUE OF WHO -- WHICH PARTY WOULD BEAR THE
3 BURDEN OF PROVING FALSITY. AND WHAT DEFENDANTS ARGUED IN THEIR
4 BRIEF AT DOCKET ENTRY 125 AT PAGE 14 --

5 THE COURT: WAIT A MINUTE.

6 MS. PEDEN: -- MADE THIS ARGUMENT.

7 THE COURT: NO. YOU BEAR THE BURDEN OF PROVING
8 FALSITY; THEY BEAR THE BURDEN OF PROVING TRUTH. ISN'T THAT HOW
9 IT WORKS?

10 MS. PEDEN: I -- WELL, I READ YOUR HONOR'S
11 SUMMARY-JUDGMENT ORDER TO SAY BECAUSE THIS WAS NOT AN ISSUE OF
12 PUBLIC CONCERN, THAT THEY WOULD BEAR THE BURDEN OF PROVING
13 FALSITY.

14 THE COURT: WHAT I SAID WAS THE ESN LAWSUIT WAS NOT
15 AN ISSUE OF PUBLIC CONCERN. I DISAGREED -- WELL, LET'S SEE.
16 THAT'S ALL I SAID, HONESTLY. THAT'S ON PAGE 10 OF MY ORDER. I
17 DON'T DISAGREE WITH MR. MORAN'S STATEMENT THAT WHAT GOES ON IN
18 OUR CLERK'S OFFICE IS, BY DEFINITION, A MATTER OF PUBLIC
19 CONCERN.

20 MS. PEDEN: YES, YOUR HONOR, BUT YOU HAVE TO LOOK