

# EXHIBIT “D”

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

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ERIC ALBRITTON ] CASE NO. 6:08CV89  
VS. ] 9 AM, SEPTEMBER 14, 2009  
CISCO SYSTEMS, INC. ] TYLER, TEXAS  
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REPORTER'S SAME-DAY DELIVERY TRANSCRIPT OF JURY TRIAL

VOLUME 1 OF 6, PAGES 1 THROUGH 248

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

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

1 Q. AND IT WAS CISCO DOING THE INVESTIGATION?

2 A. YES, SIR.

3 Q. ALL RIGHT. AND HOW LONG DID THE INVESTIGATION TAKE?

4 A. WELL, IT STARTED--IT STARTED AROUND MARCH 10TH AND WENT  
5 THROUGH ABOUT THE END OF--MIDDLE TO END OF APRIL.

6 MR. PATTON: YOUR HONOR, I HAVE AN INQUIRY MORE  
7 THAN AN OBJECTION. THERE'S SOMETHING UP ON THE SCREEN THAT  
8 MR. BABCOCK DOESN'T SEEM TO BE QUESTIONING HIM ABOUT--

9 MR. BABCOCK: DO YOU WANT ME TO TAKE IT DOWN?

10 MR. PATTON: YES.

11 MR. BABCOCK: SURE. NO PROBLEM.

12 THE WITNESS: SO IT WAS ABOUT SIX WEEKS, I WOULD  
13 SAY, GIVE OR TAKE.

14 MR. BABCOCK: OKAY.

15 Q. AND WERE YOU INTERVIEWED AS PART OF THAT INVESTIGATION?

16 A. YES, I WAS.

17 Q. AND DID CISCO--CAN YOU TELL THE LADIES AND GENTLEMEN  
18 OF THE JURY WHETHER CISCO THOUGHT YOUR ONE-DAY BANANA REPUBLIC  
19 COMMENT WAS A NEAT THING OR NOT?

20 A. OH, NO, THEY DID NOT LIKE THAT. AND I DON'T BLAME  
21 THEM. I DIDN'T LIKE IT EITHER WHEN I RECALLED THAT I HAD  
22 DONE IT. I HAD NOT REMEMBERED WHEN I FIRST GOT SUED BY  
23 MR. ALBRITTON, BUT THE LAWSUIT BROUGHT ALL THAT BACK.

24 Q. ALL RIGHT.

25 I BELIEVE YOU SAID, IN RESPONSE TO MR. PATTON, THAT

1 Q. OKAY. AND SO YOU HAD POSSESSION OF IT, I TAKE IT.

2 SO DID ANYBODY EDIT IT?

3 A. NO.

4 Q. DID ANYBODY SNEAK IN AND--

5 A. NO. I HAD POSSESSION OF THE COMPUTER, YES, YES.

6 Q. OKAY. AND DID ANYBODY AT CISCO EDIT THE--

7 A. NO, NOBODY AT CISCO EDITED THIS.

8 Q. WE HAVEN'T TALKED TOO MUCH ABOUT THE OCTOBER 17TH

9 ARTICLE, BUT THE SAME THING WITH RESPECT TO THAT. DID ANYBODY

10 AT CISCO WRITE, REVIEW OR EDIT THAT ARTICLE?

11 A. NO, NO WRITING, REVIEWING, EDITING WHATSOEVER.

12 Q. ALL RIGHT.

13 TO YOUR KNOWLEDGE, DID ANYBODY AT CISCO SEND OUT--

14 PUBLISH THE OCTOBER 18TH ARTICLE OUTSIDE CISCO, OTHER THAN

15 YOURSELF, OF COURSE?

16 A. NOT TO MY KNOWLEDGE.

17 Q. ALL RIGHT. SAME TRUE OF THE OCTOBER 17TH ARTICLE?

18 A. YES. I DON'T KNOW OF ANYONE EVER SENDING IT TO

19 ANYBODY.

20 Q. ALL RIGHT.

21 I WANT TO PUT UP DEFENDANT'S EXHIBIT 11, WHICH IS

22 FROM THE BLOG THAT YOU WERE DISCUSSING WITH--OR THE ARTICLE

23 THAT YOU WERE DISCUSSING WITH MR. MCWILLIAMS, THE LAST ONE,

24 ON FEBRUARY 23RD, 2008. DO YOU RECOGNIZE THIS AS COMING FROM

25 THAT?

1 "HEY, I'VE READ THAT YOU HAVE COMMITTED SOME SORT OF CRIME AND  
2 WE'RE INVESTIGATING IT"?

3 A. THAT'S CORRECT.

4 Q. ALL RIGHT.

5 AND YOU DIDN'T GET AN APOLOGY, BUT YOU DIDN'T REACH  
6 OUT TO MR. FRENKEL'S BLOG, TO THE PATENT TROLL TRACKER, EITHER,  
7 DID YOU?

8 A. YOU DON'T WRESTLE WITH A SNAKE, YOU CUT ITS HEAD OFF.  
9 AND THAT'S WHAT WE DID.

10 Q. WELL, HE'S STILL GOT HIS HEAD, SO YOU ARE A LITTLE  
11 PREMATURE IN THAT.

12 A. WELL, NO, WE SHUT THE BLOG DOWN IS WHAT WE DID. AND I  
13 WASN'T GONNA ENGAGE WITH HIM ON HIS HOME TURF WHERE HE COULD  
14 SPIN WHATEVER HE WAS GONNA SPIN.

15 Q. YOU SHUT THE BLOG DOWN, AND THAT WAS ONE OF YOUR  
16 OBJECTIVES, OF COURSE?

17 A. MY OBJECTIVE WAS TO GET THE ARTICLES THAT WERE ACCUSING  
18 ME OF A CRIME TAKEN DOWN. HE TOOK THE WHOLE THING DOWN ON HIS  
19 OWN ONCE CISCO GOT OUTED.

20 Q. THE ANSWER TO MY QUESTION A MINUTE AGO WAS: YOU DID  
21 NOT REACH OUT TO HIM BY E-MAILING HIM EVEN THOUGH THERE'S A  
22 BUTTON RIGHT THERE, RIGHT?

23 A. ABSOLUTELY NOT. NEVER WOULD.

24 Q. YOU NEVER WOULD?

25 A. NO WAY.

1 POINT NUMBER 7, THE ARTICLES AT ISSUE INVOLVE A  
2 MATTER OF PUBLIC CONCERN. MS. PEDEN, ANYTHING ELSE YOU WANT TO  
3 SAY ON THAT?

4 MS. PEDEN: NO, YOUR HONOR. I THINK THAT WE GOT  
5 YOUR RULING A LITTLE BIT AGO. YOU THINK THEY ARE, AND . . .

6 THE COURT: YEAH. I THINK I SAID THAT LAST WEEK. I  
7 THINK WHAT I SAID IN MY ORDER ON SUMMARY JUDGMENT WAS I WAS  
8 RESPONDING TO WHAT YOU ARGUED AND WHAT CISCO AND MR. FRENKEL  
9 ARGUED, AND -- LET'S SEE. I CAN PROBABLY FIND IT HERE.

10 I SAID THE DEFENDANTS ARGUE THAT THE BLOG POSTINGS  
11 ADDRESS THE PUBLIC CONTROVERSY REGARDING THE ABUSE OF THE  
12 PATENT SYSTEM BY NONPRACTICING ENTITIES IN THE EASTERN DISTRICT  
13 OF TEXAS. INDEED, THE BLOG POSTS DO TALK ABOUT THAT, TOO. THE  
14 PLAINTIFF COUNTERS THAT THE MATTER AT ISSUE, THE LAWSUIT  
15 BETWEEN ESN AND CISCO, DID NOT INVOLVE A PUBLIC CONTROVERSY. I  
16 AGREE. THAT LAWSUIT DOESN'T INVOLVE A PUBLIC CONTROVERSY. BUT  
17 I THINK THE MATTER AT ISSUE HERE IS WHAT'S GOING ON IN THE  
18 CLERK'S OFFICE. I THINK THAT'S REALLY THE HEART OF IT. I  
19 DIDN'T SAY ANYTHING ABOUT THAT. I PROBABLY SHOULD HAVE. I  
20 DON'T KNOW -- MAYBE I'M WRONG. MAYBE YOU TALKED ABOUT THAT  
21 ISSUE AND I JUST MISSED IT, BUT I THINK WHAT YOU TALKED ABOUT  
22 IN YOUR BRIEFING ON THE SUMMARY-JUDGMENT ISSUE -- ON THE  
23 SUMMARY-JUDGMENT MOTION WAS WHAT I RESPONDED TO ON PAGE 10 OF  
24 MY ORDER ON THE MOTION FOR SUMMARY JUDGMENT, BUT THE REAL HEART  
25 OF THE MATTER HERE IS THE OVERSIGHT OF ELECTRONIC CASE RECORDS

1 BY THE DISTRICT CLERK, AND THAT IS A MATTER OF PUBLIC CONCERN.

2 SO I THINK THAT'S PRIMARILY WHAT THE BLOG POSTS ARE  
3 ABOUT. THERE IS A MOTION FOR JUDGMENT AS A MATTER OF LAW ON  
4 THAT. I'M HAPPY TO STATE IT. AS A MATTER OF LAW, IT IS A  
5 MATTER OF PUBLIC CONCERN. I THINK THAT'S WHAT YOU'RE ASKING ME  
6 TO DO, MR. MORAN.

7 MR. MORAN: YES. SOUNDS LIKE I'M ONE FOR SEVEN SO  
8 FAR, YOUR HONOR.

9 THE COURT: OKAY.

10 MR. MORAN: YOU GRANTED NUMBER 7.

11 THE COURT: YES. YEAH, I'LL GRANT NUMBER 7.

12 LET'S SEE. NUMBER 8, THE DEFENDANTS ARGUE THAT A  
13 JUDGMENT AS A MATTER OF LAW SHOULD BE GRANTED ON THE  
14 EXEMPLARY-DAMAGES CLAIM BECAUSE THERE'S NO CLEAR AND CONVINCING  
15 EVIDENCE OF CHAPTER 41 MALICE OR GROSS NEGLIGENCE. I THINK  
16 WE'VE ALREADY COVERED THAT. I THINK THERE ARE FACT ISSUES.

17 NOW, LET ME GO BACK JUST FOR A MOMENT ON THE MATTER  
18 OF PUBLIC CONCERN. LET'S SEE. THE PLAINTIFF'S POSITION THAT  
19 IN A DEFAMATION CASE BROUGHT BY A PRIVATE-FIGURE PLAINTIFF, THE  
20 BURDEN OF PROVING FALSITY IS ON THE DEFENDANTS --

21 IN THE DEFENDANTS' REPLY BRIEF, THEY SAY THAT  
22 MR. ALBRITTON HAS THE BURDEN OF PROVING FALSITY; THAT EVEN A  
23 PRIVATE-FIGURE PLAINTIFF MUST PROVE FALSITY WHEN THE SPEECH IS  
24 ONE -- OR INVOLVES A MATTER OF PUBLIC CONCERN.

25 OKAY. NOW, DOES THAT DEPEND ON WHETHER THE