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11
12 UNITED STATES DISTRICT COURT FOR THE
13 NORTHERN DISTRICT OF CALIFORNIA

14 THE MAGNAVOX COMPANY, a corporation,)
15 and SANDERS ASSOCIATES, INC.,)
16 a corporation,)

17 Plaintiffs,)

18 v.)

19 ACTIVISION, INC., a corporation,)

20 Defendant.)

No. C 82 5270 CAL

PLAINTIFFS' PRETRIAL
PROPOSED
CONCLUSIONS OF LAW

21 1. The burden of establishing invalidity of a patent
22 or any claim thereof rests on the party asserting invalidity and
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25 PLAINTIFFS' PRETRIAL PROPOSED CONCLUSIONS OF LAW
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1 the burden is never shifted to the patentee to prove validity.
2 That is, 35 U.S.C. §282 mandates not only a presumption placing
3 the burden of going forward in a purely procedural sense, but also
4 places the burden of persuasion on the party who asserts that the
5 patent is invalid, regardless of whether the most pertinent prior
6 art was or was not considered by the United States Patent and
7 Trademark Office (PTO) or any other factor. American Hoist &
8 Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350, 1358, 1360, 220
9 U.S.P.Q. 763, 769, 771 (Fed. Cir. 1984), cert. denied, 53 U.S.L.W.
10 3236 (1984); SSIH Equipment S.A. v. U.S. International Trade
11 Commission, 718 F.2d 365, 375, 218 U.S.P.Q. 678, 687 (Fed. Cir.
12 1983); Leinoff v. Louis Milona & Sons, Inc., 726 F.2d 734, 738,
13 220 U.S.P.Q. 845, 847-49 (Fed. Cir. 1984).

14 2. The statutory presumption of validity (35 U.S.C.
15 §282) places the burden on the party attacking validity to
16 overcome the presumption by establishing appropriate facts with
17 clear and convincing evidence. Perkin-Elmer Corp. v.
18 Computervision Corp., 732 F.2d 888, 894, 221 U.S.P.Q. 669, 674
19 (Fed. Cir. 1984); American Hoist & Derrick Co. v. Sowa & Sons,
20 Inc., 725 F.2d 1350, 1358-60, 220 U.S.P.Q. 763, 769-71 (Fed. Cir.
21 1984), cert. denied, 53 U.S.L.W. 3236 (1984); Raytheon Co. v.
22 Roper Corp., 724 F.2d 951, 960, 220 U.S.P.Q. 592, 599 (Fed. Cir.
23 1983), cert. denied, 53 U.S.L.W. 3225 (1984).

1 3. A prior holding reaffirming patent validity in
2 spite of attacks upon validity by infringers should be given
3 weight in a subsequent suit again challenging validity. Stevenson
4 v. Sears, Roebuck & Co., 713 F.2d 705, 711, 218 U.S.P.Q. 969, 974
5 (Fed. Cir. 1983).

6 4. The particular weight given a prior holding
7 reaffirming patent validity despite an attack on validity by an
8 infringer will vary depending on the prior art or other evidence
9 on patentability not before the prior court that is produced in
10 the subsequent suit. Stevenson v. Sears, Roebuck & Co., 713 F.2d
11 705, 711, 218 U.S.P.Q. 969, 974 (Fed. Cir. 1983).

12 5. If the attack upon the validity of a patent in a
13 subsequent suit is on substantially the same basis as in an
14 earlier suit, the court will give the prior holding stare decisis
15 effect. Stevenson v. Sears, Roebuck & Co., 713 F.2d 705, 711, 218
16 U.S.P.Q. 969, 974 (Fed. Cir. 1983).

17 6. Once there has been a judicial determination
18 reaffirming patent validity in spite of an attack on validity by
19 an infringer, the party challenging validity in a later action has
20 the burden of presenting "persuasive new evidence" of invalidity
21 and demonstrating that there is a "material distinction" between
22 the cases on the issue of validity. American Photocopy Equipment
23 Co. v. Rovico, Inc., 384 F.2d 813, 815-16, 155 U.S.P.Q. 119, 120
24 (7th Cir. 1967), cert. denied, 390 U.S. 945, 156 U.S.P.Q. 720
25 (1968); Illinois Tool Works, Inc. v. Foster Grant Co., Inc., 547
26 F.2d 1300, 1302-03, 192 U.S.P.Q. 365, 366-67 (7th Cir. 1976),
27 cert. denied, 431 U.S. 929, 194 U.S.P.Q. 576 (1977); Mercantile

1 National Bank of Chicago v. Howmet Corp., 524 F.2d 1031, 1032, 188
2 U.S.P.Q. 353, 354 (7th Cir. 1975), cert. denied, 424 U.S. 957, 189
3 U.S.P.Q. 256 (1976).

4 7. The statutory presumption of validity accorded to a
5 patent by 35 U.S.C. §282 is greatly enhanced when it has been held
6 sufficient on the issue in a prior decision following an attack
7 upon validity by an infringer at a trial on the merits and the
8 prior adjudication sustaining validity will be followed unless the
9 court is convinced of a "very palpable error in law or fact."

10 Skil Corp. v. Lucerne Products, Inc., 684 F.2d 346, 351, 216
11 U.S.P.Q. 371, 374 (6th Cir. 1982), cert. denied, 459 U.S. 991
12 (1982).

13 8. The ultimate question of patent invalidity based on
14 obviousness and the question of obviousness are, under 35 U.S.C.
15 §103, questions of law based on factual inquiries and factual
16 evidence. Graham v. John Deere Co., 383 U.S. 1, 17, 148 U.S.P.Q.
17 459, 467 (1966); Stevenson v. International Trade Commission, 612
18 F.2d 546, 549, 204 U.S.P.Q. 276, 279 (C.C.P.A. 1979).

19 9. In determining the sufficiency or insufficiency of
20 an infringers proofs of obviousness of patented subject matter,
21 pursuant to 35 U.S.C. §103, a court must remain aware that a
22 patent shall be presumed valid and that the burden of persuasion
23 is and always remains upon the party asserting invalidity, as
24 mandated by 35 U.S.C. §282. Stevenson v. International Trade
25 Commission, 612 F.2d 546, 551, 204 U.S.P.Q. 276, 281 (C.C.P.A.
26 1979); Hughes Aircraft Co. v. United States, 717 F.2d 1351, 1359,
27 219 U.S.P.Q. 473, 478 (Fed. Cir. 1983).

1 10. "Secondary considerations" of nonobviousness, may
2 be the most pertinent, probative, and revealing evidence available
3 to aid a Court in reaching a conclusion on the
4 obviousness/nonobviousness issue. Simmons Fastener Corp. v.
5 Illinois Tool Works, Inc., 739 F.2d 1573, 1575-76, 222 U.S.P.Q.
6 744, 746-47 (Fed. Cir. 1984).

7 11. Though it is proper to note the difference existing
8 between the claimed invention and the prior art, because that
9 difference may serve as one element in determining the
10 obviousness/nonobviousness issue mandated by 35 U.S.C. §103, it is
11 improper merely to consider the difference as the invention. The
12 "difference" may appear to be slight, but it can be the key to
13 success of the invention as a whole which is an advancement in the
14 art. Jones v. Hardy, 727 F.2d 1524, 1528, 220 U.S.P.Q. 1021, 1024
15 (Fed. Cir. 1984).

16 12. It is irrelevant in determining obviousness that
17 all or all but one or two of the aspects of the claimed invention
18 are well known in the art, in a piecemeal manner, since virtually
19 every patent can be described as a "combination patent" or a
20 combination of old elements. Jones v. Hardy, 727 F.2d 1524, 1528,
21 220 U.S.P.Q. 1021, 1024 (Fed. Cir. 1984).

22 13. The statutory provisions of 35 U.S.C. §103 require
23 that the invention as claimed be considered "as a whole" when
24 considering whether the invention would have been obvious at the
25 time the invention was made. Jones v. Hardy, 727 F.2d 1524, 1528,
26 220 U.S.P.Q. 1021, 1024 (Fed. Cir. 1984).

1 14. The mere fact that the disclosures or teachings of
2 the prior art can be combined for purposes of determining the
3 obviousness/nonobviousness issue (35 U.S.C. §103) does not make
4 the combination of the teaching obvious unless the art also
5 suggests the desirability of the combination or the inventor's
6 beneficial results from the combination or the advantage to be
7 derived from combining the teachings. In re Sernaker, 702 F.2d
8 989, 995-96, 217 U.S.P.Q. 1, 6-7 (Fed. Cir. 1983); Lindemann
9 Maschinenfabrik GMBH v. American Hoist & Derrick Co., 730 F.2d
10 1452, 1462, 221 U.S.P.Q. 481, 488 (Fed. Cir. 1984); In re Gordon,
11 733 F.2d 900, 902, 221 U.S.P.Q. 1125, 1127 (Fed. Cir. 1984); In re
12 Imperato, 486 F.2d 585, 587, 179 U.S.P.Q. 730, 732 (C.C.P.A.
13 1973).

14 15. A prior art reference which merely describes a
15 product or a process without disclosing how to make it or carry it
16 out does not support a holding of obviousness under 35 U.S.C. §103
17 unless there is some known or obvious way, to a person having
18 ordinary skill in the art to which the invention pertains, to make
19 the patented product or to carry out the patented process at the
20 time the invention was made by patentee. In re Hoeksema, 399 F.2d
21 269, 273-74, 158 U.S.P.Q. 596, 600-01 (C.C.P.A. 1968); In re
22 Brown, 329 F.2d 1006, 1010-11, 141 U.S.P.Q. 245, 248-49 (C.C.P.A.
23 1964); In re Samour, 571 F.2d 559, 562, 197 U.S.P.Q. 1, 3, 4
24 (C.C.P.A. 1978).

25 16. The reliance by defendant on a large number of
26 references as prior art is indicative of patentable invention in
27 the claims that are under attack. Minneapolis-Honeywell Reg. Co.

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1 v. Midwestern Instruments, Inc., 298 F.2d 36, 38, 131 U.S.P.Q.
2 402, 403 (7th Cir. 1961); Reynolds v. Whitin Machine Works, 167
3 F.2d 78, 83-4, 76 U.S.P.Q. 551, 555 (4th Cir. 1948), cert. denied,
4 334 U.S. 844, 77 U.S.P.Q. 676 (1948); Hoeltke v. C.M. Kemp Mfg.
5 Co., 80 F.2d 912, 917, 26 U.S.P.Q. 114, 119 (4th Cir. 1935).

6 17. A party asserting that a patent claim is
7 "anticipated" under 35 U.S.C. §102 must demonstrate that each and
8 every element of the patent claim is found, as arranged in the
9 claim, either expressly described or implicitly described under
10 appropriate principles of inevitable inherency, in a single prior
11 art reference, or that the claimed invention was previously known
12 or embodied in a single prior art device or practice. Lindemann
13 Maschinenfabrik GMBH v. American Hoist & Derrick Co., 730 F.2d
14 1452, 1458, 221 U.S.P.Q. 481, 485 (Fed. Cir. 1984); Kalman v.
15 Kimberly-Clark Corp., 713 F.2d 760, 771, 218 U.S.P.Q. 781, 789
16 (Fed. Cir. 1983); Connell v. Sears, Roebuck & Co., 722 F.2d 1542,
17 1548, 220 U.S.P.Q. 193, 198 (Fed. Cir. 1983).

18 18. A prior art reference which merely describes a
19 product or a process without disclosing how to make it or carry it
20 out does not support a holding of "anticipation" under 35 U.S.C.
21 §102 unless one skilled in the art to which the invention pertains
22 could take the description found in the reference in combination
23 with his own knowledge of the particular art and thereby be put in
24 possession of the patented invention. Otherwise, the mere naked
25 statement of the invention does not put the public in possession
26 of the invention. In re Le Grice, 301 F.2d 929, 936, 938-39, 133
27 U.S.P.Q. 365, 371-72, 373-74 (C.C.P.A. 1962); Rosemount, Inc. v.

1 F.2d 559, 562, 197 U.S.P.Q. 1, 3, 4 (C.C.P.A. 1978); In re Sasse,
2 629 F.2d 675, 681-82, 207 U.S.P.Q. 107, 111-12 (C.C.P.A. 1980); In
3 re Coker, 463 F.2d 1344, 1348, 175 U.S.P.Q. 26, 29 (C.C.P.A.
4 1972).

5 24. A demonstration in confidence or not in a sales
6 context of a prototype device does not establish an offer to sell
7 or placing the invention on sale under 35 U.S.C §102(b). Poole v.
8 Mossinghoff, 214 U.S.P.Q. 506, 509-10 (D.D.C. 1982).

9 25. The provisions of 35 U.S.C. §112 require that the
10 specification of a patent application or patent set forth the
11 "best mode" contemplated by the inventor of carrying out his
12 invention at the time the application was filed. Even if there is
13 a better mode, the inventor's failure to disclose it in his patent
14 will not invalidate the patent (35 U.S.C. §112) if the inventor
15 did not, at the time of the filing of his application for patent,
16 believe that it was, in fact, the best mode. It is enough that
17 the inventor acted in good faith in his patent disclosure as of
18 the time his application for patent was actually filed. Benger
19 Laboratories, Ltd. v. R. K. Laros Co., 209 F. Supp. 639, 644, 135
20 U.S.P.Q. 11, 15-16 (E.D. Pa. 1962), aff'd per curiam, 317 F.2d
21 455, 137 U.S.P.Q. 693 (3rd Cir. 1963), cert. denied, 375 U.S. 833
22 (1963); In re Gay, 309 F.2d 769, 772-73, 135 U.S.P.Q. 311, 315-16
23 (C.C.P.A. 1962).

24 26. Since an applicant for patent is required to
25 disclose the "best mode" known to or contemplated by him at the
26 time his application is filed, he is not required to predict
27 future or post-filing date developments which may enable the
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1 practice of his invention in substantially the same way and he has
2 no continuing duty to report modifications for practicing his
3 invention either before or after a patent actually issues. Hughes
4 Aircraft Co. v. United States, 717 F.2d 1351, 1362, 219 U.S.P.Q.
5 473, 481 (Fed. Cir. 1983); W.L. Gore & Associates, Inc. v.
6 Garlock, Inc., 721 F.2d 1540, 1556-57, 220 U.S.P.Q. 303, 315-16
7 (Fed. Cir. 1983); Wilden Pump & Engineering Co. v. Pressed &
8 Welded Products Co., 655 F.2d 984, 988, 213 U.S.P.Q. 282, 286 (9th
9 Cir. 1981).

10 27. The claims of a patent, not the specification,
11 measure the invention and the patentee is not confined to a
12 particular illustrative mode disclosed in the specification.
13 Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405,
14 419 (1908); Smith v. Snow, 294 U.S. 1, 11, 24 U.S.P.Q. 26, 30
15 (1935); Environmental Designs, Ltd. v. Union Oil Co. of
16 California, 713 F.2d 693, 699, 218 U.S.P.Q. 865, 871 (Fed. Cir.
17 1983), cert. denied, 104 S.Ct. 709 (1984); Jones v. Hardy, 727
18 F.2d 1524, 1528, 220 U.S.P.Q. 1021, 1024 (Fed. Cir. 1984).

19 28. The claims of a patent are to be construed in the
20 light of the specification, and both are to be read with a view to
21 ascertaining the invention. United States v. Adams, 383 U.S. 39,
22 49, 148 U.S.P.Q. 479, 482 (1966).

23 29. In construing or interpreting a patent claim, a
24 whole host of factors (e.g., patent disclosure, the prosecution
25 history in the PTO, and comparison with other claims) may be
26 considered. Graham v. John Deere Co., 383 U.S. 1, 32-33, 148

1 U.S.P.Q. 459, 472-73 (1966); Fromson v. Advance Offset Plate,
2 Inc., 720 F.2d 1565, 1569-71, 219 U.S.P.Q. 1137, 1140-42 (Fed.
3 Cir. 1983).

4 30. The fact that patent claims are interpreted in
5 light of the specification does not mean that everything expressed
6 in the specification must be read into the claims and indeed that
7 should not be done. Environmental Designs, Ltd. v. Union Oil Co.
8 of California, 713 F.2d 693, 699, 218 U.S.P.Q. 865, 870-71 (Fed.
9 Cir. 1983), cert. denied, 104 S.Ct. 709 (1984); Raytheon Co. v.
10 Roper Corp., 724 F.2d 951, 957, 220 U.S.P.Q. 592, 597 (Fed. Cir.
11 1983), cert. denied, 53 U.S.L.W. 3225 (1984); Smith v. Snow, 294
12 U.S. 1, 11, 24 U.S.P.Q. 36, 37 (1935).

13 31. A patent specification must be sufficiently
14 explicit and complete to enable one skilled in the art to practice
15 the invention, while a claim defines only that which the patentee
16 regards as his invention. Environmental Designs, Ltd. v. Union
17 Oil Co. of California, 713 F.2d 693, 699, 218 U.S.P.Q. 865, 870-71
18 (Fed. Cir. 1983), cert. denied, 104 S.Ct. 709 (1984); Raytheon Co.
19 v. Roper Corp., 724 F.2d 951, 957, 220 U.S.P.Q. 592, 597 (Fed.
20 Cir. 1983), cert. denied, 53 U.S.L.W. 3225 (1984); Smith v. Snow,
21 294 U.S. 1, 11, 24 U.S.P.Q. 36, 37 (1935).

22 32. When a patent claim expresses an element of the
23 claimed combination as "means" for performing a specified function
24 without the recital of structure, as authorized in 35 U.S.C. §112
25 (sixth paragraph), the determination on the issue of infringement
26 requires that the claim be construed to cover both the
27 corresponding structure for that element set forth in the patent
28

1 specification and equivalents thereof. Radio Steel & Mfg. Co. v.
2 MTD Products, Inc., 731 F.2d 840, 848, 221 U.S.P.Q. 657, 663 (Fed.
3 Cir. 1984), cert. denied, 53 U.S.L.W. 3237 (1984); Lockheed
4 Aircraft Corp. v. United States, 553 F.2d 69, 82, 193 U.S.P.Q.
5 449, 460 (Ct. Cl. 1977); Stearns v. Tinker & Rasor, 252 F.2d 589,
6 597-98, 116 U.S.P.Q. 222, 228 (9th Cir. 1957).

7 33. Subject matter described in a patent and accused
8 subject matter are equivalent for the purposes of determining
9 infringement if they perform substantially the same function in
10 substantially the same way to obtain substantially the same
11 result. Graver Tank & Mfg. Co. v. Linde Air Products Co., 339
12 U.S. 605, 608 (1950); Atlas Powder Co. v. E.I. Du PuPont De
13 Nemours & Co., 750 F.2d 1569, 1579, 224 U.S.P.Q. 409 416 (Fed.
14 Cir. 1984).

15 34. The issue of infringement raises at least two
16 questions: (1) what is patented, and (2) has what is patented
17 been made, used or sold by another. The first is a question of
18 law; the second is a question of fact to be proved by a
19 preponderance of the evidence. SSIH Equipment S.A. v. U.S.
20 International Trade Commission, 718 F.2d 365, 376, 218 U.S.P.Q.
21 678, 688 (Fed. Cir. 1983); Fromson v. Advance Offset Plate, Inc.,
22 720 F.2d 1565, 1569, 219 U.S.P.Q. 1137, 1140 (Fed. Cir. 1983).

23 35. Infringement cannot be avoided by the mere fact
24 that the accused device is more or less efficient than the subject
25 matter claimed or disclosed, or merely performs additional
26 functions or adds features, or is an improvement. Amstar Corp. v.
27 Envirotech Corp., 730 F.2d 1476, 1481-82, 221 U.S.P.Q. 649, 653

1 (Fed. Cir. 1984); Radio Steel & Mfg. Co. v. MTD Products, Inc.,
2 731 F.2d 840, 848, 221 U.S.P.Q. 657, 663-64 (Fed. Cir. 1984),
3 cert. denied, 53 U.S.L.W. 3237 (1984).

4 36. What constitutes equivalency must be determined
5 against the context of the patent and the particular circumstances
6 of the case. Equivalence, in the patent law, is not the prisoner
7 of a formula and is not an absolute to be considered in a vacuum.
8 It does not require complete identity for every purpose and in
9 every respect. Graver Tank & Mfg. Co. v. Linde Co., 339 U.S. 605,
10 609, 85 U.S.P.Q. 328, 330-31 (1950); Atlas Powder Co. v. E.I. Du
11 PuPont De Nemours & Co., 750 F.2d 1569, 1579, 224 U.S.P.Q. 409,
12 416 (Fed. Cir. 1984); Hughes Aircraft Co. v. United States, 717
13 F.2d 1351, 1361, 219 U.S.P.Q. 473, 480 (Fed. Cir. 1983); Perkin-
14 Elmer Corp. v. Computervision Corp., 732 F.2d 888, 901, 221
15 U.S.P.Q. 669, 679 (Fed. Cir. 1984).

16 37. In determining the question of equivalency, things
17 for most purposes different may be equivalent for the construction
18 of a particular patent. Graver Tank & Mfg. Co. v. Linde Co., 339
19 U.S. 605, 609 (1950).

20 38. A finding of equivalence is a determination of
21 fact. Proof can be made in any form, including testimony of
22 experts or others versed in the technology. Graver Tank & Mfg.
23 Co. v. Linde Co., 339 U.S. 605, 609-10, 85 U.S.P.Q. 328, 331
24 (1950); Hughes Aircraft Co. v. United States, 717 F.2d 1351,
25 1363-66, 219 U.S.P.Q. 473, 482-84 (Fed. Cir. 1983); Thomas & Betts
26 Corp. v. Litton Systems, Inc., 720 F.2d 1572, 1579, 220 U.S.P.Q.
27 1, 6 (Fed. Cir. 1983).

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1 39. The use by the accused of an embellishment or
2 embodiment made possible by technology developed, known or
3 appreciated after the invention claimed in a patent, that is, made
4 possible by post-invention technology, or the mere use of a
5 component that may be more sophisticated than that disclosed by
6 the patentee, does not allow one to escape an appropriate range of
7 equivalents or to thereby avoid infringement of the claimed
8 invention. Hughes Aircraft Co. v. United States, 717 F.2d 1351,
9 1365-66, 219 U.S.P.Q. 473, 483-84 (Fed. Cir. 1983); Bendix Corp.
10 v. United States, 600 F.2d 1364, 1382, 204 U.S.P.Q. 617, 631 (Ct.
11 Cl. 1979).

12 40. A patentee may be his own lexicographer, i.e., he
13 is not confined to normal dictionary meanings of words used in his
14 patent claims; to understand the claims they must be construed in
15 connection with other parts of the patent. W. L. Gore &
16 Associates, Inc. v. Garlock, Inc. 721 F.2d 1540, 1557-58, 220
17 U.S.P.Q. 303, 316-17 (Fed. Cir. 1983); Fromson v. Advance Offset
18 Plate, Inc., 720 F.2d 1565, 1569-70, 219 U.S.P.Q. 1137, 1140 (Fed.
19 Cir. 1983).

20 41. Whoever actively induces infringement of a patent
21 shall be liable as an infringer. 35 U.S.C. §271.

22 42. Whoever sells a component of a patented machine,
23 manufacture, combination or composition constituting a material
24 part of the invention, knowing the same to be especially made or
25 especially adapted for use in an infringement of such patent, and

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1 717 F.2d 1380, 1390, 219 U.S.P.Q. 569, 577 (Fed. Cir. 1983).

2 47. Defendant has failed to establish that the Re. 28,507
3 patent, or any claim thereof, is invalid.



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PROOF OF SERVICE BY HAND

I, Mary A. Buller, hereby certify under penalty of perjury that:


I am employed in the County of San Francisco, California. I am over the age of 18 years and not a party to the within cause. My business address is Three Embarcadero Center, 27th Floor, San Francisco, California, 94111.

On April 17, 1985, I served a copy of PLAINTIFFS' PRETRIAL PROPOSED FINDINGS OF FACT; PLAINTIFFS' PRETRIAL PROPOSED CONCLUSIONS OF LAW; and PLAINTIFFS' PRETRIAL DEPOSITION AND INTERROGATORY DESIGNATIONS FOR THEIR PRIMA FACIE CASE

upon the following named persons by causing an envelope to be addressed as follows, a copy of the document(s) described above to be enclosed and sealed in it, and to have the envelope delivered by hand to:

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Canady, Robertson & Falk
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Executed on April 17, 1985 at San Francisco, California.



MARY A. BULLER