

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

SEAGATE TECHNOLOGY LLC,

Opposer,

v.

EC-GATE NV

Applicant.

Opposition No. 114,018



02-21-2003

U.S. Patent & TMOfo/TM Mail Rcpt. Dt. #40

CERTIFICATE OF MAILING

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Signed: Lisa Jeanetta

Lisa Jeanetta

OPPOSER'S MOTION FOR SUMMARY JUDGEMENT

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INTRODUCTION

Opposer Seagate Technology LLC owns registrations for the mark SEAGATE and SEAGATE SOFTWARE for use with computer hardware and computer software. Applicant EC-Gate NV has applied for registration of the trademark mark EC-GATE for "electronic commercial and commerce products, namely, computer hardware and computer software for use in electronic commerce and for processing transactions for electronic commerce in class 9." Seagate requests that EC-Gate's application be denied registration on the basis of likelihood of confusion with the mark SEAGATE and/or SEAGATE SOFTWARE.

FACTS

A. Seagate Has Extensively Promoted And Sold Its Goods Under The Marks SEAGATE and SEAGATE SOFTWARE

1. Seagate Technology LLC's predecessor, Seagate Technology, was incorporated in California in 1978 and commenced business in 1979. At the time, Seagate designed and manufactured magnetic disc drives for use in computers. (Deposition of Philip Detwiler, Ex. 33, p. 19, hereinafter "Detweiler," attached as Exhibit 5 to the Declaration of Diane Mason.) Seagate's first product was shipped in July 1980, and by 1981, Seagate's product sales totaled \$9,792,000. (Detwiler, Ex. 33, pp. 12-13, 20.)

2. By 1986, Seagate had broadened its customer base beyond Original Equipment Manufacturers to include value-added resellers and value-added dealers. (Detwiler, Ex. 37, p. 2.) Original Equipment Manufacturers are typically large corporations such as Compaq, IBM, Sun and Dell that sell computers or subsystems. (Detwiler, 10:18-24.) Dealers are generally storefront businesses, such as Comp USA, that sell products to end-users. (Detwiler, 12:14-13:12.)

3. Seagate has continued to expand its product line beyond magnetic disc drives. For example, in 1994, Seagate acquired software publisher Crystal Computer Services and Palindrome Corporation, a developer of data protection and management software. (Detwiler, Ex. 45, pp. 38-39.)

4. Presently, Seagate sells and distributes hard disk drives and computer software. (Declaration of Raghunath S. Minisandram, ¶4, hereinafter Minisandram Dec.) Seagate sells and distributes its products to Original Equipment Manufacturers, distributors, resellers, dealers, and retailers. (Detwiler, Ex. 49, p. 35.) Seagate products are also available for purchase by the general public at retail stores and over the internet. (Detwiler, 45:6-19; 90:11-21.)

5. Seagate also owns the following United States Trademark Registrations:

a. Registration No. 1,269,032 for SEAGATE for Magnetic Disc Drive Apparatus for use in data storage in class 9, which became registered on March 6, 1984 (Attached as Exhibit 1 to Minisandram Dec.);

b. Registration No. 2,024,197 for SEAGATE, registered December 17, 1996 for computer software for use in the field of data base management in class 9 (Attached as Exhibit 2 to Minisandram Dec.);

c. Registration No. 2,024,196 for SEAGATE SOFTWARE, registered December 17, 1996 for computer software for use in the field of data base management in class 9 (Attached as Exhibit 3 to Minisandram Dec.);

d. Registration No. 2,174,727 for SEAGATE, registered July 21, 1998 for computer software for preserving and restoring information in a computer; computer software for data access and reporting; computer software for decision support; computer software for systems management; computer software for computer network management; computer software for computer network inventory; computer software for software distribution on a computer

network; computer software for remote control of a computer network; computer software for management of computer network software licenses; computer software for monitoring a computer network; computer software for monitoring computer network problems; computer software for correlating events; computer software for data distribution on a computer network; computer software for on-line analytical processing; computer software for multidimensional on-line analytical processing; computer software for relational on-line analytical processing; computer software for generating reports and graphs; computer software for database access and report writing; computer software for analytical processing of data on a network; computer software for reporting system data; computer software for diagnosis and solving computer network problems; computer software for monitoring and alerting of computer server activity and problems; computer software for tracking and updating hardware and software configuration information; computer software for collecting and updating data on a network; computer software for inventorying computer network hardware and software; computer software for network inventorying; computer software for distributing software on a computer network and remote control of a computer network; computer software for monitoring and detecting a computer virus on a computer network; computer software for controlling computer software usage; computer software for scheduling batch applications. computer software for scheduling command executions; computer software for network backup and restoring; computer software for desktop computer backup and restoring; computer software for archiving; computer software for hierarchical storage management; computer software for monitoring network backup and restoring; computer software for network storage management; computer software for centralized management and control over data distributed on a network in class 9 (Attached as Exhibit 4 to Minisandram Dec.); and

e. Registration No. 2,218,223 for SEAGATE SOFTWARE, registered on January 19, 1999 for computer software for preserving and restoring information in a computer; computer software for data access and reporting; computer software for decision support; computer software for systems management; computer software for computer network management; computer software for computer network inventory; computer software for software distribution on a computer network; computer software for remote control of a computer network; computer software for management of computer network software licenses; computer software for monitoring a computer network; computer software for monitoring computer network problems; computer software for correlating events; computer software for data distribution on a computer network; computer software for on-line analytical processing; computer software for multidimensional on-line analytical processing; computer software for relational on-line analytical processing; computer software for generating reports and graphs; computer software for database access and report writing; computer software for analytical processing of data on a network; computer software for reporting system data; computer software for diagnosis and solving computer network problems; computer software for monitoring and alerting of computer server activity and problems; computer software for tracking and updating hardware and software configuration information; computer software for collecting and updating data on a network; computer software for inventorying computer network hardware and software; computer software for network inventorying; computer software for distributing software on a computer network and remote control of a computer network; computer software for monitoring and detecting a computer virus on a computer network; computer software for controlling computer software usage; computer software for scheduling batch applications. computer software for scheduling command executions; computer software

for network backup and restoring; computer software for desktop computer backup and restoring; computer software for archiving; computer software for hierarchical storage management; computer software for monitoring network backup and restoring; computer software for network storage management; computer software for centralized management and control over data distributed on a network in class 9.

6. Between 1986 and 1997, Seagate spent \$34.2 million on print advertising for just the promotion of its hard drives and tape drives. (Detwiler, 52:4-54:1; 56:8-11; Ex. 50.) In 1998, Seagate advertising costs were \$68 million, an increase from \$41 million in 1997, and \$34 million in 1996. (Detwiler, Ex. 49, p.51.)

7. In fiscal year 2001, Seagate spent approximately \$45 million dollars for advertising related expenditures worldwide. In fiscal year 2001, Seagate had global sales of approximately \$5.85 billion dollars. (Minisandram Dec., ¶2.)

8. In fiscal year 2002, Seagate spent approximately \$29 million dollars for advertising related expenditures worldwide. In fiscal year 2002, Seagate had global sales of approximately \$5.98 billion dollars. (Minisandram Dec., ¶3.)

B. Opposer's and Applicant's Goods are Similar

9. Applicant filed its intent-to-use application for EC-GATE for "electronic commercial and commerce products, namely, computer hardware and computer software for use in electronic commerce and for processing transactions for electronic commerce in class 9" on May 29, 1997.

10. "Electronic commercial and commerce products, namely, computer hardware and computer software for use in electronic commerce and for processing transactions for electronic

commerce in class 9” could be sold to the same customers, and in the same channels of trade as Seagate Technology’s computer hardware and software products sold under the mark SEAGATE and/or SEAGATE SOFTWARE. (Minisandram Dec., ¶5.)

11. “E” is a prefix for “electronic” as in e-mail and e-commerce. Mason Dec., ¶2-3.

C. Facts Deemed Admitted by Applicant

Opposer’s First Set of Request for Admissions was served on Applicant on September 13, 1999. Mason Dec., ¶4. Opposer failed to respond at all to the Request for Admissions. Mason Dec., ¶5. Accordingly, Opposer’s First Set of Request for Admissions are deemed to be all admitted. TBMP §411. Likewise, Opposer’s Second Set of Request for Admissions was served on Applicant on December 11, 2002. Mason Dec., ¶6. Opposer failed to respond at all to the Request for Admissions. Mason Dec., ¶7. Opposer’s Second Set of Request for Admissions are therefore also deemed to be admitted. TBMP §411.

The following facts are deemed to be admitted by EC-Gate:

1. The mark which is the subject of Serial No. 75/299,458 is pronounced “E-SEEGATE” or “E-SEAGATE.”
2. SEAGATE is an arbitrary mark for computer hardware and software products, including but not limited to computer disc drive apparatus.
3. Opposer has continuously used its mark SEAGATE in interstate commerce in the United States since as early as July 1980.
4. Applicant did not use the name or mark EC-GATE mark in the United States before 1996.
5. The mark EC-GATE is confusingly similar in appearance to the mark SEAGATE.
6. The mark EC-GATE sounds confusingly similar to the mark SEAGATE.

7. Applicant's goods, namely, "electronic commercial and commerce products, namely, computer hardware and computer software for use in electronic commerce and for processing transactions for electronic commerce in class 9" are confusingly similar to Opposer's goods, namely, computer hardware and software, marketed, advertised and/or promoted under the mark SEAGATE.

8. The goods "electronic commercial and commerce products, namely, computer hardware and computer software for use in electronic commerce and for processing transactions for electronic commerce in class 9" would be marketed, advertised, promoted and/or sold in the same channels of trade as Opposer's goods, namely computer hardware and software.

9. The goods "electronic commercial and commerce products, namely, computer hardware and computer software for use in electronic commerce and for processing transactions for electronic commerce in class 9" would be marketed, advertised, promoted and/or sold to the same customers that Opposer markets, advertises, promotes and/or sells computer hardware and/or software under the mark SEAGATE.

ARGUMENT

I. Opposer Has Priority Of Use

Opposer, through its predecessors, first used the mark SEAGATE in 1980. Opposer, through its predecessors, has continuously used the mark since 1980. Applicant filed its intent-to-use application for EC-GATE on March 29, 1997. Furthermore, Applicant admits that Opposer has priority of use of the mark SEAGATE. Accordingly, it is undisputed that Opposer has priority of use of its mark SEAGATE.

II. SEAGATE and EC-GATE are confusingly similar

On a motion for summary judgment, this Board must determine whether there is a genuine issue of material fact about likelihood of confusion. *See*, 37 C.F.R. Section 2.116(a)

(1992); *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 767, 25 USPQ2d 2027 (Fed. Cir. 1993). Whether a likelihood of confusion exists is a question of law, based on underlying factual determinations. *Id.* Likelihood of confusion is determined on a case-specific basis, applying the factors set out in *In re E. I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973), when relevant evidence is of record. “[N]ot all the of the Dupont factors are relevant or of similar weight in every case.” *Opryland USA Inc. v. Great Am. Music Show*, 970 F.2d 847, 850, 23 USPQ2d 1471, 1473 (Fed. Cir. 1992).

The DuPont factors are: (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression; (2) the similarity or dissimilarity and nature of the goods or services as described in an application or registration; (3) the similarity or dissimilarity of established, likely-to-continue trade channels; (4) the conditions under which and buyers to whom sales are made; (5) the fame of the prior mark; (6) the number and nature of similar marks in use on similar goods; (7) the nature and extent of any actual confusion; (8) the length of time during and conditions under which there have been concurrent use without evidence of actual confusion; (9) the variety of goods on which a mark is or is not used; (10) the market interface between applicant and the owner of a prior mark; (11) the extent to which applicant has a right to exclude others from use of its mark on its goods; (12) the extent of potential confusion, i.e., whether de minimis or substantial; and (13) any other established fact probative of the effect of use. *See In re E. I. DuPont DeNemours & Co.*, 177 USPQ 563.

Here, the relevant *DuPont* factors are 1) similarity of the marks in their entireties as to appearance, sound, connotation and commercial impression; 2) the similarity of the goods as described; 3) the similarity of the trade channels; and 4) the strength of the prior mark.

A. The marks are similar in appearance, sound, and connotation.

The similarity or dissimilarity of the marks in their entirety is to be considered with respect to appearance, sound and connotation. *In re E. I. DuPont de Nemours & Co.*, 177 USPQ at 567. “The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the services offered under the respective marks is likely to result.” *In re Continental Graphics Corp.*, 52 USPQ2d 1374, 1375 (TTAB 1999).

Furthermore, while marks must be compared in their entireties, one feature of a mark may have more significance than another, and in such a case there is nothing improper in giving greater weight to the dominant feature. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985) (it is not improper to give more or less weight to a particular feature of a mark). Where the dominant portions of the two marks are the same, confusion is likely. *In re Hyper Shoppes, Inc.*, 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

Here, Applicant’s mark EC-GATE is pronounced “E-SEEGATE” or “E-SEAGATE.” Furthermore, the prefix “E” is readily recognized as a prefix meaning “electronic,” as in e-mail or e-commerce. *See*, Mason Dec., ¶2-3. The prefix “e” in EC-GATE is therefore descriptive for goods related to “electronic commerce,” and is entitled to less weight than the “C-GATE” portion of the mark. Accordingly, Applicant’s mark EC-GATE is very similar in sound to Opposer’s mark SEAGATE.

The marks are also similar in appearance as both contain the formative “GATE.” Furthermore, because the marks are highly similar in sound, the marks would have similar

connotations and commercial impression. Finally, even Applicant admits that SEAGATE and EC-GATE are confusingly similar in sound, appearance and connotation.

B. The respective goods are similar

When marks in an opposition proceeding are very similar or identical, the question of likelihood of confusion turns on a consideration of the goods and services involved. *Autac, Inc. v. Viking Indus., Inc.*, 199 U.S.P.Q. 367, 372 (TTAB 1978); *Flow Technology, Inc. v. Picciano*, 18 USPQ2d 1970, 1972 (TTAB 1991). Moreover, when the marks are very similar or identical, "the relationship or similarity between the goods involved and/or the conditions surrounding their sale and promotion need not be as closely related as in those situations involving different marks" *Autac, Inc. v. Viking Indus., Inc.*, 199 U.S.P.Q. at 372.

Here, Opposer's mark SEAGATE is used on computer hardware and software in class 9. Likewise, Applicant's goods are "computer hardware and computer software for use in electronic commerce and for processing transactions for electronic commerce in class 9. Accordingly, Opposer's and Applicant's respective goods are nearly identical. In fact, Applicant has conceded that the marks are used on similar goods.

C. SEAGATE and EC-GATE are promoted in similar channels of trade and to similar customers

The "channels of trade" factor concerns how and to whom the respective products are sold and distributed. *In re E. I. DuPont de Nemours & Co.*, 177 USPQ at 567. Registrability must be determined "on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of the goods are directed." *Octocom Sys., Inc. v. Houston Computer Serv., Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787(Fed. Cir. 1990). When neither the application nor the opposer's registrations are

restricted as to trade channels or prospective purchasers, then the issue of likelihood of confusion is resolved by assuming that the products move through all the ordinary and usual channels of trade for such goods to all the usual customers for such products. *Kangol Ltd. v. KangaROOS U.S.A., Inc.*, 23 USPQ2d 1945 (Fed. Cir. 1992).

Here, neither Applicant's identification of goods, nor Opposer's registrations are restricted as to trade channels or prospective purchasers. Therefore, Opposer's and Applicant's goods, computer hardware and software, are assumed to be marketed in the same channels of trade. More importantly, Applicant has conceded that its goods and Opposer's goods would be marketed, advertised, promoted and/or sold in the same channels of trade.

D. SEAGATE is a strong mark

The strength or "distinctiveness" of a mark is a factor which broadens the scope of a mark's protection and the propensity of purchasers to be confused when confronted with similar marks. A strong mark is more likely than a weak mark to be remembered and more likely to be associated by the purchasing public with a greater breadth of goods or services. *Dan Robbins & Associates, Inc. v. Questor Corp.*, 599 F.2d 1009, 1013, 202 USPQ 100, 104 (CCPA 1979). Thus, the stronger a mark, i.e. the more likely it is to be remembered and associated in the public mind with the mark's owner, the greater the protection it is accorded by the trademark laws. *See Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

1. SEAGATE mark is arbitrary

The relative strength or distinctiveness of a mark is based on its classification in a continuum of generally increasing distinctiveness from generic, descriptive, and suggestive through arbitrary and fanciful, with arbitrary and fanciful marks being the strongest and receiving the greatest protection. *See Two Pesos, Inc. v. Taco Cabana*, 505 U.S. 763, 768, 23

USPQ2d 1081 (1992); *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 22 USPQ2d at 1456 (a strong mark casts a long shadow which competitors must avoid.)

Here, Applicant has conceded that SEAGATE is an arbitrary mark for computer hardware and software. As indicated by the Federal Circuit,

2. The SEAGATE mark is famous

The fame of a trademark increases the likelihood that purchasers will be confused, since less care may be taken in purchasing a product under a famous name. *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 22 USPQ2d at 1456. The fame of a mark is measured by its sales, advertising and length of use. *In re E. I. DuPont de Nemours & Co.*, 177 USPQ at 567; *Nina Ricci, S.A.R.L. v. E.T.F. Enters., Inc.*, 889 F.2d 1070, 1072, 12 USPQ2d 1901, 1902 (Fed. Cir. 1989) (NINA RICCI for perfume, clothing and accessories: \$200 million in sales, over \$37 million in advertising over 27 years); *Kimberly-Clark Corp. v. H. Douglas Enter., Ltd.*, 774 F.2d 1144, 1146-47, 227 USPQ 541, 542 (Fed. Cir. 1985) (HUGGIES for diapers: over \$300 million in sales over 9 years, \$15 million in advertising in one year); *Specialty Brands Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 674-75, 223 USPQ 1281, 1284 (Fed. Cir. 1984) (SPICE ISLANDS for teas, spices and seasonings: \$25 million annually in sales for spices, \$12 million between 1959 and 1981 for tea, "several million" in advertising, in use for 40 years). As the Federal Circuit has emphasized

Seagate advertises and promotes products sold under the mark SEAGATE extensively. Seagate's promotional efforts include running ads in numerous magazines and other publications, from Computer and Software News to the Wall Street Journal. (Detwiler, Ex. 50, pp. 1-3.) Seagate also prints posters, catalogs, and brochures that all bear Seagate's marks; direct mails promotional materials to prospective buyers and users of Seagate products; runs

cooperative advertising campaigns with distributors and resellers of Seagate products; participates in trade shows; and promotes and sells its products on its internet site. (Detwiler, 26:18-27:15; 43:21-45:19; Ex. 28; Ex. 29; Ex. 30; Ex. 31; Ex. 32.)

In fiscal year 2002, Seagate spent approximately \$29 million dollars for advertising related expenditures worldwide. (Minisandram Dec., 3.) As a result of Seagate's extensive advertising and promotional efforts, Seagate's revenues from worldwide product sales have grown from \$9.8 million in 1981 to \$5.98 billion dollars in fiscal year 2002. (Detwiler, 43:10-11; Ex. 33, p. 1; Minisandram Dec., 3.)

Seagate's extensive advertising and increasing sales volume demonstrates that its mark has achieved significant fame and widespread recognition in the general population over the last twenty years, particularly as the explosive growth of home computers and the internet has dramatically increased public awareness of computer-related marks such as SEAGATE and MICROSOFT. The fame and recognition of Opposer's SEAGATE mark entitles it to a broader scope of protection. Moreover, as discussed above, Seagate's computer products are closely related, if not identical, to EC-GATE's computer hardware and software.

E. Confusion is likely between the marks

It is unnecessary to show actual confusion in establishing likelihood of confusion. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 218 USPQ 390, 396 (Fed. Cir. 1983). Furthermore, any doubts as to likelihood of confusion must be resolved against the newcomer because the newcomer has the opportunity and duty to avoid a likelihood of confusion with an existing mark. *In re Hyper Shoppes, Inc.*, 6 USPQ2d at 1026. In this matter, the similarity in 1) the marks' appearance; 2) goods; and 3) the channels of trade make instances of confusion highly likely.

Moreover, as indicated above, Opposer has expended considerable time, effort and money over the past twenty years developing and growing the national recognition of its SEAGATE mark not only in the computer industry, but in the business community as a whole. In view of the famousness and strength of Opposer's mark and the fact that its goods compete for attention in the same channels of trade as those of Applicant, there is a strong likelihood that the purchasing public will be confused as to source or sponsorship of Applicant's goods bearing the confusingly similar mark EC-GATE.

SUMMARY

There is no dispute that the mark SEAGATE was used in commerce on computer hardware and software well before the filing date of the intent-to-use application for EC-GATE. Additionally, SEAGATE is an arbitrary and famous mark, and therefore entitled to greater legal protection. Because SEAGATE and EC-GATE are very similar in sound, appearance and connotation; and Opposer's and Applicant's goods used with their respective marks are very similar and share the same channels of trade and customers, Seagate respectfully requests that the Board refuse registration of Applicant's mark EC-GATE on the basis that there is a strong likelihood of confusion with Opposer's mark SEAGATE.

Respectfully submitted,

Dorsey & Whitney LLP

Date: 2/19/03

By 

Diane J. Mason

Attorneys for Opposer

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PROOF OF SERVICE BY OVERNIGHT COURIER SERVICE

I, Lisa Jeanetta, certify and declare as follows:

I am over the age of 18, and not a party to this action. My business address is Dorsey & Whitney LLP, Four Embarcadero Center, Suite 3400, San Francisco, California 94111.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for overnight delivery by DHL Worldwide Express. Such correspondence will be deposited with a facility regularly maintained by DHL Worldwide Express for Receipt on the same day in the ordinary course of business.

On February 19, 2003, at my place of business at San Francisco, California, a copy of the following documents:

Opposer's Motion To Admit Testimony Deposition Of Philip Detwiler;
Opposer's Motion For Summary Judgment;
Declaration of Raghunath Minisandram in Support of Opposer's Motion for Summary Judgment; and
Declaration of Diane Mason in Support of Opposer's Motion for Summary Judgment

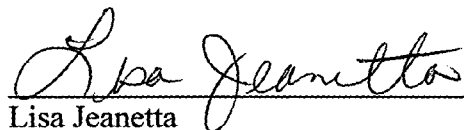
were placed for deposit for overnight delivery by DHL Worldwide Express, addressed to Applicant, EC-Gate NV, as follows:

Thomas A.M. Veringa
Controller EC-Gate Group
Bergemeester Stramanweg 105-G
1101 AA Amsterdam
The Netherlands

and such envelope was sealed and placed for collection and delivery on February 19, 2003, with delivery fees paid or provided for in accordance with ordinary business practices

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 19, 2003 at San Francisco, California.



Lisa Jeanetta

PROOF OF SERVICE BY U.S. POSTAL SERVICE

I, Lisa Jeanetta, certify and declare as follows:

I am over the age of 18, and not a party to this action. My business address is Dorsey & Whitney LLP, Four Embarcadero Center, Suite 3400, San Francisco, California 94111.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 19, 2003, at my place of business at San Francisco, California, a copy of the following documents:

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Declaration of Diane Mason in Support of Opposer's Motion for Summary Judgment

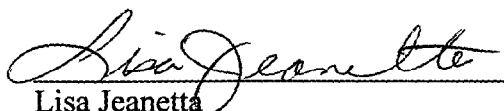
were placed for deposit in the United States Postal Service in a sealed envelope, with postage fully prepaid, addressed to Applicant's counsel, as follows:

Todd E. Adler Heller Ehrman White & McAuliffe LLP 333 Bush Street San Francisco, CA 94104-2878

and such envelop was sealed and placed for collection and mailing on February 19, 2003, following ordinary business practices.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 19, 2003 at San Francisco, California.


Lisa Jeanetta