



**USFC2004-1609-07**

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# **JOINT APPENDIX**

04-1609, 05-1141,-1202

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GOLDEN BLOUNT, INC.

Plaintiff-Appellee,

v.

ROBERT H. PETERSON CO.,

Defendant-Appellant.

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JUN 23 2005

United States Court of Appeals  
For The Federal Circuit

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF TEXAS IN 3:01-CV-127-R

JUDGE JERRY BUCKMEYER

U.S. COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

NON-CONFIDENTIAL JOINT APPENDIX

VOLUME VII, PAGES JT-APP 2919 – 3445

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NOTE ON CONFIDENTIAL MATERIAL: Pursuant to Federal Circuit Rule 30(h)(1)(B), the parties hereby state that certain material has been redacted from this version of the Joint Appendix due its confidential nature. The material generally consists of proprietary sales and pricing data.

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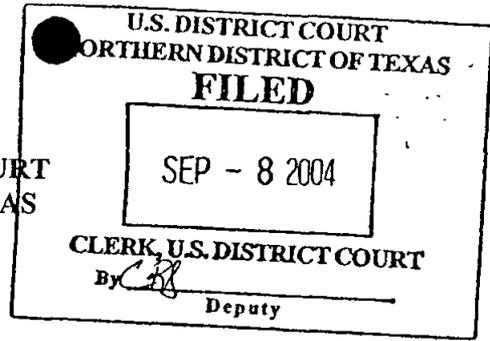
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3445

Doc #827599

*R*  
ORIGINAL

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION



GOLDEN BLOUNT, INC.

Plaintiff,

v.

ROBERT H. PETERSON CO.,

Defendant.

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CIVIL ACTION NO.  
3-01-CV-0127-R

GOLDEN BLOUNT, INC.'S APPLICATION FOR ATTORNEYS' FEES

TO THE HONORABLE UNITED STATES JUDGE JERRY BUCHMEYER:

NOW COMES Plaintiff Golden Blount, Inc. (hereinafter "Golden Blount") to file this its Application for Attorneys' Fees (hereinafter "the Application") against Robert H. Peterson Co. (hereinafter "Robert H. Peterson"), and would show the Court as follows:

1. On August 9, 2002, the Court in the above-styled action issued its Final Judgment and Findings of Fact and Conclusions of Law, finding for Golden Blount on all issues. Among other things, the Court determined that Robert H. Peterson willfully infringed the Blount Patent. The Court further found that this was an "exceptional case," warranting an award of attorneys' fees to Golden Blount.

2. Pursuant to 35 U.S.C. § 285, the Court found an exceptional case at issue and granted an award of reasonable attorneys' fees to Golden Blount as the prevailing party. Golden Blount is entitled to attorneys' fees for hours spent litigating the infringement action.

3. However, after an appeal, and on April 19, 2004, the United States Court of Appeals for the Federal Circuit found the patent not to be invalid, affirmed this Court's claim

construction, found that Robert H. Peterson had waived the issue of inequitable conduct, and remanded the case back to this Court to issue more specific findings regarding infringement, willfulness, exceptional nature of the case, and the damage amount.

4. Thereafter, on May 11, 2004, this Court ordered all parties to submit proposed findings of fact and conclusions of law on the issues of literal infringement, contributory infringement, induced infringement, infringement under the doctrine of equivalents, willfulness, the exceptional nature of the case, and damages.

5. On June 22, 2004, this Court adopted Robert H. Peterson's Findings of Fact and Conclusions of Law.

6. On August 18, 2004, after an hour and forty minute oral hearing, this Court vacated Robert H. Peterson's Findings of Fact and Conclusions of Law previously adopted on June 22, 2004, and adopted Golden Blount's Findings of Fact and Conclusions of Law. The Court then requested that Golden Blount submit updated Findings of Fact and Conclusions of Law, of which were submitted on August 31, 2004.

7. On September 2, 2004, this Court adopted the Findings of Fact and Conclusions of Law submitted on August 31, 2004. In the Findings of Fact and Conclusions of Law adopted on September 2, 2004, this Court found that this was an "exceptional case" warranting an award of attorneys' fees to Golden Blount pursuant to 35 U.S.C. § 285.

8. Golden Blount now seeks to recover attorneys' fees in the amount of \$622,015.00. The Affidavits of Charles W. Gaines, William D. Harris, Jr. and Roy W. Hardin (which are a part of the Appendix being filed simultaneously herewith) support this figure. These Affidavits address the reasonableness and necessity of attorneys' fees sought by Golden Blount in this case, the prevailing hourly rates in the Dallas legal community for such services,

and certain costs of this litigation. For the Court's convenience, summary charts, by law firm, detailing the lawyers and paralegals, their rates, hours, and totals, are attached to this Application. Furthermore, the 2001 American Intellectual Property Law Association (AIPLA) Report of Economic Survey, providing average billing rates by location of practice and years of experience, is further evidence of the reasonableness of attorneys' fees in this case.

9. Golden Blount has not included in this Application and is not currently seeking recovery of the fees incurred in preparing and submitting this request for an award of attorneys' fees and costs. However, Golden Blount respectfully reserves the right to seek leave of court to amend this Application in order to claim such fees in the event this proceeding becomes unnecessarily adversarial. Furthermore, Golden Blount specifically reserves the right to request attorneys' fees for motions on which the Court has yet to issue a ruling, as well as any motions filed in the future, including any motion for alteration of judgment and motion for new trial.

10. Additionally, Golden Blount requests that this Court award Golden Blount post judgment interest on such attorneys' fees and costs in an amount allowed by law from August 9, 2002, to April 19, 2004, and resuming on September 2, 2004.

11. Golden Blount's Memorandum in Support of Golden Blount, Inc.'s Application for Attorneys' Fees in being filed simultaneously with this Application, and is incorporated herein for all purposes. Golden Blount simultaneously with the filing of this Application is also submitting its Bill of Costs seeking the recovery of taxable costs in this matter.

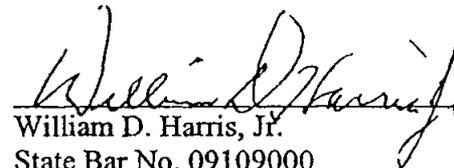
**WHEREFORE, PREMISES CONSIDERED,** Plaintiff Golden Blount, Inc. requests that this Court grant its Application for Attorneys' Fees, and award them, as against Robert H. Peterson, Co., reasonable attorneys' fees in the amount of \$622,015.00, plus post judgment

interest at the highest lawful rate from August 9, 2002, to April 19, 2004, and resuming on September 2, 2004, and such other relief as the Court deems just and proper.

DATE: September 8, 2004.

Respectfully submitted,

For Plaintiff Golden Blount, Inc.

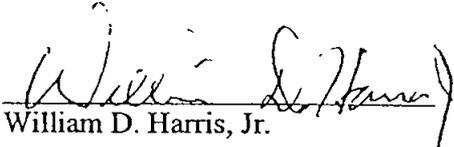


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CERTIFICATE OF CONFERENCE

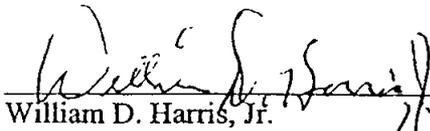
I hereby certify that on or about September 2, 2004, a conference was held with counsel for Defendant, to determine whether agreement could be reached with regard to the relief sought herein. As a result of such conference, agreement could not be reached; accordingly, the matter is presented to the Court for determination.

  
William D. Harris, Jr.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of Golden Blount, Inc.'s Application for Attorneys' Fees was each served upon the following counsel of record, via first class mail on September 8, 2004.

Jerry R. Selinger  
Jenkins & Gilchrist  
1445 Ross Avenue, Suite 3200  
Dallas, Texas 75202  
(214) 855-4500  
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William D. Harris, Jr.

**SUMMARY OF LOCKE, LIDDELL, & SAPP, LLP BILLING**  
(From January, 2000 to July, 2001)

<b>FEE EARNER</b>	<b>TOTAL HOURS</b>	<b>BILLING RATE</b>
L. Dan Tucker	1.90	\$325.00
Monty L. Ross	1.50	\$335.00
Roy W. Hardin	22.75	\$350.00 - \$375.00
Michael W. Dubner	20.00	\$135.00
Charles Phipps	34.00	\$130.00
<b>Total:</b>	<b>80.15 hours</b>	<b>\$18,967.50</b>

**SUMMARY OF HITT GAINES, P.C. BILLING**  
(From August, 2001 to June 10, 2004)

<b>FEE EARNER</b>	<b>TOTAL HOURS</b>	<b>BILLING RATE</b>
William D. Harris, Jr.	641.20	\$350.00
Charles W. Gaines	202.80	\$290.00
Charles W. Gaines	137.60	\$300.00
Greg H. Parker	965.10	\$175.00
Greg H. Parker	170.90	\$225.00
James Ortega	67.50	\$175.00
Carol Garland (Paralegal)	21.60	\$75.00
Carol Garland (Paralegal)	8.8	\$90.00
Trudy McGruder (Paralegal)	36.10	\$65.00
<b>Total:</b>	<b>2251.60 hours</b>	<b>\$548,428.00</b>

**SUMMARY OF SCHULTZ & ASSOCIATES, P.C. BILLING**  
(From September, 2003 to June 10, 2004)

<b>FEE EARNER</b>	<b>TOTAL HOURS</b>	<b>BILLING RATE</b>
William D. Harris, Jr.	162.6	\$325.00
John Pemberton	9.1	\$195.00
<b>Total:</b>	<b>171.7 hours</b>	<b>\$54,619.50</b>

R  
ORIGINAL

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
**FILED**  
SEP - 8 2004  
CLERK, U.S. DISTRICT COURT  
By CR  
Deputy

GOLDEN BLOUNT, INC.

Plaintiff,

v.

ROBERT H. PETERSON,

Defendant.

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CIVIL ACTION NO. 3-01-CV-0127-R

MEMORANDUM IN SUPPORT OF GOLDEN BLOUNT, INC.'S  
APPLICATION FOR ATTORNEYS' FEES

Respectfully submitted,  
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ATTORNEYS FOR PLAINTIFF  
GOLDEN BLOUNT, INC.

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

GOLDEN BLOUNT, INC.

Plaintiff,

v.

ROBERT H. PETERSON,

Defendant.

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CIVIL ACTION NO. 3-01-CV-0127-R

MEMORANDUM IN SUPPORT OF GOLDEN BLOUNT, INC.'S  
APPLICATION FOR ATTORNEY'S FEES

I. BACKGROUND

1. On August 9, 2002, the Court in the above-styled action issued its Final Judgment and Findings of Fact and Conclusions of Law, finding for Golden Blount, Inc. ("Golden Blount") on all issues. Among other things, the Court determined that Robert H. Peterson Co. ("Robert H. Peterson") wilfully infringed the Blount Patent. As such, the court awarded Golden Blount treble damages based on Robert H. Peterson's conduct under the authority of 35 U.S.C. 284.

2. Pursuant to 35 U.S.C. § 285, the Court found an exceptional case at issue and granted an award of reasonable attorneys' fees to Golden Blount as the prevailing party.

3. However, after an appeal, and on April 19, 2004, the United States Court of Appeals for the Federal Circuit found the patent not to be invalid, affirmed this Court's claim construction, found that Robert H. Peterson had waived the issue of inequitable

MEMORANDUM IN SUPPORT OF GOLDEN BLOUNT, INC.'S APPLICATION FOR  
ATTORNEY'S FEES-

conduct, and remanded the case back to this Court to issue more specific findings regarding infringement, willfulness, exceptional nature of the case, and the damage amount.

4. Thereafter, on May 11, 2004, this Court ordered all parties to submit proposed findings of fact and conclusions of law on the issues of literal infringement, contributory infringement, induced infringement, infringement under the doctrine of equivalents, willfulness, the exceptional nature of the case, and damages.

5. On June 22, 2004, this Court adopted Robert H. Peterson's Findings of Fact and Conclusions of Law.

6. On August 18, 2004, after an hour and forty minute oral hearing, this Court vacated Robert H. Peterson's Findings of Fact and Conclusions of Law previously adopted on June 22, 2004, and adopted Golden Blount's Findings of Fact and Conclusions of Law. The Court then requested that Golden Blount submit updated Findings of Fact and Conclusions of Law, of which were submitted on August 31, 2004.

7. On September 2, 2004, this Court adopted the Findings of Fact and Conclusions of Law submitted on August 31, 2004. In the Findings of Fact and Conclusions of Law adopted on September 2, 2004, this Court found that this was an "exceptional case" warranting an award of attorneys' fees to Golden Blount pursuant to 35 U.S.C. § 285. Accordingly, Golden Blount is entitled to attorneys' fees for hours spent litigating the infringement action consistent with the appropriate lodestar. *See Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air*, 478 U.S. 546, 564

(1986), *on remand*, 826 F.2d 238 (3<sup>rd</sup> Cir. 1987). *See also Johnson v. Mississippi*, 606 F.2d 635, 638-39 (5<sup>th</sup> Cir. 1979).<sup>1</sup>

8. Additionally, in the Findings of Fact and Conclusions of Law adopted on September 2, 2004, this Court awarded Golden Blount post judgment interest on such attorneys' fees and costs at the highest rate allowed by the law from August 9, 2002, to April 19, 2004, and resuming on September 2, 2004. A district court has authority to award post judgment interest on the unliquidated sum of an award made pursuant to 35 U.S.C. § 285. *See* 28 U.S.C. § 1961.

## II. CALCULATION OF ATTORNEYS' FEES

9. When a party to an infringement action prevails in an "exceptional case" and has obtained excellent results, its attorneys' fees recovery should be fully compensatory. *See generally Mathis v. Spears*, 857 F.2d 749, 756 (Fed. Cir. 1988) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983)). *See also Norris v. Hartmarx Specialty Stores, Inc.* 913 F.2d 253, 257 (5<sup>th</sup> Cir. 1990) (observing that the trial court did not abuse its discretion when it awarded fees for issues not tried). The party awarded fees bears the burden of establishing entitlement to an award of attorneys' fees, and also providing appropriate documentation of the hours expended and hourly rates. *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5<sup>th</sup> Cir. 1995), *cert. denied*, 516 U.S. 862 (1995). The prevailing party must also show that billing judgment was exercised to

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<sup>1</sup> Golden Blount has not included in this Application, and is not currently seeking recovery of the fees incurred in preparing and submitting this request for an award of attorneys' fees and costs. However, Golden Blount respectfully reserves the right to seek leave of court to amend this Application in order to claim such fees in the event this Application becomes unnecessarily adversarial. Furthermore, Golden Blount specifically reserves the right to request attorneys' fees for Motions on which the Court has yet to issue a ruling, as well as any motions filed in the future, including any motion for alteration of judgment and motion for new trial.

assess the reasonable number of hours expended on a case. *Green v. Administrators of the Tulane Educational Fund*, 284 F.3d 642, 662 (5<sup>th</sup> Cir. 2002).

10. The calculation of attorneys' fees under 35 U.S.C. § 285 is governed by the precedent of the Federal Circuit. *Pharmacia & Upjohn Co. v. Mylan Pharm., Inc.*, 182 F.3d 1356, 1359 (Fed. Cir. 1999). The Federal Circuit has approved use of a lodestar analysis in the calculation of reasonable attorneys' fees. See *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1068 (Fed. Cir. 1983).<sup>2</sup> The lodestar is the number of hours reasonably expended multiplied by a reasonable hourly rate, and usually supplies an objective basis on which to make an initial estimate of the value of the lawyer's service. *Hensley*, 461 U.S. at 433. "In determining the reasonableness of the award, there must be some evidence to support the reasonableness of, inter alia, the billing rate charged and the number of hours expended." *Lam*, 718 F.2d at 1068.

11. Once determined, depending on the particular circumstances in the case and the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5<sup>th</sup> Cir. 1974), the lodestar may be adjusted upward or downward. *Delaware Valley*, 478 U.S. at 564. Because the lodestar is presumptively reasonable, it should be modified only in exceptional cases. *Watkins v. Fordice*, 7 F.3d 453, 457 (5<sup>th</sup> Cir. 1993), *on remand*, 852 F.Supp. 542 (S.D. Miss 1994), *aff'd*, 49 F.3d 728 (5<sup>th</sup> Cir. 1995) (citing *City of Burlington v. Dague*, 505 U.S. 557 (1992), *on remand*, 976 F.2d 801 (2<sup>nd</sup> Cir. 1991)).

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<sup>2</sup> The Fifth Circuit also utilizes the lodestar method in calculating reasonable attorneys' fees. *Louisiana Power & Light Co.*, 50 F.3d at 324.

12. The *Johnson* factors to be considered in reviewing the reasonableness of the fee award are as follows:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the skill required to perform the legal service properly;
- (4) the preclusion of other employment by the attorney due to acceptance of the case;
- (5) the customary fee;
- (6) whether the fee is fixed or contingent;
- (7) time limitations imposed by the client or the circumstances;
- (8) the amount involved and the results obtained;
- (9) the experience, reputation and ability of the attorneys;
- (10) the undesirability of the case;
- (11) the nature and length of the professional relationship with the client; and
- (12) awards in similar cases.

*Johnson*, 488 F.2d at 717-19. To the extent that any *Johnson* factors are subsumed in the lodestar, they should not be reconsidered in determining whether an adjustment to the lodestar is required. *Delaware Valley*, 478 U.S. at 564; *Green*, 284 F.3d 661.

13. Here, based on the lodestar approach set forth in *Hensley* and *Delaware Valley*, Golden Blount is entitled to its reasonable and necessary attorneys' fees in the amount of \$622,015.00. Appendix ("App.") at p. 2, 77, 87, 112-113. Based on the time records of Locke, Liddell & Sapp, LLP, Hitt Gaines, P.C., and Schultz & Associates, P.C., as well as the Affidavits of Roy W. Hardin, Charles W. Gaines, and William D Harris, Jr., approximately 2500 hours is reasonable for the man power expended in protecting and litigating Golden Blount's patent rights. App. 2, 77, 87, 112-113. Furthermore, attorneys' fees and paralegal hourly rates, ranging from \$65.00 to \$375.00 are fair and reasonable in Texas. App. 2, 77, 87, 112-113. Based on the Affidavits of

MEMORANDUM IN SUPPORT OF GOLDEN BLOUNT, INC.'S APPLICATION FOR ATTORNEY'S FEES-

Roy Hardin, Charles W. Gaines, William D. Harris, Jr., and the American Intellectual Property Law Association (AIPLA) 2001 Report of Economic Survey, these rates are reasonable in Texas. *Mathis*, 857 F.2d at 755. App. 2, 5-9, 77, 87, 112-113. Accordingly, the loadstar approach yields Golden Blount's reasonable attorneys' fees in the amount of \$622,015.00.

### III. JOHNSON FACTORS AS APPLIED TO THIS CASE

#### (A) Time and Labor Required

14. "Although hours claimed or spent on a case should not be the sole basis for determining a fee, they are a necessary ingredient to be considered." *Johnson*, 488 F.2d at 717 (citation omitted.) "If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized." *Id.* "The trial judge should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activities." *Id.*

15. Golden Blount's counsel has, on a daily basis, maintained specific and thorough time entries detailing the work performed, the particular attorney or paralegal involved, and the hours devoted to a specific project. Since the filing of the Original Complaint on January 18, 2001, approximately 2500 hours have been expended by attorneys and paralegals to protect and enforce Golden Blount's patent rights. App. 2, 77, 87, 112-113. Not only did counsel thoroughly brief the claim construction of the Blount Patent for the Markman hearing, there was discovery exchanged and the taking of three depositions due to the vast array of patent law issues involved in the case. Two thoroughly briefed hearings were held before the Magistrate Judge. Case preparation for Golden Blount included extensive work on demonstrative exhibits, as well as substantial

MEMORANDUM IN SUPPORT OF GOLDEN BLOUNT, INC.'S APPLICATION FOR  
ATTORNEY'S FEES-

study and marshalling of the evidence. The Case additionally included, trial, post judgment motions, a full appeal before the United States Court of Appeals for the Federal Circuit, and remand back to this District Court. As indicated in the Affidavits of Charles W. Gaines and William D. Harris, Jr., these hours were scrutinized and are not excessive or duplicative hours. App. 2, 77, 87, 112-113. As established through such documentation and the exercise of billing judgment, the hours submitted by Golden Blount are reasonable and were necessarily incurred to effectively handle this matter on behalf of Golden Blount. App. 2, 5-9, 77, 87, 112-113.

(B) Novelty and Difficulty of the Questions

16. Attorneys' fees should be large enough to compensate for accepting a challenging case because it requires more time and effort. *See Johnson*, 488 F.2d at 718. As in most patent cases, the legal issues and facts in this case were complex, and required extensive and sophisticated legal services in investigating, prosecuting, and defending the various claims and affirmative defenses. First and foremost, this case involved intricate patent issues. These included questions regarding claims interpretation, invalidity of the invention, anticipation of the invention by prior art, obviousness of the invention, and infringement analysis of the claims vis-à-vis the accused Robert H. Peterson device, including inducing infringement and contributory infringement, as well as questions regarding willful infringement. The court also required Markman briefs. Moreover, in this case, the issue of the nefarious conduct of the defendant had to be ferreted out and then clearly presented to the court.

17. Likewise, there were numerous unusual evidentiary issues, such as the application of the attorney-client privilege. As this Court is well aware, Robert H.

MEMORANDUM IN SUPPORT OF GOLDEN BLOUNT, INC.'S APPLICATION FOR ATTORNEY'S FEES-

Peterson, on numerous occasions, and on the eve of trial, offered and recanted its decision to offer its alleged oral opinion of counsel. Only after the last change of its position, did Robert H. Peterson produce its counsel for deposition pursuant to the order of the Magistrate Judge.

18. The issues in this case were hard fought, further supporting the time and reasonable hourly rate charged in this matter.

(C) Skill Requisite to Perform the Legal Service Properly

19. The trial judge's responsibility is to closely observe the attorneys' work product, his preparation, and general ability before the court. *Johnson*, 488 F.2d at 718. "The trial judge's expertise gained from past experience as a lawyer and his observance from the bench of lawyers at work becomes highly important to this consideration." *Id.* Counsel in this case were required to be broadly experienced in patent law. App. 1-3. 76-78 and 86-87.

20. In this case, counsel demonstrated adequate skill level to perform the work. William D. Harris, Jr. is an attorney licensed to practice law in the State of Texas for over 40 years. Moreover, Mr. Harris is extremely well versed in complex litigation, with his primary emphasis in patent law issues. Mr. Harris has participated in numerous trials with many of these before the Northern District of Texas.

(D) Preclusion of Other Employment by the Attorney Due to Acceptance of the Case

21. "This guideline involves the dual consideration of otherwise available business which is foreclosed because of conflicts of interest which occur from the representation, and the fact that once the employment is undertaken the attorney is not

free to use the time spent on the client's behalf for other purposes." *Johnson*, 488 F.2d at 718. This case involved a substantial expenditure of manpower and effort. During the trial of the case, in addition to working during the business day, it was necessary for counsel to work after hours and on weekends, especially during the weeks before trial. As a result, counsel's ability to take on new work and service existing clients was impaired.

(E) Customary Fees

22. "The customary fee for similar work in the community should be considered" when determining the reasonableness of the requested attorney's fees. *Johnson*, 488 F.2d at 718. Reasonable hourly rates are determined by looking to the prevailing market rates in the relevant legal community. *See Watkins*, 7 F.3d at 458-59. Rather than focusing on what amount the prevailing counsel is able to charge his clients, the court should consider the prevailing rate in the relevant community. *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

23. Here, the reasonable hourly rates for legal work performed by attorneys and paralegals in all stages of this litigation ranges from \$65.00 to \$375.00 an hour. App. 2, 77, 87, 112-113.

24. Furthermore, the fee rates of Golden Blount's counsel are reasonable in relation to similar professional services performed at comparable levels of competence by attorneys in Texas. App. 1-3, 76-78 and 86-87. Pursuant to *Mathis*, 857 F.2d at 755, the Affidavits of Roy Hardin, Charles W. Gaines and William D. Harris, Jr. as well as and the AIPLA Survey constitute ample evidence to support the reasonableness of the fee award.

MEMORANDUM IN SUPPORT OF GOLDEN BLOUNT, INC.'S APPLICATION FOR  
ATTORNEY'S FEES-

(F) Whether the Fee is Fixed or Contingent

25. “The fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorneys’ fee expectations when he accepted the case.” *Johnson*, 488 F.2d at 718. Locke, Liddell & Sapp, LLP, the first counsel of record for Golden Blount submitted monthly invoices on their usual time/rate basis. App. at 86-111. Hitt Gaines, P.C., and Schultz & Associates, P.C., the second and third counsel of record for Golden Blount, agreed to a contingency fee agreement. As a *Johnson* factor, this is either a positive or neutral. Although counsel handled this case on a contingent basis, both Hitt Gaines, P.C., and Schultz & Associates, P.C. kept careful track of their time with daily time entries. App. 1-85. Hitt Gaines, P.C. for Golden Blount, operating in a firm with less than 11 attorneys, incurred significant risk by electing to represent Golden Blount on a contingent fee basis. App. 1-3. Schultz & Associates, P.C., also a relatively small firm, did the same. App. 76-78. However, adequate records were kept to properly apply the lodestar method and the *Johnson* factors. App. 2, 77, 87, 112-113.

(G) Time Limitations Imposed by the Client or the Circumstances

26. “Priority work that delays the lawyer’s other legal work is entitled to some premium.” *Johnson*, 488 F.2d at 718. “This factor is particularly important when a new counsel is called in to prosecute the appeal or handle other matters at a late stage in the proceedings.” *Id.* Here, William D. Harris, Jr. and the law firm of Hitt Gaines, P.C. were hired to represent Golden Blount only three weeks before the close of discovery. Such a limited investigation period clearly demonstrates strict time limitations as required by *Johnson*.

27. Furthermore, Golden Blount's counsel was also forced to prepare for this litigation on two separate occasions. Specifically, when counsel for Defendant appeared at the first pretrial hearing, they announced to the Court, lacking adequate justification, that they were not adequately prepared to proceed to trial. However, counsel for Golden Blount, in accordance with this Court's Order had expended numerous hours and resources preparing for this initial trial setting trial. While the Court granted the Defendant a continuance, counsel for Golden Blount was forced to incur additional expenses preparing for the second trial setting.

(H) Amount Involved and Result Obtained

28. Furthermore, the degree of the plaintiff's overall success goes to the reasonableness of a fee award. *Johnson*, 488 F.2d at 718; *Farrar v. Hobby*, 506 U.S. 103, 114 (1992). The amount of damages a plaintiff recovers is one of the many factors that a court must consider when calculating an award of attorneys' fees. *See Green*, 284 F.3d at 663.

29. In the case at hand, Golden Blount obtained favorable results. The Court not only found for Golden Blount on all issues, it also found that Robert H. Peterson's conduct amounted to willful infringement and that this was an exceptional case. In fact, the Court assessed damages in the amount of \$429,256. The Court further found that damages should be trebled under 35 U.S.C. § 284.

30. It was important to Golden Blount that a permanent injunction be entered against Robert H. Peterson and, as the prevailing party, plaintiff was afforded the protection of injunction. Such an injunction has been entered. *See In re Dahlgren Int'l, Inc.*, 811 F.Supp. 1182, 1185 (N.D. Tex. 1992).

MEMORANDUM IN SUPPORT OF GOLDEN BLOUNT, INC.'S APPLICATION FOR ATTORNEY'S FEES-

(I) Experience, Reputation, and Ability of the Attorneys

31. Attorneys specializing in complex litigation “may enjoy a higher rate for his expertise than others....” *Johnson*, 488 F.2d at 719. Counsel for Golden Blount has handled this rather complex patent case. As demonstrated above, counsel have practiced for numerous years and have extensive experience in federal court.

(J) Undesirability of the Case

32. This case was undesirable because of the difficulty in, and burden inherent in, protecting patent rights and establishing infringement against a larger well established company with greater resources and doing so within a substantially reduced time frame.

(K) Nature and Length of the Professional Relationship with the Client

33. “A lawyer in private practice may vary his fee for similar work in light of the professional relationship of the client with his office.” *Johnson*, 488 F.2d at 719. However, this case is the first matter that Golden Blount’s counsel have handled for such entities and so no standing relationship existed.

(L) Awards in Similar Cases

34. “The reasonableness of a fee may also be considered in light of awards made in similar litigation within and without the court’s circuit.” *Johnson*, 488 F.2d at 719. The fee rates of Golden Blount’s counsel are reasonable in relation to similar professional services performed at comparable levels of competence by attorneys and paralegals in the Northern District of Texas. App. 2, 77, 87, 112-113. As demonstrated by the 2001 AIPLA Report of Economic Survey, where over one million is at stake, fee awards ranging from \$498,000.00 to \$2,004,000.00 are appropriate in the State of Texas. App. 5-9.

MEMORANDUM IN SUPPORT OF GOLDEN BLOUNT, INC.’S APPLICATION FOR  
ATTORNEY’S FEES-

#### IV. POST JUDGMENT INTEREST

35. A district court has authority to award post judgment interest on the unliquidated sum (i.e., the award of attorneys' fees), of an award made under 35 U.S.C. § 285. 28 U.S.C. § 1961. Interest starts to run on the date establishing the right to an award. *Id. See also Louisiana Power & Light*, 50 F.3d at 331-32. The Court's Final Judgment and Findings of Fact and Conclusions of Law were issued on August 9, 2002, awarding Golden Blount reasonable attorneys' fees and costs. Thereafter, the Court's Final Judgment was vacated by the United States Court of Appeals for the Federal Circuit on April 19, 2004, thus tolling the time period for post judgment interest. Nevertheless, this Court again found against Robert H. Peterson when it adopted the Findings of Fact and Conclusions of Law submitted by Golden Blount on August 31, 2004, on September 2, 2004. Therefore, Golden Blount requests an award of post judgment interest, from August 9, 2002, to April 19, 2004, and resuming on September 2, 2004, on the amount of reasonable attorneys' fees at the highest rate allowed by the law.

#### V. CONCLUSION

36. In this case, the Court made a determination that Golden Blount was entitled to attorneys' fees based on the "exceptional case" ruling under 35 U.S.C. § 285. Moreover, Golden Blount has provided to the Court copies of daily time entries as adequate documentation to support its award of attorneys' fees. As demonstrated by the Affidavits of Roy Hardin, Charles W. Gaines and William D. Harris, Jr. and the 2001 AILPA Report on Economic Survey, Golden Blount has also shown that these entries are reasonable and necessary for this patent infringement action in the Northern District of Texas. Golden Blount has considered and factored in all twelve *Johnson* criteria in

MEMORANDUM IN SUPPORT OF GOLDEN BLOUNT, INC.'S APPLICATION FOR ATTORNEY'S FEES-

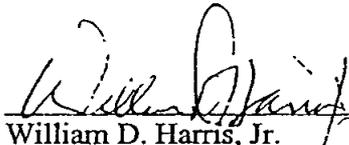
developing the Application for Attorneys' Fees. Golden Blount does not seek enhancement of the lodestar amount, as the award of \$622,015.00 in attorneys' fees is reasonable.

**WHEREFORE, PREMISES CONSIDERED,** Plaintiff Golden Blount, Inc. requests that this Court grant its Application for Attorneys' Fees, and award it, as against Robert H. Peterson Co., reasonable attorneys' fees in the amount of \$622,015.00, plus post judgment interest on such fees at the highest lawful rate from August 9, 2002, to April 19, 2004, and resuming on September 2, 2004, and such other relief as the Court deems just and proper.

DATE: September 8, 2004

Respectfully submitted,

For Plaintiff Golden Blount, Inc.

  
\_\_\_\_\_  
William D. Harris, Jr.  
State Bar No. 09109000  
SCHULTZ & ASSOCIATES, P.C.  
5400 LBJ Freeway  
One Lincoln Center, Suite 525  
Dallas, Texas 75240  
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State Bar No. 07570580  
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State Bar No. 24011301  
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2435 North Central Plaza  
Suite 1300  
Richardson, Texas 75080  
972/480-8800 (Telephone)  
972/480-8865 (Facsimile)

**MEMORANDUM IN SUPPORT OF GOLDEN BLOUNT, INC.'S APPLICATION FOR ATTORNEY'S FEES-**

CERTIFICATE OF SERVICE

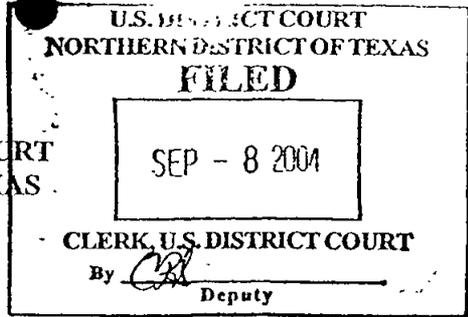
I hereby certify that true and correct copies of Golden Blount, Inc.'s Memorandum in Support of Golden Blount, Inc.'s Application for Attorneys' Fees was served upon the following counsel of record, via first class mail on September 8, 2004.

Jerry R. Selinger  
Jenkins & Gilchrist  
1445 Ross Avenue, Suite 3200  
Dallas, Texas 75202  
(214) 855-4500  
(214) 855-4300 (Facsimile)

  
William D. Harris, Jr.

ORIGINAL

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION



GOLDEN BLOUNT, INC.

Plaintiff,

v.

ROBERT H. PETERSON,

Defendant.

§  
§  
§  
§  
§  
§  
§  
§  
§

CIVIL ACTION NO. 3-01-CV-0127-R

APPENDIX IN SUPPORT OF GOLDEN BLOUNT, INC.'S  
APPLICATION FOR ATTORNEY'S FEES

Respectfully submitted,

William D. Harris, Jr.  
State Bar No. 09109000  
SCHULTZ & ASSOCIATES, P.C.  
5400 LBJ Freeway  
One Lincoln Center, Suite 525  
Dallas, Texas 75240  
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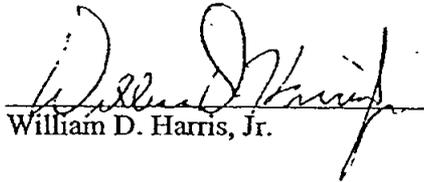
Charles W. Gaines  
State Bar No. 07570580  
Greg H. Parker  
State Bar No. 24011301  
HITT GAINES, P.C.  
2435 North Central Plaza  
Suite 1300  
Richardson, Texas 75080  
972/480-8800 (Telephone)  
972/480-8865 (Facsimile)

ATTORNEYS FOR PLAINTIFF  
GOLDEN BLOUNT, INC.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of Golden Blount, Inc.'s Appendix in Support of Application for Attorneys' Fees were each served upon the following counsel of record, via first class mail on September 8, 2004.

Jerry R. Selinger  
Jenkins & Gilchrist  
1445 Ross Avenue, Suite 3200  
Dallas, Texas 75202  
(214) 855-4500  
(214) 855-4300 (Facsimile)

  
William D. Harris, Jr.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

GOLDEN BLOUNT, INC.,	§	
	§	
Plaintiff,	§	
	§	Civil Action No.
v.	§	
	§	3-01CV0127-R
ROBERT H. PETERSON CO.,	§	
	§	
Defendant.	§	

DECLARATION OF CHARLES W. GAINES IN SUPPORT OF  
PLAINTIFF, GOLDEN BLOUNT, INC'S APPLICATION FOR ATTORNEYS' FEES

1. I, Charles W. Gaines, am a partner with the firm of Hitt Gaines, P.C., and have since the case was turned over to my firm by the firm of Locke, Liddell & Sapp, represented Golden Blount, Inc. in the above referenced litigation.

2. My firm served as trial co-counsel for Golden Blount, Inc. and assisted in handling the initial discovery process, pre-trial briefing, trial, post-trial motions, the appeal and the remand of the case.

3. This case is a patent infringement case that presents numerous substantial and complex issues including, but not limited to, invalidity, actual infringement, contributory infringement, induced infringement, infringement under the doctrine of equivalents, wilfulness, measurement of damages and the award of attorneys' fees.

4. Since the beginning of my involvement in the case, I and my colleagues have handled on behalf of our client aspects of discovery, review and preparation of facts to be presented at trial, briefing regarding claim interpretation and pre-trial issues, trial of the case and post-trial motions prior to the appeal

of the case, the appeal of the case, including oral arguments, and the remand of the case back to this Court.

5. Attached hereto are true and correct copies of the Hitt Gaines, P.C., invoices that represent my firm's attorneys' fees for representation in this case.

6. As the bills indicate, the vast majority of this representation by my firm was handled by myself, Greg H. Parker (an associate with my firm), and William D. Harris, Jr. (of Counsel with my firm). I originally had a billing rate of \$290 per hour through July of 2002, and after that, my billing rate was increased to \$300 per hour. Greg H. Parker originally had a billing rate of \$175 per hour through September of 2003, and after that, his billing rate was increased to \$225 per hour. William D. Harris, Jr., on the other hand, has had a consistent billing rate of \$350 per hour the entire time he was with my firm, which ended on about August 31, 2003. These rates are consistent with the rates charged by my firm to other clients comparable to Golden Blount, Inc.

7. In total, my firm has expended \$548,428 in attorneys' fees in this case, as shown below:

<b>FEE EARNER</b>	<b>TOTAL HOURS</b>	<b>BILLING RATE</b>
William D. Harris	641.20	\$350.00
Charles W. Gaines	202.80	\$290.00
Charles W. Gaines	137.60	\$300.00
Greg H. Parker	965.10	\$175.00
Greg H. Parker	170.90	\$225.00
James Ortega	67.50	\$175.00
Carol Garland (Paralegal)	21.60	\$75.00
Carol Garland (Paralegal)	8.8	\$90.00
Trudy McGruder (Paralegal)	36.10	\$65.00
<b>Total:</b>	<b>2251.60 hours</b>	<b>\$548,428.00</b>

8. I am familiar with the customary fees for this type of litigation charged in large legal markets such as Dallas. In my opinion, the hours billed by me and other members of my firm are reasonable in relation to the quantity and substance of the representation in this case. I further understand the hourly rates for the attorneys in my firm to be reasonable in relation to other similar attorneys in large markets such as Dallas.

9. I have reviewed the bills and do not believe that there were significant duplication of efforts among the members of my firm or the other firms representing my client.

10. It is my opinion that the total value and effort by Hitt Gaines, P.C., was reasonable and necessary for the case at hand.

11. In total, my firm has disbursed \$10,031.04 for postage, long distance calls, photocopying, travel, air express delivery, local messenger delivery, paralegals, computerized legal research and facsimiles for the time period up and through July 31, 2002, which is being submitted to the Clerk of the Northern District concurrently herewith in a Bill of Cost.

12. In total Golden Blount, Inc. is seeking \$548,428 in attorneys' fees and \$10,031.04 in disbursement for Hitt Gaines, P.C..

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed this September 8, 2004, at Dallas, Texas.

  
Charles W. Gaines

JT-APP 2950

**AIPLA**

**Report of  
Economic Survey**

**2001**

PREPARED UNDER DIRECTION OF  
LAW PRACTICE MANAGEMENT COMMITTEE

American Intellectual Property Law Association

2001 Jefferson Davis Highway, Suite 203

Arlington, Virginia 22202

[www.aipla.org](http://www.aipla.org)

JT-APP 2951

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and \$300 per copy for non-members.

American Intellectual Property Law Association  
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Arlington, Virginia 22202-3694  
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[www.aipla.org](http://www.aipla.org)

JT-APP 2952

**Table 16: Average Hourly Billing Rate by Type of Practice and Location of Primary Place of Work**

	Location of Respondent's Primary Place of Work													
	Total Survey	Boston Area	NYC Area	Philadelphia-Wilmington	Washington DC Area	Other East	Metro Southeast	Other Southeast	Chicago Area	Minneapolis-St. Paul	Other Central	Texas	California	Other West
<b>ALL PRIVATE PRACTICE</b>														
Number Reporting	1088	40	61	35	221	75	41	14	79	50	192	83	107	88
% of total		4%	6%	3%	20%	7%	4%	1%	7%	5%	18%	8%	10%	8%
75th percentile	\$300	\$390	\$375	\$280	\$316	\$280	\$275	\$245	\$300	\$270	\$230	\$300	\$350	\$275
Median	\$240	\$325	\$320	\$250	\$255	\$220	\$220	\$193	\$250	\$218	\$195	\$240	\$275	\$230
25th percentile	\$198	\$245	\$265	\$213	\$215	\$180	\$165	\$170	\$205	\$180	\$160	\$200	\$225	\$200
Average	\$252	\$321	\$331	\$252	\$269	\$230	\$232	\$216	\$256	\$223	\$202	\$253	\$284	\$239
<b>PARTNERS</b>														
Number Reporting	522	21	33	22	92	36	20	6	46	22	102	29	40	53
% of total		4%	6%	4%	18%	7%	4%	1%	9%	4%	20%	6%	8%	10%
75th percentile	\$340	\$440	\$440	\$325	\$358	\$292	\$325	\$200	\$320	\$300	\$250	\$350	\$385	\$290
Median	\$280	\$385	\$370	\$270	\$316	\$250	\$250	\$200	\$290	\$273	\$225	\$300	\$350	\$250
25th percentile	\$230	\$350	\$320	\$250	\$270	\$200	\$222	\$180	\$260	\$230	\$195	\$260	\$295	\$220
Average	\$290	\$385	\$395	\$281	\$317	\$255	\$269	\$201	\$294	\$267	\$229	\$307	\$342	\$259
<b>ASSOCIATES</b>														
Number Reporting	391	14	25	9	95	18	14	3	26	24	69	35	39	19
% of total		4%	6%	2%	24%	5%	4%	1%	7%	6%	18%	9%	10%	5%
75th percentile	\$240	\$275	\$300	\$210	\$250	\$215	\$210	\$170	\$220	\$220	\$180	\$250	\$260	\$235
Median	\$200	\$238	\$250	\$210	\$215	\$178	\$165	\$170	\$200	\$188	\$160	\$215	\$235	\$200
25th percentile	\$168	\$225	\$220	\$170	\$185	\$155	\$150	\$168	\$175	\$160	\$145	\$190	\$200	\$160
Average	\$206	\$242	\$257	\$195	\$219	\$185	\$173	\$168	\$198	\$191	\$166	\$216	\$232	\$209
<b>OF COUNSEL</b>														
Number Reporting	66	1	3	2	20	8	3	1	3	1	8	5	7	4
% of total		2%	5%	3%	30%	12%	5%	2%	5%	2%	12%	8%	11%	6%
75th percentile	\$325		\$325		\$320	\$325	\$276		\$240		\$235	\$326	\$374	\$270
Median	\$278				\$278	\$290					\$214	\$280	\$335	
25th percentile	\$240				\$250	\$230					\$160	\$240	\$301	
Average	\$277		\$252	\$250	\$287	\$268	\$283		\$235		\$207	\$283	\$339	\$278
<b>SOLO PRACTITIONERS</b>														
Number Reporting	109	4	0	3	14	13	4	4	4	3	13	14	21	12
% of total		4%	-	3%	13%	12%	4%	4%	4%	3%	12%	14%	21%	11%
75th percentile	\$250				\$300	\$210	\$175	\$200	\$200	\$150	\$200	\$275	\$300	\$230
Median	\$200	\$240		\$225	\$240	\$180		\$200	\$200	\$180	\$180	\$200	\$225	\$195
25th percentile	\$165	\$240			\$225	\$165		\$200	\$200	\$150	\$150	\$185	\$200	\$150
Average	\$220	\$241		\$212	\$265	\$200	\$210	\$230	\$206	\$163	\$178	\$223	\$250	\$190

JT-APP 2953

**Table 7b. Hourly Billing Rate by Type of Practice and Years of Experience**

	RESPONDENT'S YEARS OF INTELLECTUAL PROPERTY LAW EXPERIENCE										
	Total Survey	Less than 5	5-6	7-9	10-14	15-19	20-24	25-29	30-34	35-39	40 or More
<b>ALL PRIVATE PRACTICE</b>											
Number Reporting	1088	176	140	133	164	107	92	74	60	62	72
% of total		16%	13%	12%	15%	10%	8%	7%	6%	6%	7%
75th percentile	\$300	\$215	\$240	\$280	\$300	\$340	\$315	\$365	\$365	\$350	\$368
Median	\$240	\$180	\$210	\$235	\$240	\$290	\$275	\$288	\$284	\$300	\$300
25th percentile	\$198	\$150	\$175	\$200	\$210	\$240	\$223	\$225	\$250	\$230	\$228
Average	\$252	\$188	\$214	\$236	\$256	\$292	\$275	\$296	\$297	\$301	\$294
<b>PARTNERS</b>											
Number Reporting	522	6	17	60	106	88	66	55	46	38	40
% of total		1%	3%	11%	20%	17%	13%	11%	9%	7%	8%
75th percentile	\$340	\$205	\$250	\$270	\$310	\$350	\$325	\$375	\$375	\$380	\$380
Median	\$280	\$173	\$220	\$238	\$250	\$300	\$280	\$305	\$313	\$300	\$325
25th percentile	\$230	\$135	\$200	\$200	\$210	\$255	\$250	\$245	\$260	\$275	\$250
Average	\$290	\$182	\$236	\$237	\$267	\$305	\$291	\$320	\$319	\$329	\$322
<b>ASSOCIATES</b>											
Number Reporting	391	165	115	59	33	5	5	0	1	1	0
% of total		42%	29%	15%	8%	1%	1%	-	0%	0%	-
75th percentile	\$240	\$215	\$240	\$260	\$270	\$250	\$210	-	-	-	-
Median	\$200	\$180	\$210	\$225	\$240	\$235	\$205	-	-	-	-
25th percentile	\$168	\$150	\$175	\$195	\$215	\$200	\$165	-	-	-	-
Average	\$206	\$189	\$211	\$227	\$242	\$230	\$193	-	-	-	-
<b>OF COUNSEL</b>											
Number Reporting	66	0	3	7	8	7	6	4	7	11	12
% of total		-	5%	11%	12%	11%	9%	6%	11%	17%	18%
75th percentile	\$325	-	\$220	\$320	\$273	\$350	\$327	\$224	\$280	\$375	\$325
Median	\$278	-	\$220	\$300	\$250	\$275	\$310	\$251	\$251	\$325	\$300
25th percentile	\$240	-	\$220	\$290	\$240	\$216	\$250	\$231	\$231	\$250	\$240
Average	\$277	-	\$238	\$304	\$259	\$275	\$298	\$222	\$263	\$316	\$278
<b>SOLO PRACTITIONERS</b>											
Number Reporting	109	5	5	7	17	7	15	15	6	12	20
% of total		5%	5%	6%	16%	6%	14%	14%	6%	11%	18%
75th percentile	\$250	\$175	\$190	\$280	\$250	\$225	\$250	\$300	\$235	\$275	\$295
Median	\$200	\$150	\$180	\$225	\$200	\$195	\$200	\$225	\$200	\$188	\$235
25th percentile	\$165	\$150	\$165	\$185	\$165	\$150	\$185	\$195	\$165	\$150	\$183
Average	\$220	\$160	\$180	\$210	\$180	\$170	\$190	\$200	\$160	\$208	\$250

JT-APP 2954

Table 22. Estimated Costs of Litigation, by Location of Primary Place of Work

	Location of Respondent's Primary Place of Work													
	Total Survey	Boston Area	NYC Area	Philadelphia-Wilmington	Washington DC Area	Other East	Metro Southeast	Other Southeast	Chicago Area	Minneapolis-St. Paul	Other Central	Texas	California	Other West
<b>THOUSANDS OF DOLLARS</b>														
<b>ESTIMATE OF TOTAL COST, THROUGH END OF DISCOVERY AND INCLUSIVE, IN A PATENT INFRINGEMENT SUIT LESS THAN \$1 MILLION AT RISK</b>														
<u>End of discovery</u>														
Number Reporting	250	13	13	7	30	27	15	7	21	8	55	16	24	14
% of total		5%	5%	3%	12%	11%	6%	3%	8%	3%	22%	6%	10%	6%
75th percentile	\$451	\$601	\$499	\$399	\$499	\$500	\$449	\$249	\$501	\$700	\$298	\$375	\$450	\$400
Median	\$250	\$499	\$251	\$301	\$299	\$299	\$250	\$150	\$350	\$275	\$201	\$251	\$225	\$213
25th percentile	\$151	\$249	\$199	\$176	\$198	\$151	\$126	\$52	\$250	\$163	\$148	\$201	\$102	\$75
<u>Inclusive, all costs</u>														
Number Reporting	242	12	13	7	30	27	15	7	21	7	51	16	22	14
% of total		5%	5%	3%	12%	11%	6%	3%	9%	3%	21%	7%	9%	6%
75th percentile	\$750	\$1,050	\$752	\$749	\$800	\$999	\$599	\$398	\$1,001	\$1,499	\$501	\$600	\$700	\$900
Median	\$499	\$750	\$501	\$451	\$502	\$500	\$498	\$251	\$600	\$400	\$400	\$500	\$450	\$325
25th percentile	\$301	\$450	\$301	\$376	\$398	\$399	\$252	\$101	\$451	\$202	\$252	\$400	\$350	\$150
<b>\$1-\$2.5 MILLION AT RISK</b>														
<u>End of discovery</u>														
Number Reporting	299	17	15	10	40	33	16	7	23	7	61	22	31	16
% of total		6%	5%	3%	13%	11%	5%	2%	8%	2%	20%	7%	10%	5%
75th percentile	\$1,495	\$1,703	\$1,496	\$1,400	\$1,500	\$1,499	\$1,000	\$998	\$1,503	\$998	\$755	\$1,498	\$1,504	\$1,500
Median	\$797	\$1,497	\$996	\$900	\$900	\$798	\$625	\$500	\$1,001	\$500	\$605	\$850	\$998	\$1,000
25th percentile	\$496	\$898	\$504	\$450	\$550	\$348	\$265	\$203	\$504	\$299	\$400	\$498	\$453	\$390
<u>Inclusive, all costs</u>														
Number Reporting	295	15	15	10	40	33	17	7	23	6	61	21	28	18
% of total		5%	5%	3%	14%	11%	6%	2%	8%	2%	21%	7%	9%	6%
75th percentile	\$2,497	\$2,503	\$2,598	\$2,500	\$2,750	\$3,000	\$1,499	\$1,798	\$2,999	\$2,000	\$1,502	\$2,004	\$3,003	\$2,500
Median	\$1,499	\$2,003	\$1,999	\$1,850	\$1,752	\$1,503	\$1,253	\$700	\$1,753	\$1,150	\$1,001	\$1,499	\$1,750	\$1,750
25th percentile	\$802	\$1,498	\$1,203	\$700	\$1,200	\$798	\$1,001	\$349	\$1,253	\$550	\$748	\$749	\$850	\$600

JT-APP 2955

Selection Criteria

Client (hand select) Include: BLNT-0001LT  
Slip Classification Open  
Slip Date Earliest - Latest  
Slip Transaction Ty 1 - 1

Rate Info - identifies rate source and level

Slip ID	Dates and Time	Attorney Activity	Units DNB Time	Rate Rate Info	Slip Value
Posting Status	Description	Client File	Est. Time Variance	Bill Status	
77992	TIME	WDH	2.50	350.00	875.00
8/6/01		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		
	Meeting with Mr. Golden Blount. Telecons with Roy Hardin. Interoffice meeting. Follow-up. Not to Elizabeth: Hold this time.		0.00		
77993	TIME	WDH	2.00	350.00	700.00
8/7/01		Draft	0.00	T@1	
WIP		BLNT-0001LT	0.00		
	Draft contingency fee agreement.		0.00		
77994	TIME	WDH	0.00	350.00	0.00
8/9/01		Draft	0.00	T@1	
WIP		BLNT-0001LT	0.00		
	Draft cover letter and further work on contingency agreement.		0.00		
77995	TIME	WDH	1.00	350.00	350.00
8/13/01		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		
	Initial preparatory time by WDH.		0.00		
77996	TIME	WDH	1.75	350.00	612.50
8/14/01		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		
	Initial survey of invention potential. Negotiations with opposing counsel and reviewing understanding for 30 day extension on discovery issues.		0.00		
77997	TIME	WDH	0.50	350.00	175.00
8/15/01		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		
	Further review on faxing the Golden matter.		0.00		
78505	TIME	CWG	12.30	290.00	3567.00
8/15/01	8/31/01	Review	0.00	T@1	
WIP		BLNT-0001LT	0.00		
	Review files and pleadings; office conference with client.		0.00		

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
77998	8/17/01	TIME	Finalize motion to extend time and forwarding same to opposing counsel for execution.	WDH Misc BLNT-0001LT	0.75 0.00 0.00 0.00	350.00 T@1	262.50
77999	8/21/01	TIME	Review of papers and pleadings. Interoffice conference.	WDH Review BLNT-0001LT	1.00 0.00 0.00 0.00	350.00 T@1	350.00
78000	8/23/01	TIME	Working on formulating Golden Blount case. Entry of appearance.	WDH Misc BLNT-0001LT	2.50 0.00 0.00 0.00	350.00 T@1	875.00
78001	8/29/01	TIME	Planning and work on documents.	WDH Misc BLNT-0001LT	3.50 0.00 0.00 0.00	350.00 T@1	1225.00
78002	8/30/01	TIME	Planning discovery and document responses.	WDH Misc BLNT-0001LT	1.00 0.00 0.00 0.00	350.00 T@1	350.00
77655	8/30/01	TIME	Prepare correspondence to and telephone conference with Optipat requesting certified file wrapper histories on three patent applications; office conference with Liz regarding same.	CAG Prepare BLNT-0001LT	1.00 0.00 0.00 0.00	75.00 T	75.00
78003	8/31/01	TIME	Study of documents.	WDH Misc BLNT-0001LT	0.50 0.00 0.00 0.00	350.00 T@1	175.00
79834	9/4/01	TIME	Determine prosecution history and claim interpretation.	JHO Misc BLNT-0001LT	7.70 0.00 0.00 0.00	175.00 T@1	1347.50
79473	9/4/01	TIME	Study of case and preparation for meeting. Meeting with client on	WDH Misc BLNT-0001LT	4.00 0.00 0.00 0.00	350.00 T@1	1400.00

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	Posting Status	Client File	DNB Time	Rate Info	
	Description		Est. Time	Bill Status	
			Variance		
	Westgrove Lane.				
79835	TIME	JHO	8.80	175.00	1540.00
	9/5/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Determine prosecution history and claim interpretation.				
79474	TIME	WDH	0.75	350.00	262.50
	9/5/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Follow-up work on damages question, [REDACTED]				
79836	TIME	JHO	8.90	175.00	1557.50
	9/6/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Determine prosecution history and claim interpretation.				
79475	TIME	WDH	2.00	350.00	700.00
	9/6/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Work on document production.				
79615	TIME	CAG	2.00	75.00	150.00
	9/7/01	Prepare	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Prepare documents for production.				
79838	TIME	JHO	6.90	175.00	1207.50
	9/7/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Determine prosecution history and claim interpretation.				
79476	TIME	WDH	3.50	350.00	1225.00
	9/7/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Work on document review and classification and [REDACTED]				
79477	TIME	WDH	5.50	350.00	1925.00
	9/8/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Work on classifying documents and make ready for delivery to opponents.				
79840	TIME	JHO	9.00	175.00	1575.00
	9/10/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Determine prosecution history and claim interpretation.				

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity	Client File	Units DNB Time	Rate Rate Info	Slip Value
						Est. Time	Bill Status	
						Variance		
79478	TIME			WDH		3.00	350.00	1050.00
	9/10/01			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		
			Document production.			0.00		
79841	TIME			JHO		6.60	175.00	1155.00
	9/11/01			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		
			Determine prosecution history and claim interpretation.			0.00		
79479	TIME			WDH		1.00	350.00	350.00
	9/11/01			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		
			Document exchange arrangements and telecon with Jerry Selinger.			0.00		
79480	TIME			WDH		0.50	350.00	175.00
	9/12/01			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		
			Arrangements for discovery scheduling and further document analysis.			0.00		
79842	TIME			JHO		9.70	175.00	1697.50
	9/12/01			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		
			Determine prosecution history and claim interpretation.			0.00		
79622	TIME			CAG		2.00	75.00	150.00
	9/12/01			Prepare		0.00	T@1	
	WIP			BLNT-0001LT		0.00		
			Prepare index of and organize documents produced by BLNT.			0.00		
79481	TIME			WDH		3.00	350.00	1050.00
	9/13/01			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		
			Study of patent claims and infringement problems.			0.00		
79843	TIME			JHO		9.90	175.00	1732.50
	9/13/01			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		
			Determine prosecution history and claim interpretation.			0.00		
79482	TIME			WDH		0.30	350.00	105.00
	9/14/01			Review		0.00	T@1	
	WIP			BLNT-0001LT		0.00		
			Review of copy of 'as filed' motion to extend discovery date.			0.00		

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
79483	9/19/01	WIP	Study of record of prosecution and [REDACTED]	WDH Misc BLNT-0001LT	1.00 0.00 0.00	350.00 T@1	350.00
79484	9/20/01	WIP	Telecon with opposing counsel from Chicago in an effort to produce logistic concerning document production and delivery. Follow-up call to defendant's local counsel.	WDH Misc BLNT-0001LT	0.75 0.00 0.00	350.00 T@1	262.50
79643	9/24/01	WIP	Revise pleadings index.	CAG Revise BLNT-0001LT	0.40 0.00 0.00	75.00 T@1	30.00
79485	9/24/01	WIP	Preliminary review of Peterson documents for [REDACTED]. Formalizing court appearances.	WDH Misc BLNT-0001LT	2.00 0.00 0.00	350.00 T@1	700.00
79645	9/25/01	WIP	Draft letter to court filing Notice of Appearances for Messrs. Harris and Gaines.	CAG Draft BLNT-0001LT	0.50 0.00 0.00	75.00 T@1	37.50
79486	9/25/01	WIP	Review of certain of Peterson documents and planning discovery.	WDH Review BLNT-0001LT	2.00 0.00 0.00	350.00 T@1	700.00
79653	9/26/01	WIP	Revised pleadings index.	CAG Revise BLNT-0001LT	0.20 0.00 0.00	75.00 T@1	15.00
79487	9/26/01	WIP	Conference with Charles and preparation for depositions.	WDH Misc BLNT-0001LT	2.50 0.00 0.00	350.00 T@1	875.00
79658	9/27/01	WIP	Office conference with Charles W. Gaines	CAG Misc BLNT-0001LT	1.10 0.00 0.00	75.00 T@1	82.50

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	Posting Status	Client	DNB Time	Rate Info	
	Description	File	Est. Time	Bill Status	
			Variance		
					regarding preparation for depositions; prepare documents for depositions.
79488	TIME	WDH	4.00	350.00	1400.00
	9/27/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
			0.00		Work on documents and preparation for depositions. [REDACTED] [REDACTED]. Telecon with Bill McLaughlin, opposing counsel.
79666	TIME	CAG	3.50	75.00	262.50
	9/28/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
			0.00		Office conference with William D. Harris regarding Notices of Deposition; draft Notice of Rule 30(b)(6) Deposition for RH Peterson Co.; draft Notice of Deposition of F. William McLaughlin; draft letter to opposing counsel regarding Notices of Deposition; [REDACTED] [REDACTED]
79855	TIME	WDH	3.00	350.00	1050.00
	9/28/01	Prepare	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
			0.00		Preparation for deposition. Faxes back and forth to opposing counsel. Deposition notices.
81783	TIME	WDH	2.00	350.00	700.00
	10/1/01	Prepare	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
			0.00		Prepare for deposition and calls from and to opposing counsel in Chicago.
81784	TIME	WDH	1.50	350.00	525.00
	10/2/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
			0.00		Revision of deposition notes and arrangement of deposition reporting for Friday, October 5, 2001.
81785	TIME	WDH	2.00	350.00	700.00
	10/3/01	Review	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
			0.00		[REDACTED] [REDACTED] arrangements for deposition in Chicago.
81710	TIME	CAG	0.50	75.00	37.50
	10/3/01	Revise	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
			0.00		Revise pleadings index and docket

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
Notices of Deposition.							
81786	TIME			WDH	4.00	350.00	1400.00
	10/4/01			Prepare	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Preparation for deposition.		0.00		
81787	TIME			WDH	12.00	350.00	4200.00
	10/5/01			Prepare	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Preparation for and travel to Chicago. Taking of deposition. Return to Dallas.		0.00		
81788	TIME			WDH	3.00	350.00	1050.00
	10/8/01			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Study of documents. Letter to client. Conferring with Mr. Gaines.		0.00		
81789	TIME			WDH	5.50	350.00	1925.00
	10/9/01			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Case preparation. Two telecons with Mr. Blount. Work on motion regarding attorneys opinions. Study of claim interpretation.		0.00		
81596	TIME			GHP	3.80	175.00	665.00
	10/10/01			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Motion in Limine.		0.00		
81790	TIME			WDH	3.00	350.00	1050.00
	10/10/01			Teleconference	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Telecon with opposing counsel regarding problem of use of opinions of counsel.		0.00		
81600	TIME			GHP	2.30	175.00	402.50
	10/11/01			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Motion in Limine.		0.00		
81598	TIME			GHP	3.40	175.00	595.00
	10/11/01			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Motion in Limine.		0.00		
81791	TIME			WDH	3.80	350.00	1330.00
	10/11/01			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Work on case preparation.		0.00		

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Slip ID	Dates and Time	Attorney Activity	Units	Rate	Slip Value
	Posting Status	Client	DNB Time	Rate Info	
	Description	File	Est. Time	Bill Status	
			Variance		
81792	TIME	WDH	2.50	350.00	875.00
	10/12/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Execution of Motion in Limine and filing and serving of same.		0.00		
81793	TIME	WDH	2.00	350.00	700.00
	10/15/01	Review	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Review of certain drawings and documents and preparing for meeting with Golden Blount.		0.00		
81794	TIME	WDH	5.00	350.00	1750.00
	10/16/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Preparation for and conference with Golden Blount at his offices and certain follow-up thereafter.		0.00		
81865	TIME	CWG	4.50	290.00	1305.00
	10/16/01	Meeting	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Meeting at Golden Blount's office.		0.00		
81795	TIME	WDH	1.00	350.00	350.00
	10/19/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	[REDACTED]		0.00		
81759	TIME	CAG	0.50	75.00	37.50
	10/23/01	Revise	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Revise pleadings index.		0.00		
81771	TIME	CAG	0.50	75.00	37.50
	10/26/01	Revise	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Revise pleadings index.		0.00		
83972	TIME	WDH	1.20	350.00	420.00
	11/1/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	[REDACTED]		0.00		
	[REDACTED]				
	[REDACTED]				
83735	TIME	CWG	0.75	290.00	217.50
	11/5/01	Review	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Review documents; office conference with Bill Harris regarding [REDACTED].		0.00		

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83974	TIME			WDH	3.00	350.00	1050.00
	11/5/01			Misc	0.00	T@1	
	WIP		BLNT-0001LT		0.00		
			Further work and planning strategy.		0.00		
83740	TIME			CWG	0.75	290.00	217.50
	11/6/01			Misc	0.00	T@1	
	WIP		BLNT-0001LT		0.00		
			Conference with Bill Harris regarding [REDACTED]		0.00		
83973	TIME			WDH	5.00	350.00	1750.00
	11/6/01			Misc	0.00	T@1	
	WIP		BLNT-0001LT		0.00		
			Work on [REDACTED] Study of claims. Meeting with Charles Gaines [REDACTED] [REDACTED] Telecons with opposing counsel and with Golden Blount.		0.00		
83975	TIME			WDH	3.00	350.00	1050.00
	11/7/01			Misc	0.00	T@1	
	WIP		BLNT-0001LT		0.00		
			Attention to response to the opposition to our motion in limine.		0.00		
83594	TIME			GHP	2.80	175.00	490.00
	11/9/01			Draft	0.00	T@1	
	WIP		BLNT-0001LT		0.00		
			Draft reply to defendants Response to Motion in Limine.		0.00		
83977	TIME			WDH	2.00	350.00	700.00
	11/9/01			Misc	0.00	T@1	
	WIP		BLNT-0001LT		0.00		
			Further work on Reply.		0.00		
83595	TIME			GHP	1.60	175.00	280.00
	11/11/01			Draft	0.00	T@1	
	WIP		BLNT-0001LT		0.00		
			Draft reply to defendants Response to Motion in Limine.		0.00		
83976	TIME			WDH	2.00	350.00	700.00
	11/12/01			Misc	0.00	T@1	
	WIP		BLNT-0001LT		0.00		
			Work on reply to our opposition to motion in limine.		0.00		
83978	TIME			WDH	2.00	350.00	700.00
	11/13/01			Misc	0.00	T@1	
	WIP		BLNT-0001LT		0.00		
			Telecons with Judge's law coordinator. [REDACTED]		0.00		

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
			receiving continuance notice for Judge Stickney's hearing.				
83979	TIME			WDH	1.00	350.00	350.00
	11/15/01			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Attention to revised order for hearing by Magistrate. Conference with Charles Gaines.		0.00		
83512	TIME			CAG	0.50	75.00	37.50
	11/16/01			Revise	0.00	T	
	WIP			BLNT-0001LT	0.00		
			Revise pleadings index.		0.00		
83980	TIME			WDH	1.50	350.00	525.00
	11/19/01			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Préparation for trial [REDACTED]		0.00		
83981	TIME			WDH	4.50	350.00	1575.00
	11/26/01			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Preparation for an argument before Magistrate Judge regarding [REDACTED]		0.00		
83982	TIME			WDH	1.00	350.00	350.00
	11/27/01			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Follow-up on hearing of November 26 and review of Magistrate Judge's Order.		0.00		
83555	TIME			TAM	0.50	65.00	32.50
	11/28/01			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Update pleadings index.		0.00		
101323	TIME			WDH	0.50	350.00	175.00
	12/3/01			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Preparations for further depositions per Judge's Order.		0.00		
101324	TIME			WDH	1.00	350.00	350.00
	12/4/01			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Preparing for further depositions.		0.00		
101325	TIME			WDH	0.60	350.00	210.00
	12/5/01			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Telecon with Bill McLaughlin in efforts to		0.00		

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			work out discovery issues and deposition timing.				
101326	12/6/01	TIME	WIP Telecons with opposing counsel (Bill McLaughlin) concerning timing, and particularly as relates to the McLaughlin deposition and completion of Mr. Bortz's deposition to be held in Dallas.	WDH Misc BLNT-0001LT	0.50 0.00 0.00 0.00	350.00 T@1	175.00
101327	12/13/01	TIME	WIP Telecon with opposing attorney (McLaughlin) regarding deposition setting and follow-up.	WDH Misc BLNT-0001LT	0.60 0.00 0.00 0.00	350.00 T@1	210.00
101328	12/14/01	TIME	WIP Telecons with Bill McLaughlin in an effort to finalize 30(b)(6) deposition.	WDH Misc BLNT-0001LT	1.00 0.00 0.00 0.00	350.00 T@1	350.00
101329	12/17/01	TIME	WIP Notice letter faxed to Bill McLaughlin concerning deposition notice and request for documents. Telecon with Bill McLaughlin.	WDH Misc BLNT-0001LT	0.60 0.00 0.00 0.00	350.00 T@1	210.00
101331	12/18/01	TIME	WIP Prepare materials for McLaughlin's deposition.	CWG Prepare BLNT-0001LT	1.00 0.00 0.00 0.00	290.00 T@1	290.00
101330	12/18/01	TIME	WIP Preparations for deposition of Bill McLaughlin and Mr. Bortz.	WDH Misc BLNT-0001LT	2.00 0.00 0.00 0.00	350.00 T@1	700.00
101333	12/19/01	TIME	WIP Further preparation for and taking depositions of Mr. McLaughlin and Mr. Bortz.	WDH Misc BLNT-0001LT	6.00 0.00 0.00 0.00	350.00 T@1	2100.00
101332	12/19/01	TIME	WIP	CWG Attend BLNT-0001LT	6.50 0.00 0.00	290.00 T@1	1885.00

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	Posting Status	Client	DNB Time	Rate Info	
	Description	File	Est. Time	Bill Status	
			Variance		
		Attend depositions of McLaughlin and Bortz.	0.00		
101334	TIME	WDH	0.50	350.00	175.00
	12/20/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Conference with Charles Gaines regarding [REDACTED].		0.00		
101336	TIME	WDH	0.80	350.00	280.00
	12/21/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Consideration of presentation of evidence. Telecon with Golden Blount.		0.00		
101335	TIME	GHP	2.40	175.00	420.00
	12/21/01	Prepare	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Prepare Exhibits.		0.00		
101337	TIME	GHP	3.10	175.00	542.50
	12/27/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Plaintiff's Reply to Defendant's Counterclaim.		0.00		
101338	TIME	GHP	1.10	175.00	192.50
	12/27/01	Prepare	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Prepare Exhibits.		0.00		
101339	TIME	GHP	1.10	175.00	192.50
	12/28/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Plaintiff's Reply to Defendant's Counterclaim.		0.00		
101340	TIME	WDH	1.00	350.00	350.00
	12/31/01	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Response to Counterclaims.		0.00		
87666	TIME	GHP	2.10	175.00	367.50
	1/2/02	Research	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Research for WDH.		0.00		
88076	TIME	WDH	1.00	350.00	350.00
	1/7/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Preliminary review of depositions.		0.00		

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity	Client	File	Units DNB	Time Est.	Time Variance	Rate Rate Info	Bill Status	Slip Value
87671	1/7/02	TIME	WIP Research Disclaimer.	GHP	Research	BLNT-0001LT	2.30	0.00	0.00	175.00	T@1	402.50
87673	1/8/02	TIME	WIP Research Disclaimer.	GHP	Research	BLNT-0001LT	2.40	0.00	0.00	175.00	T@1	420.00
88077	1/9/02	TIME	WIP Preparation for trial.	WDH	Misc	BLNT-0001LT	0.60	0.00	0.00	350.00	T@1	210.00
87674	1/9/02	TIME	WIP Prepare Claim Chart Exhibit.	GHP	Prepare	BLNT-0001LT	4.80	0.00	0.00	175.00	T@1	840.00
88078	1/10/02	TIME	WIP Preparation and meeting.	WDH	Misc	BLNT-0001LT	3.50	0.00	0.00	350.00	T@1	1225.00
87678	1/10/02	TIME	WIP Meetings with Golden & Family [REDACTED].	GHP	Misc	BLNT-0001LT	2.10	0.00	0.00	175.00	T@1	367.50
88025	1/10/02	TIME	WIP Meeting with Golden Blount regarding [REDACTED]; preparation for meeting.	CWG	Meeting	BLNT-0001LT	8.00	0.00	0.00	290.00	T@1	2320.00
88028	1/13/02	TIME	WIP Review deposition.	CWG	Review	BLNT-0001LT	4.00	0.00	0.00	290.00	T@1	1160.00
88029	1/14/02	TIME	WIP Conference with Bill Harris regarding [REDACTED].	CWG	Conference	BLNT-0001LT	3.00	0.00	0.00	290.00	T@1	870.00
87682	1/14/02	TIME	WIP Discussions with Charles and Bill regarding [REDACTED].	GHP	Misc	BLNT-0001LT	9.30	0.00	0.00	175.00	T@1	1627.50

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Slip ID	Attorney	Units	Rate	Slip Value
Dates and Time	Activity	DNB Time	Rate Info	
Posting Status	Client	Est. Time	Bill Status	
Description	File	Variance		
88079	WDH	5.50	350.00	1925.00
1/14/02	Misc	0.00	T@1	
WIP	BLNT-0001LT	0.00		
Work on case. Preparation primarily on [REDACTED] t. Telecon with opposing counsel.				
88041	CWG	2.00	290.00	580.00
1/15/02	Teleconference	0.00	T@1	
WIP	BLNT-0001LT	0.00		
Telephone conference with John Palaski and follow up office conference with Bill Harris regarding [REDACTED].				
88080	WDH	5.00	350.00	1750.00
1/15/02	Misc	0.00	T@1	
WIP	BLNT-0001LT	0.00		
Telecon from [REDACTED] t [REDACTED] Mark-up of the Chicago segment of the Bortz deposition. Conference with co-counsel regarding [REDACTED].				
87689	GHP	1.70	175.00	297.50
1/16/02	Review	0.00	T@1	
WIP	BLNT-0001LT	0.00		
Review Financial Documents and Other exhibits.				
88081	WDH	4.00	350.00	1400.00
1/16/02	Misc	0.00	T@1	
WIP	BLNT-0001LT	0.00		
Work on preparation of required Pretrial Disclosures.				
88082	WDH	5.00	350.00	1750.00
1/17/02	Review	0.00	T@1	
WIP	BLNT-0001LT	0.00		
Review of documents; [REDACTED] exchange of faxes with Bill McLaughlin (opposing counsel) regarding pretrial disclosure schedule and regarding preparation of pretrial order. Initiation of efforts to obtain stipulations from Bill McLaughlin. Consideration of [REDACTED].				
88044	CWG	5.50	290.00	1595.00
1/17/02	Review	0.00	T@1	
WIP	BLNT-0001LT	0.00		
Review and discuss documents and exhibits for pretrial disclosure.				

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Slip ID	Dates and Time Posting Status Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
87690	TIME 1/17/02 WIP Review Financial Documents and Other exhibits.	GHP Review BLNT-0001LT	8.70 0.00 0.00 0.00	175.00 T@1	1522.50
87691	TIME 1/18/02 WIP Draft Pretrial Disclosure.	GHP Draft BLNT-0001LT	2.20 0.00 0.00 0.00	175.00 T@1	385.00
88083	TIME 1/18/02 WIP Further preparation for pretrial disclosures and pretrial order.	WDH Review BLNT-0001LT	3.00 0.00 0.00 0.00	350.00 T@1	1050.00
88084	TIME 1/21/02 WIP Preparation for trial including further preparation for pretrial disclosures.	WDH Review BLNT-0001LT	3.00 0.00 0.00 0.00	350.00 T@1	1050.00
88049	TIME 1/21/02 WIP Mark depositions for pretrial materials.	CWG Misc BLNT-0001LT	3.00 0.00 0.00 0.00	290.00 T@1	870.00
87692	TIME 1/21/02 WIP Draft Pretrial Disclosure.	GHP Draft BLNT-0001LT	2.90 0.00 0.00 0.00	175.00 T@1	507.50
87901	TIME 1/22/02 WIP Prepare log of privileged documents.	TAM Prepare BLNT-0001LT	1.00 0.00 0.00 0.00	65.00 T@1	65.00
87693	TIME 1/22/02 WIP Draft Pretrial Disclosure/Review Interrogatories.	GHP Draft BLNT-0001LT	3.10 0.00 0.00 0.00	175.00 T@1	542.50
88085	TIME 1/23/02 WIP Preparation and study relating to pretrial materials and pretrial order. Conference with Greg Parker and brief conference with Charles Gaines.	WDH Misc BLNT-0001LT	4.00 0.00 0.00 0.00	350.00 T@1	1400.00

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
87694	TIME			GHP	1.50	175.00	262.50
	1/23/02			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Jury Instructions.		0.00		
88086	TIME			WDH	2.30	350.00	805.00
	1/24/02			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Trial instructions for jury. Preparation time with Greg Parker. Telecons seeking to find status of pretrial disclosures.		0.00		
87698	TIME			GHP	3.40	175.00	595.00
	1/25/02			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Pretrial Order (including Jury Instructions & Voir Dire).		0.00		
88087	TIME			WDH	2.00	350.00	700.00
	1/25/02			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Conferences with Charles Gaines and Greg Parker regarding [REDACTED]. [REDACTED]. Telecon with Bill McLaughlin in Chicago. [REDACTED]. [REDACTED].		0.00		
88088	TIME			WDH	4.00	350.00	1400.00
	1/28/02			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Preparation for trial.		0.00		
87700	TIME			GHP	4.10	175.00	717.50
	1/28/02			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Pretrial Order & Exhibit List.		0.00		
87902	TIME			TAM	0.50	65.00	32.50
	1/29/02			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Update pleadings Index.		0.00		
88089	TIME			WDH	4.00	350.00	1400.00
	1/29/02			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Preparation for trial.		0.00		
88065	TIME			CWG	2.00	290.00	580.00
	1/30/02			Conference	0.00	T@1	
	WIP			BLNT-0001LT	0.00		
			Conferences with Bill Harris and Greg Parker regarding [REDACTED].		0.00		

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
88090	TIME		1/30/02 WIP Trial preparation; Meeting with Mr. Blount.	WDH Misc BLNT-0001LT	5.50 0.00 0.00 0.00	350.00 T@1	1925.00
87705	TIME		1/31/02 WIP Review/Mark Deposition Designations & Review 30)b)(6) motion.	GHP Review BLNT-0001LT	4.70 0.00 0.00 0.00	175.00 T@1	822.50
88066	TIME		1/31/02 WIP Begin mark depositions for pretrial designations; conferences with Bill Harris and Greg Parker regarding [REDACTED].	CWG Misc BLNT-0001LT	3.00 0.00 0.00 0.00	290.00 T@1	870.00
88091	TIME		1/31/02 WIP Preparation for trial.	WDH Misc BLNT-0001LT	5.00 0.00 0.00 0.00	350.00 T@1	1750.00
89910	TIME		2/1/02 WIP Prepare/Review Portions of Pretrial Order.	GHP Prepare BLNT-0001LT	6.50 0.00 0.00 0.00	175.00 T@1	1137.50
89703	TIME		2/1/02 WIP Prepare pre-trial exhibits.	TAM Prepare BLNT-0001LT	2.50 0.00 0.00 0.00	65.00 T@1	162.50
90409	TIME		2/1/02 WIP Work on various parts and subparts of pretrial order and other pretrial materials required by Judge Buchmeyer. Sending initial drafts of foregoing to opposing counsel, as per requirements by Court.	WDH Work on BLNT-0001LT	5.00 0.00 0.00 0.00	350.00 T@1	1750.00
89579	TIME		2/2/02 WIP Prepare pretrial order; interoffice conference with Bill Harris and Greg Parker regarding [REDACTED].	CWG Prepare BLNT-0001LT	7.00 0.00 0.00 0.00	290.00 T@1	2030.00
89591	TIME		2/4/02 WIP Prepare pretrial order and pretrial disclosure materials.	CWG Prepare BLNT-0001LT	3.00 0.00 0.00 0.00	290.00 T@1	870.00

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity	Client File	Units DNB Time	Rate Rate Info	Slip Value
						Est. Time	Bill Status	
						Variance		
90410	TIME			WDH		5.00	350.00	1750.00
	2/4/02			Work on		0.00	T@1	
	WIP			BLNT-0001LT		0.00		
			Work on jury charges and special questions for jury. Further work on pretrial order.			0.00		
89914	TIME			GHP		3.40	175.00	595.00
	2/4/02			Review		0.00	T@1	
	WIP			BLNT-0001LT		0.00		
			Review Documentation for Preliminary Jury Instructions with William D. Harris, Jr. and Research and Drafting of Jury Instructions.			0.00		
89913	TIME			GHP		2.60	175.00	455.00
	2/4/02			Prepare		0.00	T@1	
	WIP			BLNT-0001LT		0.00		
			Prepare/Review Remaining Portions of Pretrial Order.			0.00		
89580	TIME			CWG		3.00	290.00	870.00
	2/4/02			Prepare		0.00	T@1	
	WIP			BLNT-0001LT		0.00		
			Prepare pretrial order; interoffice conference with Greg Parker regarding [REDACTED]			0.00		
90411	TIME			WDH		4.00	350.00	1400.00
	2/5/02			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		
			[REDACTED] es. Review of McLaughlin's letter pressing for pretrial material drafts and redrafting of response.			0.00		
89918	TIME			GHP		2.30	175.00	402.50
	2/5/02			Prepare		0.00	T@1	
	WIP			BLNT-0001LT		0.00		
			Preparation of Objections to Defendants Pretrial Disclosure.			0.00		
89592	TIME			CWG		5.00	290.00	1450.00
	2/5/02			Prepare		0.00	T@1	
	WIP			BLNT-0001LT		0.00		
			Prepare pretrial materials.			0.00		
89706	TIME			TAM		0.20	65.00	13.00
	2/6/02			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		
			Update pleadings index.			0.00		

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Slip ID		Attorney	Units	Rate	Slip Value
Dates and Time		Activity	DNB Time	Rate Info	
Posting Status		Client	Est. Time	Bill Status	
Description		File	Variance		
89593	TIME	CWG	2.00	290.00	580.00
2/6/02		Prepare	0.00	T@1	
WIP		BLNT-0001LT	0.00		
Prepare pretrial materials.					
90412	TIME	WDH	8.00	350.00	2800.00
2/6/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		
Numerous letters and pretrial materials to and from opposing counsel, related primary to scheduling order and Judge Buchmeyer's pretrial requirement. Preparation for trial. [REDACTED] with Charles Gaines and Greg Parker.					
89922	TIME	GHP	1.70	175.00	297.50
2/6/02		Draft	0.00	T@1	
WIP		BLNT-0001LT	0.00		
Draft/Review Stipulations of Fact and Explanation of Witnesses.					
89921	TIME	GHP	1.10	175.00	192.50
2/6/02		Review	0.00	T@1	
WIP		BLNT-0001LT	0.00		
Review Defendant's Interrogatories for Completeness.					
89920	TIME	GHP	1.70	175.00	297.50
2/6/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		
Discussions with William D. Harris, Jr. regarding exhibits, pretrial order, Golden Blount, etc.					
89602	TIME	CWG	6.00	290.00	1740.00
2/7/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		
Interoffice discussion with Bill Harris regarding [REDACTED]; Telephone conference with Golden Blount; [REDACTED]					
90413	TIME	WDH	5.00	350.00	1750.00
2/7/02		Prepare	0.00	T@1	
WIP		BLNT-0001LT	0.00		
Preparation for pretrial papers, pretrial conference and for trial.					
89925	TIME	GHP	5.20	175.00	910.00
2/7/02		Prepare	0.00	T@1	
WIP		BLNT-0001LT	0.00		
Preparation of Jury Instructions.					

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Dates and Time	Activity	DNB Time	Rate Info	
Posting Status	Client	Est. Time	Bill Status	
Description	File	Variance		
89927	GHP	1.90	175.00	332.50
2/8/02	Draft	0.00	T@1	
WIP	BLNT-0001LT	0.00		
Draft/Review Letters to B. McLaughlin.				
89606	CWG	4.00	290.00	1160.00
2/8/02	Prepare	0.00	T@1	
WIP	BLNT-0001LT	0.00		
Prepare letter to opposing counsel; telephone conference with Mr. Blount regarding <del>_____</del> ; prepare letter to Mr. Blount regarding <del>_____</del> . Interoffice conference with Bill Harris.				
89931	GHP	2.80	175.00	490.00
2/8/02	Prepare	0.00	T@1	
WIP	BLNT-0001LT	0.00		
Preparation of Equivalence Chart.				
89930	GHP	1.30	175.00	227.50
2/8/02	Prepare	0.00	T@1	
WIP	BLNT-0001LT	0.00		
Preparation of Jury Instructions.				
89928	GHP	3.50	175.00	612.50
2/8/02	Prepare	0.00	T@1	
WIP	BLNT-0001LT	0.00		
Preparation of Jury Instructions.				
90414	WDH	4.00	350.00	1400.00
2/8/02	Prepare	0.00	T@1	
WIP	BLNT-0001LT	0.00		
Preparation for trial.				
90415	WDH	3.00	350.00	1050.00
2/11/02	Work on	0.00	T@1	
WIP	BLNT-0001LT	0.00		
Work on pretrial order and work on voir dire questions. Conferences with Charles Gaines and Greg Parker. Letter to Bill McLaughlin regarding follow-up request for privilege log. Review of correspondence from Bill McLaughlin.				
89932	GHP	6.90	175.00	1207.50
2/11/02	Prepare	0.00	T@1	
WIP	BLNT-0001LT	0.00		
Preparation of Jury Instructions.				
89937	GHP	0.80	175.00	140.00
2/12/02	Misc	0.00	T@1	
WIP	BLNT-0001LT	0.00		
Strategy discussion with William D. Harris, Jr. regarding <del>_____</del> .				

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Posting Status	Description	Client File	DNB Time	Rate Info	
			Est. Time	Bill Status	
			Variance		
89621	TIME	CWG	2.00	290.00	580.00
2/14/02		Revise	0.00	T@1	
WIP		BLNT-0001LT	0.00		
	Revise Doctrine of Equivalents chart.		0.00		
90417	TIME	WDH	4.00	350.00	1400.00
2/14/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		
	Further preparation for trial. Preparation conference with Charles Gaines.		0.00		
90418	TIME	WDH	5.50	350.00	1925.00
2/15/02		Prepare	0.00	T@1	
WIP		BLNT-0001LT	0.00		
	Preparation for trial and numerous telecons.		0.00		
89619	TIME	CWG	1.00	290.00	290.00
2/15/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		
	Interoffice discussion with Bill Harris regarding [REDACTED]		0.00		
89635	TIME	CWG	1.00	290.00	290.00
2/15/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		
	Interoffice conference with Bill Harris regarding [REDACTED]		0.00		
89642	TIME	CWG	1.00	290.00	290.00
2/18/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		
	Interoffice conference regarding [REDACTED]		0.00		
90419	TIME	WDH	5.00	350.00	1750.00
2/18/02		Continue	0.00	T@1	
WIP		BLNT-0001LT	0.00		
	Continued preparation for trial.		0.00		
89648	TIME	CWG	1.50	290.00	435.00
2/19/02		Review	0.00	T@1	
WIP		BLNT-0001LT	0.00		
	Review draft of Pre-trial Order; telephone conference with opposing counsel; interoffice conference with Greg Parker regarding [REDACTED]		0.00		
89644	TIME	CWG	1.00	290.00	290.00
2/19/02		Review	0.00	T@1	
WIP		BLNT-0001LT	0.00		
	Review draft of Jury instructions.		0.00		

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						Est. Time	Bill Status	
						Variance		
89961	2/19/02	TIME	WIP Incorporate Charles W. Gaines changes into Jury Instructions.	GHP Misc	BLNT-0001LT	1.70 0.00 0.00	175.00 T@1	297.50
89962	2/19/02	TIME	WIP Draft/Review Final Pretrial Order.	GHP Misc	BLNT-0001LT	4.20 0.00 0.00	175.00 T@1	735.00
90420	2/20/02	TIME	WIP [REDACTED]	WDH Work on	BLNT-0001LT	3.00 0.00 0.00	350.00 T@1	1050.00
89965	2/20/02	TIME	WIP Completion/Filing of Pretrial Order and Pretrial Materials.	GHP Misc	BLNT-0001LT	8.30 0.00 0.00	175.00 T@1	1452.50
90421	2/21/02	TIME	WIP [REDACTED]. Conferences with Charles Gaines and Greg Parker.	WDH Work on	BLNT-0001LT	2.00 0.00 0.00	350.00 T@1	700.00
89667	2/21/02	TIME	WIP Review draft of Peterson's Jury Charge.	CWG Review	BLNT-0001LT	1.00 0.00 0.00	290.00 T@1	290.00
89970	2/22/02	TIME	WIP Preparation of Joint Agreed to Motion for Trial by the Court Sitting Without a Jury.	GHP Prepare	BLNT-0001LT	2.10 0.00 0.00	175.00 T@1	367.50
89973	2/25/02	TIME	WIP Preparation of Charts for Blnt Trial.	GHP Prepare	BLNT-0001LT	3.40 0.00 0.00	175.00 T@1	595.00
89847	2/25/02	TIME	WIP Interoffice conference regarding claims interpretation [REDACTED]	GWB Misc	BLNT-0001LT	1.00 1.00 0.00	275.00 T@1 Do Not Bill	275.00
89971	2/25/02	TIME	WIP	GHP Misc	BLNT-0001LT	1.20 0.00 0.00	175.00 T@1	210.00

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
			Strategy discussion with [REDACTED]		0.00		
90422	2/25/02	TIME	Further preparation for trial including numerous telecons with Bill McLaughlin and Dean Monco. Follow-up question posed by opposing counsel [REDACTED]	WDH Misc BLNT-0001LT	5.00 0.00 0.00 0.00	350.00 T@1	1750.00
89976	2/26/02	TIME	Strategy discussion with Charles W. Gaines about [REDACTED]	GHP Misc BLNT-0001LT	2.10 0.00 0.00 0.00	175.00 T@1	367.50
90423	2/26/02	TIME	Further preparation for trial. [REDACTED] including numerous re-wording transmission to opposing counsel. [REDACTED] Planning for pretrial conference.	WDH Misc BLNT-0001LT	4.70 0.00 0.00 0.00	350.00 T@1	1645.00
89848	2/26/02	TIME	Interoffice conference regarding [REDACTED]	GWB Misc BLNT-0001LT	1.00 1.00 0.00 0.00	275.00 T@1 Do Not Bill	275.00
89974	2/26/02	TIME	Preparing Charts for Blnt Trial.	GHP Prepare BLNT-0001LT	5.30 0.00 0.00 0.00	175.00 T@1	927.50
89975	2/26/02	TIME	Draft Motion/Brief for 60-Day Continuance—Send to opposing counsel.	GHP Draft BLNT-0001LT	1.50 0.00 0.00 0.00	175.00 T@1	262.50
89677	2/26/02	TIME	Review exhibit charts and interoffice	CWG Review BLNT-0001LT	2.50 0.00 0.00 0.00	290.00 T@1	725.00

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
			conference with Greg Parker regarding [REDACTED]				
89682	2/27/02	TIME	WIP Prepare claim construction chart.	CWG Prepare BLNT-0001LT	7.50 0.00 0.00 0.00	290.00 T@1	2175.00
89714	2/27/02	TIME	WIP Transmittal of documents to co-counsel; service of pleading on opposing counsel.	TAM Misc BLNT-0001LT	0.50 0.00 0.00 0.00	65.00 T@1	32.50
89715	2/27/02	TIME	WIP Prepare documents for production.	TAM Misc BLNT-0001LT	0.50 0.00 0.00 0.00	65.00 T@1	32.50
89978	2/27/02	TIME	WIP Preparing Claims Interp. Chart.	GHP Prepare BLNT-0001LT	3.40 0.00 0.00 0.00	175.00 T@1	595.00
89977	2/27/02	TIME	WIP Preparing Charts for Blnt Trial.	GHP Prepare BLNT-0001LT	3.10 0.00 0.00 0.00	175.00 T@1	542.50
90424	2/27/02	TIME	WIP Work on 3 motions and numerous calls to council to court and to client.	WDH Work on BLNT-0001LT	2.00 0.00 0.00 0.00	350.00 T@1	700.00
89980	2/28/02	TIME	WIP Strategy Discussions with William D. Harris, Jr. regarding [REDACTED] [REDACTED].	GHP Misc BLNT-0001LT	1.70 0.00 0.00 0.00	175.00 T@1	297.50
90425	2/28/02	TIME	WIP Further work on 3 motions.	WDH Misc BLNT-0001LT	2.00 0.00 0.00 0.00	350.00 T@1	700.00
92050	3/1/02	TIME	WIP Revise pleadings index.	CAG Revise BLNT-0001LT	1.00 0.00 0.00 0.00	75.00 T	75.00

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92492	TIME			WDH		0.50			350.00		175.00
	3/4/02			Misc		0.00			T@1		
	WIP			BLNT-0001LT		0.00					
			Follow-up on motion in limine made by opposing counsel.			0.00					
92493	TIME			WDH		0.30			350.00		105.00
	3/5/02			Work on		0.00			T@1		
	WIP			BLNT-0001LT		0.00					
			Work on pleadings.			0.00					
92169	TIME			TAM		0.20			65.00		13.00
	3/5/02			Misc		0.00			T@1		
	WIP			BLNT-0001LT		0.00					
			Update pleadings index.			0.00					
92494	TIME			WDH		3.50			350.00		1225.00
	3/6/02			Review		0.00			T@1		
	WIP			BLNT-0001LT		0.00					
			Review of depositions to look for [REDACTED]			0.00					
			[REDACTED] Further work on our responsive memo.								
92495	TIME			WDH		0.50			350.00		175.00
	3/11/02			Misc		0.00			T@1		
	WIP			BLNT-0001LT		0.00					
			Attention to Motion To Strike.			0.00					
92013	TIME			GHP		0.70			175.00		122.50
	3/13/02			Misc		0.00			T@1		
	WIP			BLNT-0001LT		0.00					
			Strategy discussions with WDH regarding reply to Protective Order.			0.00					
92496	TIME			WDH		3.00			350.00		1050.00
	3/13/02			Draft		0.00			T@1		
	WIP			BLNT-0001LT		0.00					
			Draft and revisions to draft to responsive memo.			0.00					
92016	TIME			GHP		4.80			175.00		840.00
	3/14/02			Misc		0.00			T@1		
	WIP			BLNT-0001LT		0.00					
			Legal Research Regarding Opinion of Counsel Issue.			0.00					
92018	TIME			GHP		5.70			175.00		997.50
	3/15/02			Draft		0.00			T@1		
	WIP			BLNT-0001LT		0.00					
			Draft/Review/File Response to Def. Motion in Limine.			0.00					

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92497	TIME			WDH		5.00			350.00		1750.00
	3/15/02			Misc		0.00			T@1		
	WIP			BLNT-0001LT		0.00					
			Completion of response to motion for protective order.			0.00					
92172	TIME			TAM		0.20			65.00		13.00
	3/25/02			Misc		0.00			T@1		
	WIP			BLNT-0001LT		0.00					
			Update pleadings index.			0.00					
92498	TIME			WDH		1.00			350.00		350.00
	3/27/02			Misc		0.00			T@1		
	WIP			BLNT-0001LT		0.00					
			Determining the changes needed for meeting the new disclosure of pretrial material (April 19, 2002) and pretrial conference. [REDACTED]			0.00					
			[REDACTED]								
			[REDACTED]								
92499	TIME			WDH		0.40			350.00		140.00
	3/28/02			Misc		0.00			T@1		
	WIP			BLNT-0001LT		0.00					
			[REDACTED]			0.00					
			[REDACTED]								
94597	TIME			WDH		4.00			350.00		1400.00
	4/1/02			Work on		0.00			T@1		
	WIP			BLNT-0001LT		0.00					
			Working on findings of fact and review or requirements by Court in the new scheduling order.			0.00					
94598	TIME			WDH		4.00			350.00		1400.00
	4/2/02			Work on		0.00			T@1		
	WIP			BLNT-0001LT		0.00					
			Work on Findings of fact.			0.00					
94599	TIME			WDH		2.50			350.00		875.00
	4/15/02			Misc		0.00			T@1		
	WIP			BLNT-0001LT		0.00					
			A [REDACTED] and [REDACTED]			0.00					
			[REDACTED]								
			[REDACTED]								
94600	TIME			WDH		3.00			350.00		1050.00
	4/16/02			Work on		0.00			T@1		
	WIP			BLNT-0001LT		0.00					
			Work on additional findings of fact and first draft of set of conclusions of law.			0.00					

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Dates and Time		Activity	DNB Time	Rate Info	
Posting Status		Client	Est. Time	Bill Status	
Description		File	Variance		
94273	TIME	GHP	2.80	175.00	490.00
4/16/02		Research	0.00	T@1	
WIP		BLNT-0001LT	0.00		
Research damages issues for William D. Harris.					
94601	TIME	WDH	5.00	350.00	1750.00
4/17/02		Prepare	0.00	T@1	
WIP		BLNT-0001LT	0.00		
Preparation for trial and preparation of submission to court. Further work on findings of fact and conclusions of law. Study of Markman type for claim interpretation.					
94275	TIME	GHP	5.10	175.00	892.50
4/17/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		
Formulate claim construction/findings of fact and conclusions of law/research damages convoy issue.					
94280	TIME	GHP	4.30	175.00	752.50
4/18/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		
Trial brief.					
94602	TIME	WDH	4.00	350.00	1400.00
4/18/02		Work on	0.00	T@1	
WIP		BLNT-0001LT	0.00		
Work on trial brief.					
94281	TIME	GHP	10.30	175.00	1802.50
4/19/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		
Complete/Review/File findings of fact and conclusions of law, pretrial order, contested issues of fact and stipulated facts.					
94603	TIME	WDH	7.00	350.00	2450.00
4/19/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		
Brief and preparation time on trial brief and on submission of pretrial material including pretrial order.					
94604	TIME	WDH	2.00	350.00	700.00
4/22/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		
Follow-up to pretrial filings and further preparation. Telecon with Golden Blount.					

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94605	TIME		4/23/02 WIP Preparation for trial.	WDH Prepare BLNT-0001LT	3.00 0.00 0.00 0.00	350.00 T@1	1050.00
94420	TIME		4/24/02 WIP Interoffice conference with Bill Harris and Greg Parker regarding [REDACTED]	CWG Misc BLNT-0001LT	2.00 0.00 0.00 0.00	290.00 T@1	580.00
94606	TIME		4/24/02 WIP Preparation for trial.	WDH Prepare BLNT-0001LT	3.00 0.00 0.00 0.00	350.00 T@1	1050.00
94290	TIME		4/25/02 WIP Preparation of demonstrative evidence.	GHP Prepare BLNT-0001LT	4.10 0.00 0.00 0.00	175.00 T@1	717.50
94020	TIME		4/25/02 WIP Obtain copies of cases cited in pre-trial pleadings.	CAG Misc BLNT-0001LT	1.40 0.00 0.00 0.00	75.00 T	105.00
94291	TIME		4/25/02 WIP Trial preparation with Charles Gaines and Bill Harris.	GHP Misc BLNT-0001LT	4.30 0.00 0.00 0.00	175.00 T@1	752.50
94292	TIME		4/25/02 WIP Read/Review cases in defendant's findings of fact and conclusions of law.	GHP Misc BLNT-0001LT	1.30 0.00 0.00 0.00	175.00 T@1	227.50
94423	TIME		4/25/02 WIP Interoffice conference with Bill Harris and Greg Parker regarding [REDACTED] [REDACTED] [REDACTED]	CWG Misc BLNT-0001LT	8.50 0.00 0.00 0.00	290.00 T@1	2465.00
94607	TIME		4/25/02 WIP Preparation for trial.	WDH Prepare BLNT-0001LT	4.00 0.00 0.00 0.00	350.00 T@1	1400.00

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94608	4/26/02	TIME	WIP Further preparations for trial.	WDH Misc BLNT-0001LT	6.00 0.00 0.00 0.00	350.00 T@1	2100.00
94295	4/26/02	TIME	WIP Continued preparation of demonstrative evidence.	GHP Misc BLNT-0001LT	7.70 0.00 0.00 0.00	175.00 T@1	1347.50
94426	4/29/02	TIME	WIP Interoffice conference with Bill Harris and Greg Parker regarding [REDACTED]y.	CWG Misc BLNT-0001LT	3.00 0.00 0.00 0.00	290.00 T@1	870.00
94609	4/29/02	TIME	WIP Preparation for trial.	WDH Prepare BLNT-0001LT	1.00 0.00 0.00 0.00	350.00 T@1	350.00
94300	4/29/02	TIME	WIP Trial preparation with Charles Gaines and Bill Harris.	GHP Misc BLNT-0001LT	6.20 0.00 0.00 0.00	175.00 T@1	1085.00
94431	4/30/02	TIME	WIP Meeting with Golden Blount regarding [REDACTED]; Interoffice conference with Bill Harris regarding [REDACTED] review other pretrial materials.	CWG Misc BLNT-0001LT	4.50 0.00 0.00 0.00	290.00 T@1	1305.00
94301	4/30/02	TIME	WIP Trial preparation with Charles Gaines and Bill Harris.	GHP Misc BLNT-0001LT	9.30 0.00 0.00 0.00	175.00 T@1	1627.50
94610	4/30/02	TIME	WIP Preparation for trial.	WDH Prepare BLNT-0001LT	6.00 0.00 0.00 0.00	350.00 T@1	2100.00
96168	5/1/02	TIME	WIP Prepare trial exhibits and other materials.	CWG Prepare BLNT-0001LT	4.50 0.00 0.00 0.00	290.00 T@1	1305.00

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95647	5/1/02	TIME	WIP Trial preparation.	GHP Misc BLNT-0001LT	10.70 0.00 0.00 0.00	175.00 T@1	1872.50
98917	5/1/02	TIME	WIP Preparation for trial.	WDH Prepare BLNT-0001LT	6.00 0.00 0.00 0.00	350.00 T@1	2100.00
95991	5/2/02	TIME	WIP Assist with preparation of trial notebooks.	CAG Misc BLNT-0001LT	3.00 0.00 0.00 0.00	75.00 T	225.00
96174	5/2/02	TIME	WIP Prepare Golden Blount for trial.	CWG Prepare BLNT-0001LT	6.00 0.00 0.00 0.00	290.00 T@1	1740.00
96230	5/2/02	TIME	WIP Preparation of exhibit notebooks for trial.	TAM Prepare BLNT-0001LT	5.50 0.00 0.00 0.00	65.00 T@1	357.50
95649	5/2/02	TIME	WIP Trial preparation.	GHP Misc BLNT-0001LT	12.40 0.00 0.00 0.00	175.00 T@1	2170.00
98918	5/2/02	TIME	WIP Preparation for trial. Extended meeting with Golden Blount and intense trial preparation.	WDH Prepare BLNT-0001LT	8.00 0.00 0.00 0.00	350.00 T@1	2800.00
95992	5/3/02	TIME	WIP Assist with preparation of trial materials.	CAG Misc BLNT-0001LT	3.50 0.00 0.00 0.00	75.00 T	262.50
96175	5/3/02	TIME	WIP Attend pre-trial conference.	CWG Misc BLNT-0001LT	2.00 0.00 0.00 0.00	290.00 T@1	580.00
95650	5/3/02	TIME	WIP Preparation for Pretrial Conference.	GHP Misc BLNT-0001LT	2.20 0.00 0.00 0.00	175.00 T@1	385.00

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	Posting Status	Client	DNB Time	Rate Info	
	Description	File	Est. Time	Bill Status	
			Variance		
96231	TIME	TAM	3.00	65.00	195.00
	5/3/02	Prepare	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Preparation of exhibit notebooks.		0.00		
95652	TIME	GHP	3.10	175.00	542.50
	5/3/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Begin preparation of Markman Brief.		0.00		
95651	TIME	GHP	2.10	175.00	367.50
	5/3/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Pretrial conference.		0.00		
98919	TIME	WDH	2.00	350.00	700.00
	5/3/02	Prepare	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Preparation and attendance at Pretrial Conference. Preliminary considerations on Markman brief.		0.00		
95653	TIME	GHP	2.70	175.00	472.50
	5/6/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Discussions with William D. Harris, Jr. and Charles W. Gaines regarding [REDACTED]		0.00		
96179	TIME	CWG	1.50	290.00	435.00
	5/6/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Interoffice conference regarding [REDACTED]		0.00		
95654	TIME	GHP	4.10	175.00	717.50
	5/7/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Begin preparation of Markman Brief.		0.00		
98920	TIME	WDH	0.80	350.00	280.00
	5/8/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Checking status of Markman brief and inputs.		0.00		
95655	TIME	GHP	9.70	175.00	1697.50
	5/8/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Preparation of Markman Brief.		0.00		

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95657	TIME 5/9/02 WIP Preparation of Markman Brief.	GHP Misc BLNT-0001LT	4.30 0.00 0.00 0.00	175.00 T@1	752.50
95659	TIME 5/9/02 WIP Discussions with William D. Harris, Jr. regarding ██████████.	GHP Misc BLNT-0001LT	1.30 0.00 0.00 0.00	175.00 T@1	227.50
98921	TIME 5/9/02 WIP Work on Markman brief.	WDH Work on BLNT-0001LT	0.00 0.00 0.00 0.00	350.00 T@1	0.00
98922	TIME 5/10/02 WIP Work on Markman brief.	WDH Work on BLNT-0001LT	3.00 0.00 0.00 0.00	350.00 T@1	1050.00
95660	TIME 5/10/02 WIP Discussions with Charles W. Gaines regarding ██████████.	GHP Misc BLNT-0001LT	1.10 0.00 0.00 0.00	175.00 T@1	192.50
95661	TIME 5/10/02 WIP Incorporate William D. Harris, Jr.'s Markman Brief suggestions of May 9, 2002.	GHP Misc BLNT-0001LT	1.80 0.00 0.00 0.00	175.00 T@1	315.00
95662	TIME 5/10/02 WIP ████████████████████ ████████████████████	GHP Review BLNT-0001LT	1.30 0.00 0.00 0.00	175.00 T@1	227.50
95666	TIME 5/13/02 WIP Discuss claim interpretation with William D. Harris, Jr. and make changes.	GHP Misc BLNT-0001LT	2.40 0.00 0.00 0.00	175.00 T@1	420.00
98923	TIME 5/15/02 WIP Work on Markman brief.	WDH Work on BLNT-0001LT	1.00 0.00 0.00 0.00	350.00 T@1	350.00

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95672	5/15/02	WIP	Work on claim interpretation.	GHP Misc BLNT-0001LT	3.10 0.00 0.00	175.00 T@1	542.50
96208	5/16/02	WIP	Conference with Bill Harris and Greg Parker regarding [REDACTED].	CWG Misc BLNT-0001LT	2.50 0.00 0.00	290.00 T@1	725.00
95676	5/16/02	WIP	Discuss claim interpretation with William D. Harris, Jr. and make changes.	GHP Misc BLNT-0001LT	8.30 0.00 0.00	175.00 T@1	1452.50
96232	5/17/02	WIP	Assist in preparation and service of Markman Brief.	TAM Misc BLNT-0001LT	2.00 0.00 0.00	65.00 T@1	130.00
95678	5/17/02	WIP	Finalize and file claim interpretation.	GHP Misc BLNT-0001LT	9.10 0.00 0.00	175.00 T@1	1592.50
95679	5/20/02	WIP	Discussions with William D. Harris, Jr. about finalized version of claim interpretation.	GHP Misc BLNT-0001LT	0.90 0.00 0.00	175.00 T@1	157.50
95684	5/21/02	WIP	Various conversations b/w myself, William D. Harris, Jr. and Charles W. Gaines regarding the [REDACTED].	GHP Misc BLNT-0001LT	0.80 0.00 0.00	175.00 T@1	140.00
96238	5/28/02	WIP	General discussions regarding the hearing before Magistrate Stickney, as well as [REDACTED].	GHP Misc BLNT-0001LT	2.30 0.00 0.00	175.00 T@1	402.50
96241	5/29/02	WIP	Discussions with William D. Harris and Charles W. Gaines regarding [REDACTED].	GHP Misc BLNT-0001LT	6.10 0.00 0.00	175.00 T@1	1067.50

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96224	5/30/02	WIP	Interoffice conference with Bill Harris and Greg Parker regarding [REDACTED]	CWG Interoffice BLNT-0001LT	1.00 0.00 0.00 0.00	290.00 T@1	290.00
96236	5/30/02	WIP	Locate and obtain copies of case law.	TAM Misc BLNT-0001LT	0.50 0.00 0.00 0.00	65.00 T@1	32.50
96243	5/30/02	WIP	Draft Markman Reply.	GHP Draft BLNT-0001LT	5.20 0.00 0.00 0.00	175.00 T@1	910.00
96244	5/31/02	WIP	Preparation for and hearing before Judge Stickney regarding Bill McLaughlin as a witness.	GHP Prepare BLNT-0001LT	3.20 0.00 0.00 0.00	175.00 T@1	560.00
96245	5/31/02	WIP	Draft Markman Reply.	GHP Draft BLNT-0001LT	6.10 0.00 0.00 0.00	175.00 T@1	1067.50
98182	6/3/02	WIP	Draft/Fomalize/File Markman Reply.	GHP Draft BLNT-0001LT	8.20 0.00 0.00 0.00	175.00 T@1	1435.00
98940	6/3/02	WIP	Further work of WDH on Reply Brief and filing of same.	WDH Misc BLNT-0001LT	7.00 0.00 0.00 0.00	350.00 T@1	2450.00
98941	6/26/02	WIP	Preparation for and conference concerning the start-up of an orderly trial preparation for the trial setting of July 29, 30 and 31.	WDH Prepare BLNT-0001LT	1.00 0.00 0.00 0.00	350.00 T@1	350.00
98212	6/26/02	WIP		GHP Misc BLNT-0001LT	0.90 0.00 0.00	175.00 T@1	157.50

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	Posting Status	Client File	Time Est. Time Variance	Rate Info Bill Status	
100085	TIME	GHP	13.70	175.00	2397.50
	7/24/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Trial Preparation.				
99852	TIME	CWG	2.00	290.00	580.00
	7/25/02	Prepare	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Prepare for trial.				
101147	TIME	WDH	3.50	350.00	1225.00
	7/25/02	Prepare	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Preparation for trial including interview with Mr. Blount.				
100086	TIME	GHP	13.90	175.00	2432.50
	7/25/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Trial Preparation.				
100087	TIME	GHP	14.00	175.00	2450.00
	7/26/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Trial Preparation.				
99856	TIME	CWG	5.00	290.00	1450.00
	7/26/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Trial preparation.				
101148	TIME	WDH	5.00	350.00	1750.00
	7/26/02	Prepare	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Preparation for trial.				
101149	TIME	WDH	4.00	350.00	1400.00
	7/27/02	Prepare	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Preparation for trial including interview with Mr. Blount.				
99996	TIME	TAM	8.00	65.00	520.00
	7/27/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Assist in preparation of trial, prepare duplicates of defendant's exhibits.				
99857	TIME	CWG	11.00	290.00	3190.00
	7/27/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		
	Trial preparation.				

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity	Client File	Units DNB Time	Rate Rate Info	Slip Value
						Est. Time	Bill Status	
						Variance		
100088	7/27/02	TIME	WIP Trial Preparation.	GHP	BLNT-0001LT	12.00 0.00 0.00	175.00 T@1	2100.00
101150	7/28/02	TIME	WIP Preparation for trial.	WDH	BLNT-0001LT	4.00 0.00 0.00	350.00 T@1	1400.00
99858	7/28/02	TIME	WIP Prepare witness materials.	CWG	BLNT-0001LT	6.00 0.00 0.00	290.00 T@1	1740.00
99997	7/28/02	TIME	WIP Assist in preparation for trial, prepare trial notebooks.	TAM	BLNT-0001LT	4.00 0.00 0.00	65.00 T@1	260.00
100089	7/28/02	TIME	WIP Trial Preparation.	GHP	BLNT-0001LT	9.50 0.00 0.00	175.00 T@1	1662.50
99859	7/29/02	TIME	WIP Attend trial and prepare materials for following day.	CWG	BLNT-0001LT	13.00 0.00 0.00	290.00 T@1	3770.00
100090	7/29/02	TIME	WIP Trial.	GHP	BLNT-0001LT	15.50 0.00 0.00	175.00 T@1	2712.50
101151	7/29/02	TIME	WIP Further preparation for trial and participation of first day at trial.	WDH	BLNT-0001LT	10.00 0.00 0.00	350.00 T@1	3500.00
101152	7/30/02	TIME	WIP Further preparation for trial and participation of second day at trial.	WDH	BLNT-0001LT	11.00 0.00 0.00	350.00 T@1	3850.00
99860	7/30/02	TIME	WIP Attend trial and prepare materials for following day.	CWG	BLNT-0001LT	14.00 0.00 0.00	290.00 T@1	4060.00

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Slip ID	Dates and Time Posting Status Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
100091	TIME 7/30/02 WIP Trial.	GHP Misc BLNT-0001LT	17.10 0.00 0.00 0.00	175.00 T@1	2992.50
100092	TIME 7/31/02 WIP Trial.	GHP Misc BLNT-0001LT	7.80 0.00 0.00 0.00	175.00 T@1	1365.00
101153	TIME 7/31/02 WIP Early morning preparation for trial and conclusion of trial.	WDH Misc BLNT-0001LT	6.00 0.00 0.00 0.00	350.00 T@1	2100.00
99861	TIME 7/31/02 WIP Attend trial.	CWG Misc BLNT-0001LT	5.00 0.00 0.00 0.00	290.00 T@1	1450.00
Grand Total		Billable Unbillable Total	1252.50 2.00 1254.50		313381.50 550.00 313931.50

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Selection Criteria

Client (hand select) Include: BLNT-0001LT  
Slip Classification Open  
Slip Date 8/1/02 - 6/10/04  
Slip Transaction Ty 1 - 1

Rate Info - identifies rate source and level

Slip ID	Dates and Time	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
102080	TIME	GHP	2.10	175.00	367.50
8/1/02		Review	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
Review of damages brief and discussions with Bill Harris about filing damages brief.					
103681	TIME	WDH	2.00	350.00	700.00
8/1/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
Further follow-up and analysis of whether to file any subsequent documents. Meeting with Greg Parker regarding same.					
103682	TIME	WDH	1.50	350.00	525.00
8/12/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
Initial study of Judge Buchmeyer's opinion, conclusions, findings of fact and injunction.					
103683	TIME	WDH	1.00	350.00	350.00
8/13/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
Study of damage figures and initiation of time spent by attorneys on case to go into damages.					
102212	TIME	CWG	0.50	300.00	150.00
8/13/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
Discussions with Bill Harris regarding settlement and Appeal.					
102223	TIME	CWG	2.50	300.00	750.00
8/14/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
Telephone conference with client regarding outcome of case; telephone conference with judges' clerk regarding findings of fact and conclusions of law; interoffice conference with Bill Harris regarding post trial strategy.					

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	Posting Status	Client	DNB Time	Rate Info	
	Description	File	Est. Time	Bill Status	
			Variance		
103684	TIME	WDH	2.00	350.00	700.00
	8/14/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Consideration of the accuracy of the damage numbers raised by opposing counsel. Conference with Charles Gaines.		0.00		
103686	TIME	WDH	0.70	350.00	245.00
	8/15/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Completion of draft of motion for sealing confidential files and arrangements for review by local counsel.		0.00		
102227	TIME	CWG	1.00	300.00	300.00
	8/15/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Telephone conference with opposing counsel regarding post trial matters; interoffice conference with Bill Harris regarding attorney's fee calculation.		0.00		
103685	TIME	WDH	2.00	350.00	700.00
	8/15/02	Review	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Reviewing follow-up subject matter on questions on opinion. Conference with Charles Gaines.		0.00		
103687	TIME	WDH	5.00	350.00	1750.00
	8/19/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Work on motions and papers regarding the attorney fee award and costs; work on pre and post interest questions and related papers.		0.00		
103688	TIME	WDH	5.00	350.00	1750.00
	8/20/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Further work on attorney fees and costs; work on related papers.		0.00		
102110	TIME	GHP	3.10	175.00	542.50
	8/20/02	Research	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Research and gather data for fee petition for award of attorney's fees.		0.00		
102237	TIME	CWG	1.50	300.00	450.00
	8/20/02	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Discussions with Bill Harris regarding filing of posttrial motions and response to Peterson's Motion; legal research		0.00		

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
			regarding timing for filing support for attorney's fees.				
102109	8/20/02	TIME	WIP	GHP Misc BLNT-0001LT	0.80 0.00 0.00	175.00 T@1	140.00 Hold
			Read Defendant's Opposition to Plaintiff's Motion to Disregard the Testimony of John Palaski - Discuss with William D. Harris, Jr. and Charles W. Gaines.				
103689	8/21/02	TIME	WIP	WDH Misc BLNT-0001LT	5.00 0.00 0.00	350.00 T@1	1750.00 Hold
			Continued work on attorney fee award and costs and related papers.				
102112	8/21/02	TIME	WIP	GHP Research BLNT-0001LT	9.40 0.00 0.00	175.00 T@1	1645.00 Hold
			Research and gather data for fee petition for award of attorney's fees.				
103690	8/22/02	TIME	WIP	WDH Misc BLNT-0001LT	5.50 0.00 0.00	350.00 T@1	1925.00 Hold
			Work on application for attorneys fees; motion to include updated damages and pre and post judgement interest; bill of costs; and related papers.				
102113	8/22/02	TIME	WIP	GHP Research BLNT-0001LT	8.70 0.00 0.00	175.00 T@1	1522.50 Hold
			Research and gather data for fee petition for award of attorney's fees, bill of costs, pre and post judgement interest, further drafted letter to Dean Monco requesting that Defendant update its sales, reviewed affidavits of Bill Harris and Roy Hardin.				
102248	8/22/02	TIME	WIP	CWG Misc BLNT-0001LT	2.25 0.00 0.00	300.00 T@1	675.00 Hold
			Discuss pos-trial motions with Bill Harris and Kim Elkjer.				
103691	8/23/02	TIME	WIP	WDH Misc BLNT-0001LT	6.00 0.00 0.00	350.00 T@1	2100.00 Hold
			Preparation of motions and papers required to enter the attorney fees award and cover taxable costs; moreover, to obtain pre and post interest.				

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Dates and Time		Activity	DNB Time	Rate Info	
Posting Status		Client	Est. Time	Bill Status	
Description		File	Variance		
101942	TIME	TAM	1.00	65.00	65.00
8/23/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
Assist in preparation of bill of costs.					
102251	TIME	CWG	0.50	300.00	150.00
8/23/02		Revise	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
Revise Memorandum and Affidavit of Bill Harris.					
102114	TIME	GHP	8.20	175.00	1435.00
8/23/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
Complete/Review/File Motions for Attorney's Fee, increased damages, supporting affidavits and bill of costs.					
102115	TIME	GHP	2.20	175.00	385.00
8/25/02		Read	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
Read and think about Defendant's Motions filed on August 23, 2002.					
102118	TIME	GHP	1.10	175.00	192.50
8/26/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
Phone conversation with Mr. Golden Blount and Charles W. Gaines.					
102116	TIME	GHP	0.90	175.00	157.50
8/26/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
Discussions with William D. Harris, Jr. and Charles W. Gaines regarding motions filed by Defendant on August 23, 2002.					
103692	TIME	WDH	2.00	350.00	700.00
8/26/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
Follow-up regarding documents filed with the Court on 8/23/02.					
103693	TIME	WDH	2.00	350.00	700.00
8/27/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
Review of court's entry regarding Bill of Costs. Sending copy of same to Dean Monco.					
101943	TIME	TAM	1.50	65.00	97.50
8/30/02		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
Organize pleadings filed since trial, update pleadings file.					

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						Est. Time	Bill Status	
						Variance		
103694	TIME			WDH		2.00	350.00	700.00
	8/30/02			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		Hold
			Preliminary review of post trial motions and consultation with Charles Gaines.			0.00		
102125	TIME			GHP		1.30	175.00	227.50
	8/31/02			Review		0.00	T@1	
	WIP			BLNT-0001LT		0.00		Hold
			Review Defendant's Motions.			0.00		
104246	TIME			WDH		1.50	350.00	525.00
	9/3/02			Review		0.00	T@1	
	WIP			BLNT-0001LT		0.00		Hold
			Review of Peterson's effort to credit Palaski's testimony, review of findings of fact and conclusions of law as relates to the Palaski question.			0.00		
104248	TIME			GHP		1.20	175.00	210.00
	9/3/02			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		Hold
			Conversations with Bill Harris and Charles W. Gaines regarding replies and responses to Def. Motions, as well as time frame for each.			0.00		
104251	TIME			GHP		2.70	175.00	472.50
	9/4/02			Review		0.00	T@1	
	WIP			BLNT-0001LT		0.00		Hold
			Review, prepare, and file Plaintiffs reply to Defendants response to Palaski Motion.			0.00		
104752	TIME			WDH		4.50	350.00	1575.00
	9/4/02			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		Hold
			Further review of Peterson's paper as relates to testimony of Palaski.			0.00		
104258	TIME			GHP		1.90	175.00	332.50
	9/9/02			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		Hold
			Conversations with Bill Harris and Charles W. Gaines regarding replies and responses to Def. Motions.			0.00		
104758	TIME			WDH		1.00	350.00	350.00
	9/9/02			Review		0.00	T@1	
	WIP			BLNT-0001LT		0.00		Hold
			Review of outstanding motions and preparatory work on those for which response is required.			0.00		

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						Est. Time Variance	Bill Status	
104760	9/10/02	TIME	WIP	WDH	BLNT-0001LT	3.50 0.00 0.00	350.00 T@1	1225.00 Hold
Analysis of second motion to amend findings of fact, conclusions of law and consultation concerning method of attaining a transcript.								
104263	9/11/02	TIME	WIP	GHP	BLNT-0001LT	2.10 0.00 0.00	175.00 T@1	367.50 Hold
Preparation for filing and drafting motions.								
104763	9/11/02	TIME	WIP	WDH	BLNT-0001LT	1.00 0.00 0.00	350.00 T@1	350.00 Hold
Attention to requirements [REDACTED] Follow-up on status of transcript and joint motion to postpone.								
104409	9/12/02	TIME	WIP	CWG	BLNT-0001LT	1.00 0.00 0.00	300.00 T@1	300.00 Hold
Teleconferences with Bill McLaughlin, Jerry Sellinger and Gloria Parker regarding transcript.								
104390	9/12/02	TIME	WIP	TAM	BLNT-0001LT	1.00 0.00 0.00	65.00 T@1	65.00 Hold
Prepare correspondence and documents for transmittal to client.								
104389	9/12/02	TIME	WIP	TAM	BLNT-0001LT	0.30 0.00 0.00	65.00 T@1	19.50 Hold
Update pleadings file.								
104265	9/12/02	TIME	WIP	GHP	BLNT-0001LT	1.70 0.00 0.00	175.00 T@1	297.50 Hold
Begin reading 600+ page trial transcript.								
104267	9/13/02	TIME	WIP	GHP	BLNT-0001LT	2.80 0.00 0.00	175.00 T@1	490.00 Hold
Continue reading 600+ page trial transcript.								
104268	9/14/02	TIME	WIP	GHP	BLNT-0001LT	2.10 0.00 0.00	175.00 T@1	367.50 Hold
Continue reading 600+ page trial transcript.								

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104767	9/16/02	TIME	WIP	WDH	BLNT-0001LT	4.50	0.00	350.00 T@1	1575.00
			Study of transcript			0.00	0.00		Hold
104269	9/16/02	TIME	WIP	GHP	BLNT-0001LT	9.10	0.00	175.00 T@1	1592.50
			Continue reading 600+ page trial transcript.			0.00	0.00		Hold
104770	9/17/02	TIME	WIP	WDH	BLNT-0001LT	5.00	0.00	350.00 T@1	1750.00
			Further review of transcript and preparation for response to Plaintiff's pending motions.			0.00	0.00		Hold
104270	9/17/02	TIME	WIP	GHP	BLNT-0001LT	8.20	0.00	175.00 T@1	1435.00
			Continue reading 600+ page trial transcript; research issues for Motion; multiple conversations with Bill Harris and Charles W. Gaines.			0.00	0.00		Hold
104271	9/18/02	TIME	WIP	GHP	BLNT-0001LT	9.40	0.00	175.00 T@1	1645.00
			Begin Motions.			0.00	0.00		Hold
104773	9/18/02	TIME	WIP	WDH	BLNT-0001LT	6.00	0.00	350.00 T@1	2100.00
			Further work on responses.			0.00	0.00		Hold
104430	9/19/02	TIME	WIP	CWG	BLNT-0001LT	1.00	0.00	300.00 T@1	300.00
			Interoffice conference with Greg Parker and Bill Harris regarding response brief; review draft of response brief to Peterson's request for a new trial.			0.00	0.00		Hold
104775	9/19/02	TIME	WIP	WDH	BLNT-0001LT	8.00	0.00	350.00 T@1	2800.00
			Completion of brief in reply to Defendant's Second Motion to Amend.			0.00	0.00		Hold

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
104276	TIME			GHP	8.70	175.00	1522.50
	9/19/02			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Complete and file motions.		0.00		
104777	TIME			WDH	1.50	350.00	525.00
	9/20/02			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Planning responses to outstanding motions and briefs of Peterson.		0.00		
104278	TIME			GHP	3.30	175.00	577.50
	9/20/02			Review	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Review and discuss Defendant's Motions received on September 19, 2002.		0.00		
104779	TIME			WDH	2.00	350.00	700.00
	9/23/02			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Final review of first motion to amend findings of fact and conclusions of law and preparation of the draft of a response. Follow-up to see response was being filed and served/		0.00		
104279	TIME			GHP	1.30	175.00	227.50
	9/23/02			Review	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Review and discuss Defendant's Motions received on September 19, 2002.		0.00		
104281	TIME			GHP	3.10	175.00	542.50
	9/24/02			Research	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Research and discuss Defendant's Motions received on September 19, 2002.		0.00		
104282	TIME			GHP	5.50	175.00	962.50
	9/25/02			Research	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Research and discuss Defendant's Motions received on September 19, 2002.		0.00		
104284	TIME			GHP	6.70	175.00	1172.50
	9/26/02			Research	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Research Case Law regarding Defendant's Motions.		0.00		
104286	TIME			GHP	10.70	175.00	1872.50
	9/27/02			Draft	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Draft response to Defendant's Damage Motion.		0.00		

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity	Client File	Units DNB Time	Rate Rate Info	Slip Value
						Est. Time Variance	Bill Status	
104287	9/28/02	TIME	WIP Draft response to Defendant's Damage Motion.	GHP	BLNT-0001LT	3.10 0.00 0.00	175.00 T@1	542.50 Hold
104446	9/29/02	TIME	WIP Review and revise draft of response to Defendant's Motion to reduce damages.	CWG	BLNT-0001LT	3.00 0.00 0.00	300.00 T@1	900.00 Hold
104288	9/29/02	TIME	WIP Draft response to Defendant's Damage Motion.	GHP	BLNT-0001LT	8.90 0.00 0.00	175.00 T@1	1557.50 Hold
104289	9/30/02	TIME	WIP Draft response to Defendant's Damage Motion.	GHP	BLNT-0001LT	11.10 0.00 0.00	175.00 T@1	1942.50 Hold
104786	9/30/02	TIME	WIP Reviewing draft of our reply to defendant's opposition to our motion regarding damages and conferring with Greg Parker regarding my findings.	WDH	BLNT-0001LT	1.50 0.00 0.00	350.00 T@1	525.00 Hold
104447	9/30/02	TIME	WIP Interoffice conference with Greg Parker regarding revisions to response; revise second draft with Greg Parker; search case law regarding inducement.	CWG	BLNT-0001LT	1.50 0.00 0.00	300.00 T@1	450.00 Hold
106452	10/1/02	TIME	WIP Draft Plaintiff's reply to defendant's objection application for attorneys' fees.	GHP	BLNT-0001LT	9.50 0.00 0.00	175.00 T@1	1662.50 Hold
108881	10/2/02	TIME	WIP Brainstorming conference with Greg Parker and review of draft of Reply to Defendant's objections to Blount's claim for attorneys fees.	WDH	BLNT-0001LT	1.00 0.00 0.00	350.00 T@1	350.00 Hold

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						Est. Time Variance	Bill Status	
106453	TIME			GHP		7.30	175.00	1277.50
	10/2/02			Draft		0.00	T@1	
	WIP			BLNT-0001LT		0.00		Hold
			Draft Plaintiff's reply to defendant's objection application for attorneys' fees.			0.00		
106455	TIME			GHP		6.20	175.00	1085.00
	10/3/02			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		Hold
			Complete Plaintiff's reply to defendant's objection to application for attorneys' fees.			0.00		
108882	TIME			WDH		2.50	350.00	875.00
	10/3/02			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		Hold
			Further review and revision of drafts for [REDACTED]			0.00		
108883	TIME			WDH		5.00	350.00	1750.00
	10/4/02			Prepare		0.00	T@1	
	WIP			BLNT-0001LT		0.00		Hold
			Preparation of Proffer For In Camera inspection, final inputs and arrangements for filing [REDACTED]			0.00		
106460	TIME			GHP		1.50	175.00	262.50
	10/7/02			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		Hold
			Interoffice discussions with Charles W. Gaines and Bill Harris.			0.00		
106211	TIME			TAM		0.30	65.00	19.50
	10/7/02			Prepare		0.00	T@1	
	WIP			BLNT-0001LT		0.00		Hold
			Prepare documents for transmittal to client.			0.00		
108884	TIME			WDH		0.90	350.00	315.00
	10/7/02			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		Hold
			Cursory review of defendant's reply to our response to 2nd motion to amend findings of fact and conclusions of law. Short conference with Charles Gaines and Greg Parker.			0.00		
106212	TIME			TAM		0.70	65.00	45.50
	10/8/02			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		Hold
			Update pleadings file.			0.00		
106461	TIME			GHP		1.90	175.00	332.50
	10/8/02			Misc		0.00	T@1	
	WIP			BLNT-0001LT		0.00		Hold
			Motion to amend the findings of fact and conclusions of law.			0.00		

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108885	TIME			WDH	1.80	350.00	630.00
	10/8/02			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Critical review of reply to our answer regarding second motion for damages findings and deciding how to proceed.		0.00		
106311	TIME			CWG	1.00	300.00	300.00
	10/9/02			Review	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Review Peterson's reply brief; interoffice conference with Bill Harris and Greg Parker regarding same.		0.00		
114027	TIME			WDH	1.50	350.00	525.00
	2/7/03			Review	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Review of Order from Judge Buchmeyer ruling on plaintiff and defendant's post-trial motions. Conversations with Charles Gaines and Greg Parker regarding court's order.		0.00		
113217	TIME			GHP	5.30	175.00	927.50
	2/10/03			Review	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Review Judge's Order and Notice of Appeal Issues.		0.00		
113220	TIME			GHP	0.90	175.00	157.50
	2/11/03			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Discussions with WDH and Charles W. Gaines and review files.		0.00		
114028	TIME			WDH	1.50	350.00	525.00
	2/17/03			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Attention to request for extension of time in order to provide sales from May 1, 2002 to August 9, 2002. Review draft of same. Telecons with opposing counsel's assistant. Interoffice conference on request.		0.00		
115094	TIME			WDH	1.00	350.00	350.00
	2/18/03			Review	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Review of sufficiency of injunction.		0.00		
113229	TIME			GHP	1.70	175.00	297.50
	2/18/03			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Discussions with WDH and Charles W. Gaines; review files and review Docket.		0.00		

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113219	2/19/03	TIME	WIP Discussions with WDH and Charles W. Gaines and review Injunction issues.	GHP Misc BLNT-0001LT	3.20 0.00 0.00	175.00 T@1	560.00 Hold
115095	2/19/03	TIME	WIP Meeting and review of Moore's treatise plus cases located by Greg Parker.	WDH Misc BLNT-0001LT	1.50 0.00 0.00	350.00 T@1	525.00 Hold
114029	2/21/03	TIME	WIP Consideration of request from opposing counsel to agree that one supercedes bond will be adequate to cover damages and attorneys fees and that the combined bond could be posted at a shortly extended time.	WDH Misc BLNT-0001LT	1.00 0.00 0.00	350.00 T@1	350.00 Hold
114030	2/24/03	TIME	WIP Review of draft letter from opposing counsel regarding draft letter agreement setting forth the terms discussed regarding extension of time to execute the Judge's Order.	WDH Misc BLNT-0001LT	1.00 0.00 0.00	350.00 T@1	350.00 Hold
113238	2/24/03	TIME	WIP Draft reply letter to Defendant's Response to Court's Order of February 6, 2003.	GHP Draft BLNT-0001LT	2.10 0.00 0.00	175.00 T@1	367.50 Hold
113244	2/28/03	TIME	WIP Draft/finalize reply letter to Defendant's Response to Court's Order of February 6, 2003.	GHP Draft BLNT-0001LT	1.40 0.00 0.00	175.00 T@1	245.00 Hold
114031	2/28/03	TIME	WIP Discussions and inputs on a court paper we filed to combat opponent's effort to get product returns subtracted.	WDH Misc BLNT-0001LT	1.00 0.00 0.00	350.00 T@1	350.00 Hold
114713	3/10/03	TIME	WIP Discussions with WDH and Greg H.	GHP Misc BLNT-0001LT	2.20 0.00 0.00	175.00 T@1	385.00 Hold

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	Posting Status	Client File	Est. Time	Bill Status	
	Description		Variance		
		Parker, review rules of appellate procedure and fed. Cir. Rules.			
114715	TIME	GHP	1.40	175.00	245.00
	3/11/03	Review	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
			0.00		
		Review Final Order, Review Fed. Cir. Rules.			
115109	TIME	WDH	0.30	350.00	105.00
	3/11/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
			0.00		
		Further study of Judge Buchmeyer's recent affirmation order.			
114717	TIME	GHP	0.80	175.00	140.00
	3/13/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
			0.00		
		Calculate damage amount/speak with WDH about Dist. Clerk error in sending Appeal to 5th Cir.			
114723	TIME	GHP	1.30	175.00	227.50
	3/14/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
			0.00		
		Discussions with WDH and Greg H. Parker research Fed. Cir. issue.			
114726	TIME	GHP	2.40	175.00	420.00
	3/16/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
			0.00		
		Reading Entire Fed. Cir. Rules.			
115110	TIME	WDH	1.00	350.00	350.00
	3/17/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
			0.00		
		Attention to amended points on appeal by Peterson Study appellants rules.			
114728	TIME	GHP	0.70	175.00	122.50
	3/17/03	Review	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
			0.00		
		Review prejudgment interest issue.			
114727	TIME	GHP	0.40	175.00	70.00
	3/17/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
			0.00		
		Discussion with Charles W. Gaines about prejudgment interest.			
114732	TIME	GHP	2.80	175.00	490.00
	3/18/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
			0.00		
		Discussions with Charles W. Gaines and WDH regarding appeal, review rules of			

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	Posting Status	Client	DNB Time	Rate Info	
	Description	File	Est. Time	Bill Status	
			Variance		
	fed. cir., contact clerk of fed. cir.				
115111	TIME	WDH	2.00	350.00	700.00
	3/21/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Conference with Charles Gaines regarding supercedes versus escrow with bank and examining the proper numbers to use for same.		0.00		
114739	TIME	GHP	1.80	175.00	315.00
	3/24/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Read Escrow Agreement, discussions with WDH and Charles W. Gaines, contact BOT to discuss local Escrow Agreement.		0.00		
114745	TIME	GHP	1.30	175.00	227.50
	3/27/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Discussions with WDH and Charles W. Gaines.		0.00		
115112	TIME	WDH	2.00	350.00	700.00
	3/27/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Further review of suggested escrow agreement; interoffice conference concerning whether to allow an extension to defendant on supplying listing of appendix contents; telecon with Jennifer Fitzgerald (new litigation counsel for defendant) concerning the extension and an extension for plaintiff and follow-up discussions.		0.00		
115113	TIME	WDH	1.50	350.00	525.00
	3/28/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Final review and markup of draft of escrow agreement for forwarding to defendant's counsel.		0.00		
114749	TIME	GHP	0.80	175.00	140.00
	3/31/03	Review	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Review and finalize Notice of Appearance and interested persons documents.		0.00		
118327	TIME	WDH	2.00	350.00	700.00
	4/1/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Details concerning review, execution and filing Entry of Appearance and Certificate		0.00		

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	Posting Status	Client	Est. Time	Bill Status	
	Description	File	Variance		
	of Interest. E-mails to Jennifer Fitzgerald.				
118328	TIME	WDH	1.00	350.00	350.00
	4/2/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Final changes in escrow draft and email transmission of same to opposing counsel.		0.00		
118329	TIME	WDH	1.00	350.00	350.00
	4/8/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Interoffice meeting of WDH with Greg Parker.		0.00		
118330	TIME	WDH	3.00	350.00	1050.00
	4/21/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Matters having to do with designation of record on appeal.		0.00		
116257	TIME	GHP	1.70	175.00	297.50
	4/30/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Docketing updates; conversations with Charles W. Gaines and Lee Hutchinson; work on Escrow agreement.		0.00		
117521	TIME	GHP	1.60	175.00	280.00
	5/1/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Discussions with Charles W. Gaines and calculation of superseadeas bond amount.		0.00		
117523	TIME	GHP	4.30	175.00	752.50
	5/6/03	Prepare	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Prepare and review Appendix Documents.		0.00		
120123	TIME	WDH	2.00	350.00	700.00
	5/20/03	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Cursory review of defendant Peterson's brief. Interoffice meeting with Greg Parker.		0.00		
117548	TIME	GHP	6.30	175.00	1102.50
	5/21/03	Review	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Review Appellant's Brief.		0.00		
120124	TIME	WDH	5.50	350.00	1925.00
	5/21/03	Review	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Review of opposing brief and study of certain portions of records. Extended meeting with Greg Parker.		0.00		

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
117550	5/22/03	TIME	WIP Review Appellant's Brief and discussions with William D. Harris, Jr.	GHP Review BLNT-0001LT	5.70 0.00 0.00	175.00 T@1	997.50 Hold
117553	5/23/03	TIME	WIP Review Appellant's Brief and discussions with William D. Harris, Jr.	GHP Review BLNT-0001LT	3.30 0.00 0.00	175.00 T@1	577.50 Hold
120125	5/27/03	TIME	WIP Consultation with Greg Parker on points in defendant's brief.	WDH Misc BLNT-0001LT	4.00 0.00 0.00	350.00 T@1	1400.00 Hold
120126	5/28/03	TIME	WIP Preparation for and meeting of WDH with Charles Gaines and Greg Parker regarding preparation of our responsive brief.	WDH Prepare BLNT-0001LT	5.50 0.00 0.00	350.00 T@1	1925.00 Hold
120127	5/29/03	TIME	WIP Work on studying Defendant's brief and study of text in cases.	WDH Work on BLNT-0001LT	5.00 0.00 0.00	350.00 T@1	1750.00 Hold
120128	5/30/03	TIME	WIP Legal research.	WDH Misc BLNT-0001LT	2.00 0.00 0.00	350.00 T@1	700.00 Hold
117559	5/31/03	TIME	WIP Review Trial Transcript.	GHP Review BLNT-0001LT	6.60 0.00 0.00	175.00 T@1	1155.00 Hold
118233	6/1/03	TIME	WIP Read trial transcript.	CWG Misc BLNT-0001LT	4.00 0.00 0.00	300.00 T@1	1200.00 Hold
118771	6/1/03	TIME	WIP Reading transcript.	GHP Misc BLNT-0001LT	5.40 0.00 0.00	175.00 T@1	945.00 Hold
118772	6/2/03	TIME	WIP	GHP Misc BLNT-0001LT	11.10 0.00 0.00	175.00 T@1	1942.50 Hold

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	Posting Status	Client	DNB Time	Rate Info	
	Description	File	Est. Time	Bill Status	
			Variance		
			0.00		
	Reading transcript/outlining argument with Charles W. Gaines.				
120136	TIME	WDH	5.00	350.00	1750.00
6/2/03		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
	Study of transcript and exhibits in preparation for our brief answering appellant.		0.00		
118234	TIME	CWG	8.00	300.00	2400.00
6/2/03		Prepare	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
	Prepare issues outline for brief.		0.00		
118235	TIME	CWG	8.50	300.00	2550.00
6/3/03		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
	Continue preparation of outline.		0.00		
120137	TIME	WDH	5.00	350.00	1750.00
6/3/03		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
	Study of transcript and exhibits in preparation for our brief. Conference with Charles Gaines and Greg Parker regarding our preparations.		0.00		
118773	TIME	GHP	9.70	175.00	1697.50
6/3/03		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
	Reading transcript/outlining argument with Charles W. Gaines.		0.00		
120138	TIME	WDH	4.00	350.00	1400.00
6/4/03		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
	Study of appendix and work in preparation for our brief answering appellants.		0.00		
118774	TIME	GHP	10.70	175.00	1872.50
6/4/03		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
	Reading transcript/outlining argument with Charles W. Gaines.		0.00		
118236	TIME	CWG	8.00	300.00	2400.00
6/4/03		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
	Finalize preparation of outline.		0.00		
118237	TIME	CWG	2.00	300.00	600.00
6/5/03		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
	Office conference with Bill Harris and		0.00		

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Posting Status	Client	Est. Time	Bill Status	
Description	File	Variance		
Greg Parker regarding outline.				
118777	GHP	9.70	175.00	1697.50
6/6/03	Work on	0.00	T@1	
WIP	BLNT-0001LT	0.00		Hold
Work on Appeal Brief.		0.00		
118778	GHP	9.30	175.00	1627.50
6/9/03	Work on	0.00	T@1	
WIP	BLNT-0001LT	0.00		Hold
Work on Appeal Brief.		0.00		
118779	GHP	8.90	175.00	1557.50
6/10/03	Work on	0.00	T@1	
WIP	BLNT-0001LT	0.00		Hold
Work on Appeal Brief.		0.00		
118780	GHP	9.80	175.00	1715.00
6/11/03	Work on	0.00	T@1	
WIP	BLNT-0001LT	0.00		Hold
Work on Appeal Brief.		0.00		
118238	CWG	2.00	300.00	600.00
6/11/03	Review	0.00	T@1	
WIP	BLNT-0001LT	0.00		Hold
Review and revise statement of facts.		0.00		
118239	CWG	1.50	300.00	450.00
6/12/03	Misc	0.00	T@1	
WIP	BLNT-0001LT	0.00		Hold
Office conference with Bill Harris and Greg Parker regarding brief.		0.00		
118781	GHP	10.40	175.00	1820.00
6/12/03	Work on	0.00	T@1	
WIP	BLNT-0001LT	0.00		Hold
Work on Appeal Brief.		0.00		
118782	GHP	9.00	175.00	1575.00
6/13/03	Work on	0.00	T@1	
WIP	BLNT-0001LT	0.00		Hold
Work on Appeal Brief.		0.00		
118240	CWG	4.00	300.00	1200.00
6/14/03	Review	0.00	T@1	
WIP	BLNT-0001LT	0.00		Hold
Review case law for Standard review.		0.00		
118783	GHP	5.70	175.00	997.50
6/15/03	Work on	0.00	T@1	
WIP	BLNT-0001LT	0.00		Hold
Work on Appeal Brief.		0.00		

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118241	6/15/03	TIME	WIP	CWG Misc BLNT-0001LT	3.00 0.00 0.00 0.00	300.00 T@1	900.00 Hold
Continue review of case law and prepare draft of Stand of review.							
120139	6/16/03	TIME	WIP	WDH Misc BLNT-0001LT	7.00 0.00 0.00 0.00	350.00 T@1	2450.00 Hold
Time for weekend and today on preparation for brief on appeal. Review of facts (transcript) etc.							
118784	6/16/03	TIME	WIP	GHP Work on BLNT-0001LT	12.10 0.00 0.00 0.00	175.00 T@1	2117.50 Hold
Work on Appeal Brief.							
118242	6/16/03	TIME	WIP	CWG Review BLNT-0001LT	3.00 0.00 0.00 0.00	300.00 T@1	900.00 Hold
Review and revise direction of ports portion of brief.							
118785	6/17/03	TIME	WIP	GHP Work on BLNT-0001LT	12.50 0.00 0.00 0.00	175.00 T@1	2187.50 Hold
Work on Appeal Brief.							
118786	6/18/03	TIME	WIP	GHP Work on BLNT-0001LT	13.60 0.00 0.00 0.00	175.00 T@1	2380.00 Hold
Work on Appeal Brief.							
118787	6/19/03	TIME	WIP	GHP Work on BLNT-0001LT	14.20 0.00 0.00 0.00	175.00 T@1	2485.00 Hold
Work on Appeal Brief.							
120140	6/20/03	TIME	WIP	WDH Work on BLNT-0001LT	5.00 0.00 0.00 0.00	350.00 T@1	1750.00 Hold
Work on brief preparation.							
118788	6/20/03	TIME	WIP	GHP Work on BLNT-0001LT	13.20 0.00 0.00 0.00	175.00 T@1	2310.00 Hold
Work on Appeal Brief.							
118789	6/21/03	TIME	WIP	GHP Work on BLNT-0001LT	4.00 0.00 0.00 0.00	175.00 T@1	700.00 Hold
Work on Appeal Brief.							

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118790	6/22/03	TIME	WIP Work on Appeal Brief.	GHP Work on BLNT-0001LT	5.30 0.00 0.00	175.00 T@1	927.50 Hold
120141	6/23/03	TIME	WIP Work on Appeal Brief.	WDH Work on BLNT-0001LT	4.00 0.00 0.00	350.00 T@1	1400.00 Hold
118791	6/23/03	TIME	WIP Work on Appeal Brief.	GHP Work on BLNT-0001LT	11.20 0.00 0.00	175.00 T@1	1960.00 Hold
120142	6/24/03	TIME	WIP Work on Appeal Brief.	WDH Work on BLNT-0001LT	4.00 0.00 0.00	350.00 T@1	1400.00 Hold
118794	6/24/03	TIME	WIP Work on Appeal Brief.	GHP Work on BLNT-0001LT	10.60 0.00 0.00	175.00 T@1	1855.00 Hold
118720	6/25/03	TIME	WIP Shepardize cases cited in appeal brief.	CAG Misc BLNT-0001LT	1.00 0.00 0.00	90.00 T@1	90.00 Hold
120143	6/25/03	TIME	WIP Work on Appeal Brief.	WDH Work on BLNT-0001LT	6.00 0.00 0.00	350.00 T@1	2100.00 Hold
118796	6/25/03	TIME	WIP Work on Appeal Brief.	GHP Work on BLNT-0001LT	8.30 0.00 0.00	175.00 T@1	1452.50 Hold
118803	6/26/03	TIME	WIP Work on Appeal Brief.	GHP Work on BLNT-0001LT	11.30 0.00 0.00	175.00 T@1	1977.50 Hold
120144	6/26/03	TIME	WIP Work on Appeal Brief.	WDH Work on BLNT-0001LT	5.00 0.00 0.00	350.00 T@1	1750.00 Hold
118721	6/26/03	TIME	WIP Obtain parallel cites, Shepardize additional cases, and review short form	CAG Misc BLNT-0001LT	0.80 0.00 0.00	90.00 T@1	72.00 Hold

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Slip ID Dates and Time Posting Status Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
citations.				
120145 6/27/03 WIP Work on Appeal Brief.	WDH Work on BLNT-0001LT	8.00 0.00 0.00 0.00	350.00 T@1	2800.00 Hold
118804 6/27/03 WIP Work on Appeal Brief.	GHP Work on BLNT-0001LT	10.90 0.00 0.00 0.00	175.00 T@1	1907.50 Hold
120146 6/28/03 WIP Work on Appeal Brief.	WDH Work on BLNT-0001LT	3.00 0.00 0.00 0.00	350.00 T@1	1050.00 Hold
120147 6/29/03 WIP Work on Appeal Brief.	WDH Work on BLNT-0001LT	6.00 0.00 0.00 0.00	350.00 T@1	2100.00 Hold
118805 6/29/03 WIP Work on Appeal Brief.	GHP Work on BLNT-0001LT	4.20 0.00 0.00 0.00	175.00 T@1	735.00 Hold
120148 6/30/03 WIP Concluding work on brief.	WDH Misc BLNT-0001LT	3.00 0.00 0.00 0.00	350.00 T@1	1050.00 Hold
118807 6/30/03 WIP Complete and File Appeal Brief.	GHP Misc BLNT-0001LT	9.50 0.00 0.00 0.00	175.00 T@1	1662.50 Hold
118571 6/30/03 WIP Preparation of Appeal Brief.	CWG Prepare BLNT-0001LT	17.50 0.00 0.00 0.00	300.00 T@1	5250.00 Hold
119969 7/21/03 WIP Read and Digest Def.'s Reply Brief.	GHP Misc BLNT-0001LT	4.40 0.00 0.00 0.00	175.00 T@1	770.00 Hold
122920 10/13/03 WIP Conduct legal research regarding issues relating to percentage of damages; interoffice conference with Greg Parker regarding oral argument support strategy for Bill Harris.	CWG Misc BLNT-0001LT	2.00 0.00 0.00 0.00	300.00 T@1	600.00 Hold

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Slip ID	Dates and Time	Attorney Activity	Units	Rate	Slip Value
Posting Status	Description	Client File	DNB Time	Rate Info	
			Est. Time	Bill Status	
			Variance		
123209	TIME	GHP	8.30	225.00	1867.50
10/13/03		Prepare	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
	Preparation for Oral Arguments.		0.00		
123210	TIME	GHP	9.60	225.00	2160.00
10/14/03		Prepare	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
	Preparation for Oral Arguments.		0.00		
123214	TIME	GHP	5.10	225.00	1147.50
10/17/03		Prepare	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
	Preparation for Oral Arguments.		0.00		
123218	TIME	GHP	2.10	225.00	472.50
10/22/03		Prepare	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
	Preparation for Oral Arguments.		0.00		
123219	TIME	GHP	3.30	225.00	742.50
10/23/03		Prepare	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
	Preparation for Oral Arguments.		0.00		
123223	TIME	GHP	6.20	225.00	1395.00
10/29/03		Prepare	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
	Preparation for Oral Arguments.		0.00		
123236	TIME	CAG	5.00	90.00	450.00
10/30/03		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
	Obtain copies of and Shephardize cases cited in Defendant's two appeal briefs.		0.00		
123224	TIME	GHP	1.20	225.00	270.00
10/30/03		Prepare	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
	Preparation for Oral Arguments.		0.00		
123225	TIME	GHP	4.40	225.00	990.00
10/31/03		Prepare	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
	Preparation for Oral Arguments.		0.00		
123238	TIME	CAG	2.00	90.00	180.00
10/31/03		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
	Obtain copies of and Shephardize cases cited in Plaintiff's appeal brief.		0.00		

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Slip ID	Dates and Time	Attorney	Units	Rate	Slip Value
Posting Status		Activity	DNB Time	Rate Info	
Description		Client	Est. Time	Bill Status	
		File	Variance		
124090	TIME	GHP	3.10	225.00	697.50
11/1/03		Prepare	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
Prepare for Oral Arguments.			0.00		
124091	TIME	GHP	1.10	225.00	247.50
11/2/03		Prepare	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
Prepare for Oral Arguments.			0.00		
124092	TIME	GHP	2.80	225.00	630.00
11/3/03		Prepare	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
Prepare for Oral Arguments.			0.00		
124093	TIME	GHP	4.30	225.00	967.50
11/4/03		Prepare	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
Oral Arguments.			0.00		
124094	TIME	GHP	1.30	225.00	292.50
11/5/03		Misc	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
Discuss options with Charles W. Gaines regarding Oral Arguments.			0.00		
124096	TIME	GHP	0.50	225.00	112.50
11/6/03		Misc	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
Discuss options with WDH regarding Oral Arguments.			0.00		
124098	TIME	GHP	2.40	225.00	540.00
11/7/03		Research	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
Research regarding Oral Arguments.			0.00		
129346	TIME	CWG	2.00	300.00	600.00
4/19/04		Review	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
Review Opinion from the Federal Circuit; discuss decision with Greg Parker; telephone conference with Bill Harris regarding same.			0.00		
128954	TIME	GHP	3.50	225.00	787.50
4/19/04		Misc	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
Read Federal Circuit Opinion, discussions with Charles W. Gaines and phone conversation with Bill Harris.			0.00		
128959	TIME	GHP	2.50	225.00	562.50
4/22/04		Research	0.00	T	
WIP		BLNT-0001LT	0.00		Hold

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
			Research regarding Federal Circuit Opinion.		0.00		
128960	TIME			GHP	1.30	225.00	292.50
	4/23/04			Review	0.00	T	
	WIP			BLNT-0001LT	0.00		Hold
			Review cases found in research.		0.00		
128966	TIME			GHP	0.40	225.00	90.00
	4/28/04			Misc	0.00	T	
	WIP			BLNT-0001LT	0.00		Hold
			Discussions with Charles W. Gaines.		0.00		
128967	TIME			GHP	0.50	225.00	112.50
	4/29/04			Misc	0.00	T	
	WIP			BLNT-0001LT	0.00		Hold
			Discussions with Charles W. Gaines.		0.00		
129347	TIME			CWG	2.50	300.00	750.00
	5/7/04			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Discuss possible trial strategy regarding remand and preparation of findings of fact and conclusions of law with Greg Parker; follow-up telephone conversation with Bill Harris regarding same.		0.00		
129348	TIME			CWG	4.25	300.00	1275.00
	5/9/04			Review	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Review trial transcript and deposition of Leslie Bortz.		0.00		
130130	TIME			GHP	4.20	225.00	945.00
	5/9/04			Misc	0.00	T	
	WIP			BLNT-0001LT	0.00		Hold
			Read Transcript.		0.00		
129345	TIME			CWG	3.00	300.00	900.00
	5/10/04			Misc	0.00	T@1	
	WIP			BLNT-0001LT	0.00		Hold
			Interoffice conference with Greg regarding damages argument in brief; meeting with Bill Harris and Greg Parker regarding strategy for moving forward with new conclusions of law and findings of fact.		0.00		
130131	TIME			GHP	1.10	225.00	247.50
	5/10/04			Misc	0.00	T	
	WIP			BLNT-0001LT	0.00		Hold
			Read Transcript and Appeal Brief.		0.00		
130132	TIME			GHP	2.00	225.00	450.00
	5/10/04			Misc	0.00	T	
	WIP			BLNT-0001LT	0.00		Hold

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
			Discussions with Charles W. Gaines and Bill Harris regarding proceeding.		0.00		
130134	5/12/04	TIME	Legal Research.	GHP Misc BLNT-0001LT	3.70 0.00 0.00 0.00	225.00 T	832.50 Hold
130136	5/13/04	TIME	Review Case Law and discussions with Charles W. Gaines and Bill Harris.	GHP Misc BLNT-0001LT	2.10 0.00 0.00 0.00	225.00 T	472.50 Hold
130138	5/14/04	TIME	Search for Findings of Fact and Conclusions of Law and various discussions with Bill, Charles W. Gaines and a phone call with Bill and McLaughlin.	GHP Misc BLNT-0001LT	3.30 0.00 0.00 0.00	225.00 T	742.50 Hold
130142	5/17/04	TIME	Multiple discussions between myself and Charles W. Gaines as well as Bill Harris, review findings of fact and conclusions of law drafted by other attorneys.	GHP Misc BLNT-0001LT	6.70 0.00 0.00 0.00	225.00 T	1507.50 Hold
130143	5/18/04	TIME	Discussions with Charles W. Gaines and Bill Harris regarding how to proceed about FOF and COL as well as begin outline of the same.	GHP Misc BLNT-0001LT	3.10 0.00 0.00 0.00	225.00 T	697.50 Hold
130373	5/18/04	TIME	Interoffice conference with Greg H. Parker regarding general outline for Findings of Fact and Conclusions of Law.	CWG Misc BLNT-0001LT	2.00 0.00 0.00 0.00	300.00 T@1	600.00 Hold
130144	5/19/04	TIME	Discussions with Charles W. Gaines and Bill Harris regarding opposition to Peterson's request for return of monies from the court, and research case law about the same.	GHP Misc BLNT-0001LT	6.40 0.00 0.00 0.00	225.00 T	1440.00 Hold

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Slip ID	Dates and Time	Posting Status	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
130372	5/19/04	TIME	CWG	2.00	300.00	600.00
	WIP		Misc BLNT-0001LT	0.00	T@1	Hold
	Telephone conference with Bill Harris regarding Peterson's Motion for reimbursement of funds in registry of the court; interoffice conference with Greg H. Parker regarding case law cited in Peterson's Motion; review of opposing case law regarding remaining liability of Appellant after remand.					
130147	5/20/04	TIME	GHP	1.10	225.00	247.50
	WIP		Misc BLNT-0001LT	0.00	T	Hold
	Discussions with Charles W. Gaines about motion to oppose return of cash security.					
130148	5/21/04	TIME	GHP	1.50	225.00	337.50
	WIP		Misc BLNT-0001LT	0.00	T	Hold
	Review and discussed Charles' motion to oppose and forwarded on to Bill Harris.					
130152	5/24/04	TIME	GHP	7.10	225.00	1597.50
	WIP		Misc BLNT-0001LT	0.00	T	Hold
	Begin drafting findings of fact and conclusions of law.					
130153	5/25/04	TIME	GHP	2.10	225.00	472.50
	WIP		Misc BLNT-0001LT	0.00	T	Hold
	Continue drafting findings of fact and conclusions of law.					
130154	5/26/04	TIME	GHP	8.30	225.00	1867.50
	WIP		Misc BLNT-0001LT	0.00	T	Hold
	Continue drafting findings of fact and conclusions of law.					
130155	5/27/04	TIME	GHP	8.70	225.00	1957.50
	WIP		Misc BLNT-0001LT	0.00	T	Hold
	Continue drafting findings of fact and conclusions of law.					
130156	5/28/04	TIME	GHP	3.10	225.00	697.50
	WIP		Misc BLNT-0001LT	0.00	T	Hold
	Continue drafting findings of fact and conclusions of law.					

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Slip ID	Dates and Time	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
131490	TIME	GHP	3.80	225.00	855.00
6/1/04		Misc	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
	Continued working on FIF and COL.		0.00		
132002	TIME	CWG	1.90	300.00	570.00
6/1/04		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
	Discussions with Greg H. Parker on FIF and COL.		0.00		
132003	TIME	CWG	4.30	300.00	1290.00
6/2/04		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
	Discussions with Greg H. Parker on FIF and COL.		0.00		
131491	TIME	GHP	7.90	225.00	1777.50
6/2/04		Misc	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
	Continued working on FIF and COL.		0.00		
132004	TIME	CWG	8.10	300.00	2430.00
6/3/04		Misc	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
	Review of FIF and COL.		0.00		
131493	TIME	GHP	9.10	225.00	2047.50
6/3/04		Misc	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
	Continued working on FIF and COL.		0.00		
130512	TIME	CWG	12.00	300.00	3600.00
6/4/04	6/8/04	Prepare	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
	Prepare Memorandum in Opposition to Defendant's motion for return of security cash.		0.00		
131495	TIME	GHP	5.20	225.00	1170.00
6/4/04		Meeting	0.00	T	
WIP		BLNT-0001LT	0.00		Hold
	Meeting with WDH and continued working on FIF and COL.		0.00		
130513	TIME	CWG	4.60	300.00	1380.00
6/7/04		Review	0.00	T@1	
WIP		BLNT-0001LT	0.00		Hold
	Review and revise draft of Conclusions of Law and Findings of Fact with Greg Parker.		0.00		

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HITT GAINES, PC  
Slip Listing

Slip ID	Dates and Time	Attorney Activity	Units DNB Time	Rate Rate Info	Slip Value
	Posting Status	Client	Est. Time	Bill Status	
	Description	File	Variance		
131498	TIME	GHP	4.60	225.00	1035.00
	6/7/04	Misc	0.00	T	
	WIP	BLNT-0001LT	0.00		Hold
	Continued working on FIF and COL.				
			0.00		
131501	TIME	GHP	3.40	225.00	765.00
	6/8/04	Misc	0.00	T	
	WIP	BLNT-0001LT	0.00		Hold
	Continued working on FIF and COL.				
			0.00		
130514	TIME	CWG	3.40	300.00	1020.00
	6/8/04	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Make additional changes to Conclusions and Findings.				
			0.00		
130515	TIME	CWG	2.00	300.00	600.00
	6/9/04	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Telephone conference with Bill Harris regarding Conclusions and Findings; make additional Conclusions pursuant to discussions with Bill Harris.				
			0.00		
131508	TIME	GHP	8.50	225.00	1912.50
	6/10/04	Misc	0.00	T	
	WIP	BLNT-0001LT	0.00		Hold
	Finish and File FIF and COL.				
			0.00		
132005	TIME	CWG	6.30	300.00	1890.00
	6/10/04	Misc	0.00	T@1	
	WIP	BLNT-0001LT	0.00		Hold
	Review of FIF and COL.				
			0.00		
Grand Total					
		Billable	999.10		235046.50
		Unbillable	0.00		0.00
		Total	999.10		235046.50

JT-APP 3021

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

GOLDEN BLOUNT, INC.,	§	
	§	
Plaintiff,	§	
	§	Civil Action No.
v.	§	
	§	3-01CV0127-R
ROBERT H. PETERSON CO.,	§	
	§	
Defendant.	§	

DECLARATION OF WILLIAM D. HARRIS, JR., IN SUPPORT OF  
PLAINTIFF, GOLDEN BLOUNT, INC'S APPLICATION FOR ATTORNEYS' FEES

1. I, William D. Harris, Jr., am currently of Counsel with the firm of Schultz & Associates, P.C., and have since the case was turned over to me by the firm of Locke, Liddell & Sapp, represented Golden Blount, Inc. in the above referenced litigation.

2. From the beginning of my involvement with the case through about August 31, 2003, I was of Counsel with the firm of Hitt Gaines, P.C.. Thereafter, and to the present time, I have been of Counsel with the firm of Schultz & Associates, P.C..

3. I understand that Charles W. Gaines is attesting to the attorneys' fees and expenses expended on the part of Hitt Gaines, P.C., including the time I was of Counsel with Hitt Gaines, P.C.. Therefore, this declaration is made with respect to the attorneys' fees and expenses expended on the part of Schultz & Associates, P.C..

4. This case is a patent infringement case that presents numerous substantial and complex issues including, but not limited to, invalidity, actual infringement, contributory infringement, induced

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infringement, infringement under the doctrine of equivalents, wilfulness, measurement of damages and the award of attorneys' fees.

5. My current firm served as co-counsel for Golden Blount, Inc. and assisted in the appeal of the case, including oral arguments, and the remand of the case back to this Court.

6. Attached hereto are true and correct copies of the Schultz & Associates, P.C., invoices that represent my current firm's attorneys' fees for representation in this case.

7. As the bills indicate, the vast majority of the representation by my current firm was handled by myself, William D. Harris, Jr.. Since moving to Schultz & Associates, P.C., I have had a billing rate of \$325 per hour. A small amount of attorneys' time was spent on the case by an associate of my current firm, John Pemberton, whom had a billing rate of \$195 per hour. These rates are consistent with the rates charged by my current firm to other clients comparable to Golden Blount, Inc.

8. In total, my current firm has expended \$54,619.50 in attorneys' fees in this case, as shown below:

FEE EARNER	TOTAL HOURS	BILLING RATE
William D. Harris, Jr	162.6	\$325.00
John Pemberton	9.1	\$195.00
<b>Total:</b>	<b>171.7 hours</b>	<b>\$54,619.50</b>

9. I am familiar with the customary fees for this type of litigation charged in large legal markets such as Dallas. In my opinion, the hours billed by me and other members of my current firm are reasonable in relation to the quantity and substance of the representation in this case. I further understand the hourly

rates for the attorneys in my current firm to be reasonable in relation to other similar attorneys in large markets such as Dallas.

10. I have reviewed the bills and do not believe that there were significant duplication of efforts among the members of my current firm or the other firms representing my client.

11. It is my opinion that the total value and effort by Schultz & Associates, P.C., was reasonable and necessary for the case at hand.

12. In total Golden Blount, Inc. is seeking \$54,619.50 in fees for Schultz & Associates, P.C..

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed this September 8, 2004, at Dallas, Texas.

---

William D. Harris, Jr.

08/25/2004  
9:24 AM

Schutz & Associates, P.C.  
Slip Listing

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Selection Criteria

Slip Classification Open  
Client (hand select) Include: golden; golden-101 miscellaneous; golden-102 gbi v. rhpc  
Activity (hand select) Include: Service  
Slip Date 08/25/2001 - 08/10/2004

Rate Info - identifies rate source and level

Slip ID	Timekeeper	Units	Rate	Slip Value
Dates and Time	Activity	DNB Time	Rate Info	
Posting Status	Client		Bill Status	
Description	Reference	Variance		
11016	Bill	1.00	325.00	325.00
09/18/2003	Service	1.00	T@1	
Billed	G:13508 10/01/2003 golden-102 gbi v. rhpc			
Review of portions of appendix.		0.00		
11018	Bill	2.50	325.00	812.50
09/22/2003	Service	2.50	T@1	
Billed	G:13508 10/01/2003 golden-102 gbi v. rhpc			
Further review of appendix with attention to transcript.		0.00		
11023	Bill	1.00	325.00	325.00
09/28/2003	Service	1.00	T@1	
Billed	G:13508 10/01/2003 golden-102 gbi v. rhpc			
Consideration of schedule for argument and planning for preparation of oral argument.		0.00		
11655	John	0.40	195.00	78.00
10/15/2003	Service	0.40	T@1	
Billed	G:13770 11/01/2003 golden-102 gbi v. rhpc			
Research case cites, determine proper cite and sheperdize cases		0.00		
11694	John	2.90	195.00	565.50
10/30/2003	Service	2.90	T@1	
Billed	G:13770 11/01/2003 golden-102 gbi v. rhpc			
Research cases cited in defendant's brief; draft, review, revise memo re cited cases		0.00		
11699	John	5.80	195.00	1131.00
10/31/2003	Service	5.80	T@1	
Billed	G:13770 11/01/2003 golden-102 gbi v. rhpc			
Research cases cited in defendant's brief; draft, review, revise memo re cited cases		0.00		
11708	Bill	5.00	325.00	1625.00
10/18/2003	Service	5.00	T@1	
Billed	G:13770 11/01/2003 golden-102 gbi v. rhpc			

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Schultz & Associates, P.C.  
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Page 2

Slip ID	Timekeeper	Units	Rate	Slip Value
Dates and Time	Activity	DNB Time	Rate Info	
Posting Status	Client		Bill Status	
Description	Reference	Variance		
Emphasis case law cited in Peterson's principal brief.		0.00		
11707	Bill	5.00	325.00	1625.00
10/19/2003	Service	5.00	T@1	
Billed	G:13770 11/01/2003 golden-102 gbi v. rhpc			
Emphasis on case law cited in Peterson's reply brief.		0.00		
11710	Bill	2.00	325.00	650.00
10/20/2003	Service	2.00	T@1	
Billed	G:13770 11/01/2003 golden-102 gbi v. rhpc			
Further study on case law and factual application.		0.00		
11717	Bill	1.00	325.00	325.00
10/24/2003	Service	1.00	T@1	
Billed	G:13770 11/01/2003 golden-102 gbi v. rhpc			
Preparation for argument.		0.00		
11720	Bill	2.90	325.00	942.50
10/27/2003	Service	2.90	T@1	
Billed	G:13770 11/01/2003 golden-102 gbi v. rhpc			
Preparation for argument.		0.00		
11725	Bill	2.50	325.00	812.50
10/28/2003	Service	2.50	T@1	
Billed	G:13770 11/01/2003 golden-102 gbi v. rhpc			
Preparation for argument.		0.00		
11728	Bill	2.00	325.00	650.00
10/02/2003	Service	2.00	T@1	
Billed	G:13770 11/01/2003 golden-102 gbi v. rhpc			
Preparation for argument in appeals court.		0.00		
11730	Bill	0.80	325.00	260.00
10/03/2003	Service	0.80	T@1	
Billed	G:13770 11/01/2003 golden-102 gbi v. rhpc			
Handling details in connection with planned for hearing in the Federal Circuit on 11/4/03.		0.00		
11732	Bill	0.60	325.00	195.00
10/06/2003	Service	0.60	T@1	
Billed	G:13770 11/01/2003 golden-102 gbi v. rhpc			
Telephone conference with Greg Parker. Letter and pink sheet to Federal Circuit.		0.00		

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Schultz & Associates, P.C.  
Slip Listing

Page 3

Slip ID	Timekeeper	Units	Rate	Slip Value
Dates and Time	Activity	DNB	Rate Info	
Posting Status	Client	Time	Bill Status	
Description	Reference	Variance		
11733	TIME	4.00	325.00	1300.00
10/07/2003	Bill	4.00	T@1	
Billed	Service			
G:13770	golden-102 gbi v. rhpc			
11/01/2003	Preparation for argument.	0.00		
11734	TIME	3.00	325.00	975.00
10/08/2003	Bill	3.00	T@1	
Billed	Service			
G:13770	golden-102 gbi v. rhpc			
11/01/2003	Study of case law in preparation for argument.	0.00		
11743	TIME	4.00	325.00	1300.00
10/13/2003	Bill	4.00	T@1	
Billed	Service			
G:13770	golden-102 gbi v. rhpc			
11/01/2003	Study of case law relating to argument before the Federal Circuit.	0.00		
11747	TIME	4.00	325.00	1300.00
10/15/2003	Bill	4.00	T@1	
Billed	Service			
G:13770	golden-102 gbi v. rhpc			
11/01/2003	Study cases in preparation for oral argument.	0.00		
11748	TIME	4.00	325.00	1300.00
10/16/2003	Bill	4.00	T@1	
Billed	Service			
G:13770	golden-102 gbi v. rhpc			
11/01/2003	Legal research for oral argument.	0.00		
11749	TIME	5.00	325.00	1625.00
10/17/2003	Bill	5.00	T@1	
Billed	Service			
G:13770	golden-102 gbi v. rhpc			
11/01/2003	Legal research for preparation regarding oral argument.	0.00		
12286	TIME	12.00	325.00	3900.00
11/03/2003	Bill	12.00	T@1	
Billed	Service			
G:13897	golden-102 gbi v. rhpc			
12/01/2003	Work argument and travel to Washington, DC.	0.00		
12287	TIME	10.00	325.00	3250.00
11/04/2003	Bill	10.00	T@1	
Billed	Service			
G:13897	golden-102 gbi v. rhpc			
12/01/2003	Further work on presentation and late return to Dallas.	0.00		
12288	TIME	3.00	325.00	975.00
11/05/2003	Bill	3.00	T@1	
Billed	Service			
G:13897	golden-102 gbi v. rhpc			
12/01/2003				

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Schultz & Associates, P.C.  
Slip Listing

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Slip ID	Timekeeper	Units	Rate	Slip Value
Dates and Time	Activity	DNB Time	Rate Info	
Posting Status	Client		Bill Status	
Description	Reference	Variance		
Follow-up considerations of argument on November 4, 2003.		0.00		
12301	TIME	Bill	1.00	325.00
11/11/2003		Service	1.00	T@1
Billed	G:13897 12/01/2003	golden-102 gbi v. rhpc		325.00
Follow-up inquiries concerning appeal.		0.00		
15426	TIME	Bill	0.80	325.00
04/21/2004		Service	0.80	T@1
Billed	G:14620 05/01/2004	golden-102 gbi v. rhpc		260.00
Telephone conference with Charles Gaines and Greg Parker on opinion from Federal Circuit.		0.00		
15429	TIME	Bill	1.00	325.00
04/22/2004		Service	1.00	T@1
Billed	G:14620 05/01/2004	golden-102 gbi v. rhpc		325.00
Review of opinion from Federal Circuit.		0.00		
15431	TIME	Bill	1.50	325.00
04/28/2004		Service	1.50	T@1
Billed	G:14620 05/01/2004	golden-102 gbi v. rhpc		487.50
Further review of the opinion of the Federal Circuit. Telephone conference with Charles Gaines and Greg Parker regarding interpretation of the opinion and certain case law.		0.00		
16272	TIME	Bill	2.00	325.00
05/11/2004		Service	2.00	T@1
Billed	G:14781 06/01/2004	golden-102 gbi v. rhpc		650.00
Search to locate the pertinent material for preparing findings and conclusions; Telephone call from Ardy DeCaster (Judge Buchmeyer's Clerk) concerning scheduling; Telephone conference with co-counsel in an effort to obtain deposition copies.		0.00		
16274	TIME	Bill	2.50	325.00
05/12/2004		Service	2.50	T@1
Billed	G:14781 06/01/2004	golden-102 gbi v. rhpc		812.50
Study and preliminary analysis of Judge Buchmeyer's Order for findings of fact and conclusion of law. Telephone conferences with Greg Parker and separate conference call with Golden Blount.		0.00		

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Schultz & Associates, P.C.  
Slip Listing

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Slip ID	Timekeeper	Units	Rate	Slip Value	
Dates and Time	Activity	DNB Time	Rate Info		
Posting Status	Client		Bill Status		
Description	Reference	Variance			
16282	TIME	Bill	5.00	325.00	1625.00
05/19/2004		Service	5.00	T@1	
Billed	G:14781 06/01/2004	golden-102 gbi v. rhpc			
Work on background for findings of fact and conclusions of law.			0.00		
16284	TIME	Bill	5.00	325.00	1625.00
05/20/2004		Service	5.00	T@1	
Billed	G:14781 06/01/2004	golden-102 gbi v. rhpc			
Work on background for findings and conclusions.			0.00		
16286	TIME	Bill	3.00	325.00	975.00
05/21/2004		Service	3.00	T@1	
Billed	G:14781 06/01/2004	golden-102 gbi v. rhpc			
Further work on findings and conclusions. Study of depositions.			0.00		
16287	TIME	Bill	2.00	325.00	650.00
05/22/2004		Service	2.00	T@1	
Billed	G:14781 06/01/2004	golden-102 gbi v. rhpc			
Work on strategy to take regarding in response to findings and conclusions. Interoffice meeting.			0.00		
16288	TIME	Bill	1.50	325.00	487.50
05/24/2004		Service	1.50	T@1	
Billed	G:14781 06/01/2004	golden-102 gbi v. rhpc			
Made changes and comments to Charles Gaines and Greg Parker's motion and memorandum in support. Email to co-counsel. Telephone conference with Charles Gaines and Greg Parker.			0.00		
16292	TIME	Bill	1.00	325.00	325.00
05/26/2004		Service	1.00	T@1	
Billed	G:14781 06/01/2004	golden-102 gbi v. rhpc			
Review of evidence.			0.00		
16301	TIME	Bill	2.00	325.00	650.00
05/27/2004		Service	2.00	T@1	
Billed	G:14781 06/01/2004	golden-102 gbi v. rhpc			
Further review of evidence			0.00		

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Schultz & Associates, P.C.  
Slip Listing

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Slip ID	Timekeeper	Units	Rate	Slip Value
Dates and Time	Activity	DNB Time	Rate Info	
Posting Status	Client		Bill Status	
Description	Reference	Variance		
17253	TIME	4.00	325.00	1300.00
06/02/2004	Bill			
Billed	Service	4.00	T@1	
G:15323 08/07/2004	golden-102 gbi v. rhpc			
Work on new findings and conclusions.		0.00		
17256	TIME	3.00	325.00	975.00
06/03/2004	Bill			
Billed	Service	3.00	T@1	
G:15323 08/07/2004	golden-102 gbi v. rhpc			
Review of Charles Gaines and Greg Parker's draft of opposition of motion to retain the funds out of the court's registry. Telephone conference regarding same. Work on findings and conclusions.		0.00		
17257	TIME	6.00	325.00	1950.00
05/29/2004	Bill			
Billed	Service	6.00	T@1	
G:15323 08/07/2004	golden-102 gbi v. rhpc			
Study of record and listing pertinent facts from record.		0.00		
17258	TIME	4.00	325.00	1300.00
05/30/2004	Bill			
Billed	Service	4.00	T@1	
G:15323 08/07/2004	golden-102 gbi v. rhpc			
Further study of record and listing pertinent facts from record.		0.00		
17259	TIME	3.00	325.00	975.00
05/31/2004	Bill			
Billed	Service	3.00	T@1	
G:15323 08/07/2004	golden-102 gbi v. rhpc			
Work on findings and conclusions.		0.00		
17262	TIME	3.00	325.00	975.00
06/01/2004	Bill			
Billed	Service	3.00	T@1	
G:15323 08/07/2004	golden-102 gbi v. rhpc			
Rough drafting on findings and conclusions.		0.00		
17283	TIME	6.50	325.00	2112.50
08/03/2004	Bill			
Billed	Service	6.50	T@1	
G:15323 08/07/2004	golden-102 gbi v. rhpc			
Work on aspects of finding of fact and conclusions of law.		0.00		
17285	TIME	3.50	325.00	1137.50
06/04/2004	Bill			
Billed	Service	3.50	T@1	
G:15323 08/07/2004	golden-102 gbi v. rhpc			
Preparation for and meeting with Charles Gaines and Greg Parker and follow-up attention to review of cases and telephone		0.00		

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08/25/2004  
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Schultz & Associates, P.C.  
Slip Listing

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Slip ID	Dates and Time	Posting Status	Description	Timekeeper Activity	Client Reference	Units DNB	Rate Rate Info	Slip Value
			conference with Greg Parker.					
17266	TIME			Bill		4.00	325.00	1300.00
	06/08/2004			Service		4.00	T@1	
	Billed	G:15323	08/07/2004	golden-102 gbi v. rhpc				
	Work on brief.					0.00		
17267	TIME			Bill		2.00	325.00	650.00
	06/05/2004			Service		2.00	T@1	
	Billed	G:15323	08/07/2004	golden-102 gbi v. rhpc				
	Work on brief.					0.00		
17268	TIME			Bill		4.50	325.00	1462.50
	06/07/2004			Service		4.50	T@1	
	Billed	G:15323	08/07/2004	golden-102 gbi v. rhpc				
	Further work on findings and conclusions with attention to the record and draft revisions.					0.00		
17271	TIME			Bill		4.50	325.00	1462.50
	06/08/2004			Service		4.50	T@1	
	Billed	G:15323	08/07/2004	golden-102 gbi v. rhpc				
	Work on revising and finalizing findings and conclusions. Telephone conferences with Greg Parker and reading certain cases.					0.00		
17273	TIME			Bill		6.00	325.00	1950.00
	06/09/2004			Service		6.00	T@1	
	Billed	G:15323	08/07/2004	golden-102 gbi v. rhpc				
	Work on revising and finalizing findings and conclusions of law.					0.00		
17276	TIME			Bill		5.00	325.00	1625.00
	06/10/2004			Service		5.00	T@1	
	Billed	G:15323	08/07/2004	golden-102 gbi v. rhpc				
	Work on findings and conclusions.					0.00		
Grand Total				Billable		0.00		0.00
				Unbillable		171.70		54819.50
				Total		171.70		54619.50

JT-APP 3031

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

GOLDEN BLOUNT, INC.

Plaintiff,

v.

ROBERT H. PETERSON CO.,

Defendant.

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

CIVIL ACTION NO.

3-01-CV-0127-R

AFFIDAVIT OF ROY W. HARDIN IN SUPPORT OF PLAINTIFF'S  
APPLICATION FOR ATTORNEYS' FEES PURSUANT TO 35 U.S.C. § 285

BEFORE ME, the undersigned authority, on this day personally appeared Roy W. Hardin, who being duly sworn according to law, did upon his oath depose and say:

1. "My name is Roy W. Hardin. I am over the age of twenty-one (21) years, am of sound mind, have never been convicted of a crime, and am fully competent in all respects to make this Affidavit. I have personal knowledge of the facts stated in this Affidavit.

2. "I am an attorney licensed to practice law in the State of Texas. I have been licensed to practice law in the State of Texas for over 25 years. I am familiar with the time and expenses involved in prosecuting and defending patent infringement actions in Dallas, Dallas County, Texas. I am a partner in the law firm of Locke, Liddell & Sapp, L.L.P., which was counsel of record for Golden Blount, Inc. ("Golden Blount") in the above-styled and numbered cause of action.

3. Attached hereto is a genuine, true and correct copy of the time records of the law firm of Locke, Liddell & Sapp, L.L.P. from January 2000 through July 2001 with

JT-APP 3032

regard to the case at hand. Locke, Liddell & Sapp, L.L.P. has maintained true and correct copies of these documents in its files since they were generated by our office. Members of the Locke, Liddell & Sapp, L.L.P. firm billed the hours to the case. The numbers of hours billed and their hourly rates is listed below:

<u>Name</u>	<u>Hours</u>	<u>Hourly Rate</u>
L. Dan Tucker	1.90	\$325.00
Monty L. Ross	1.50	\$335.00
Roy W. Hardin	22.75	\$350.00 - \$375.00
Charles Phipps	34.00	\$230.00
Michael W. Dubner	20.00	\$135.00

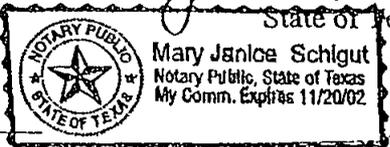
4. "In my opinion, the hours billed by myself and the other members of my firm listed above were reasonable and necessary for proper prosecution of the case. I further believe that the hourly rates for the members of the firm are reasonable in relation to similar services performed at comparable levels of competence by attorneys and paralegals in the Northern District of Texas.

5. "Therefore, in my opinion, the total value of time and effort expended by the law firm of Locke, Liddell & Sapp, L.L.P. of \$18,967.50 was reasonable and necessary for proper prosecution of this case."

FURTHER AFFIANT SAITH NOT.

  
Roy W. Hardin

SUBSCRIBED AND SWORN TO BEFORE ME by the said Roy W. Hardin on this, the 23 day of August, 2002, to certify which witness my official hand and seal of office.

  
Notary Public in and for the  
State of Texas  
  
Mary Janice Schigut  
Notary Public, State of Texas  
My Comm. Expires 11/20/02

My Commission Expires: \_\_\_\_\_

JT-APP 3033

**LOCKE LIDDELL & SAPP LLP**  
 ATTORNEYS & COUNSELORS

P. O. Box 911541  
 DALLAS, TEXAS 75391-1541  
 TAX ID 74-1164324

February 18, 2000

Golden Blount  
 4200 West Grove  
 Dallas, TX 75248

As of January 31, 2000

File No.: 09842/60434

Re: Gas-Fired Artifl Logs & Coals-Burner Assembly

DATE	SERVICES	ATTY	HOURS	VALUE
12/10/99	Preparation of cease and desist letters.	LDT	1.00	325.00
	TOTAL HOURS		1.00	
	TOTAL SERVICES			\$325.00

DATE	CHARGES	VALUE
	Facsimiles @ 1.00 per page	2.00
	TOTAL CHARGES	\$2.00
	TOTAL SERVICES AND CHARGES	\$327.00
	TOTAL DUE THIS STATEMENT	\$327.00

Please remit payment to:  
 Locke Liddell & Sapp LLP  
 P. O. Box 911541  
 Dallas, Texas 75391-1541

JT-APP 3034

February 18, 2000

Golden Blount  
Page 2

As of January 31, 2000

File No.: 09842/60434

Re: Gas-Fired Artifl Logs & Coals-Burner Assembly

This statement is due upon receipt. Please call Roy W. Hardin (214) 740-8000 of this firm if you have questions concerning legal services covered by it or if you dispute the amount of the statement. Ms. Emily Teague in our Accounting Department (214) 740-8347 can answer questions concerning payments on your account.

Any payment for less than the full amount of this statement tendered in full satisfaction of this statement (or any portion of it) should be sent to: Locke Liddell & Sapp LLP, Attention: Accounts Receivable, 2200 Ross Avenue, Suite 2200, Dallas, Texas 75201-6776

PRIVACY NOTICE

Locke Liddell & Sapp may acquire and collect nonpublic personal information about clients and former clients in the course of providing legal services. Such information may be obtained from the client; may be generated as a result of the services provided; or may be received from third parties involved in, or affiliated with, the services provided.

Locke Liddell & Sapp does not disclose, nor does Locke Liddell & Sapp reserve the right to disclose, any nonpublic personal information about clients or former clients, except as permitted by law.

Locke Liddell & Sapp restricts access to nonpublic personal information to those employees who need to know that information to provide the applicable services. Locke Liddell & Sapp maintains physical, electronic and procedural safeguards that comply with federal regulations to guard the nonpublic personal information of clients and former clients.

JT-APP 3035

LOCKE LIDDELL & SAPP LLP  
ATTORNEYS & COUNSELORS

P. O. Box 911541  
DALLAS, TEXAS 75391-1541  
Tax ID 74-1164324

May 12, 2000

Golden Blount  
4200 West Grove  
Dallas, TX 75248

As of April 30, 2000

File No.: 09842/60434

Re: Gas-Fired Artifl Logs & Coals-Burner Assembly

DATE	SERVICES	ATTY	HOURS	VALUE
03/21/00	Conference with Mr. Blount regarding <del>_____</del>	LDT	.50	175.00
04/26/00	Telephone conference with Mr. Blount and preparation of demand letter to Robert H. Peterson Co.	LDT	.40	140.00
	TOTAL HOURS		.90	
	TOTAL SERVICES . . . . .			\$315.00
	TOTAL DUE THIS STATEMENT . . . . .			\$315.00

Please remit payment to:  
Locke Liddell & Sapp LLP  
P. O. Box 911541  
Dallas, Texas 75391-1541

JT-APP 3036

May 12, 2000

Golden Blount  
Page 2

As of April 30, 2000

File No.: 09842/60434

Re: Gas-Fired Artifl Logs & Coals-Burner Assembly

This statement is due upon receipt. Please call Roy W. Hardin (214) 740-8000 of this firm if you have questions concerning legal services covered by it or if you dispute the amount of the statement. Ms. Emily Teague in our Accounting Department (214) 740-8347 can answer questions concerning payments on your account.

Any payment for less than the full amount of this statement tendered in full satisfaction of this statement (or any portion of it) should be sent to: Locke Liddell & Sapp LLP, Attention: Accounts Receivable, 2200 Ross Avenue, Suite 2200, Dallas, Texas 75201-6776

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Locke Liddell & Sapp does not disclose, nor does Locke Liddell & Sapp reserve the right to disclose, any nonpublic personal information about clients or former clients, except as permitted by law.

Locke Liddell & Sapp restricts access to nonpublic personal information to those employees who need to know that information to provide the applicable services. Locke Liddell & Sapp maintains physical, electronic and procedural safeguards that comply with federal regulations to guard the nonpublic personal information of clients and former clients.

JT-APP 3037

**LOCKE LIDDELL & SAPP LLP**  
ATTORNEYS & COUNSELORS

P. O. BOX 911541  
DALLAS, TEXAS 75391-1541  
TAX ID 74-1164324

Golden Blount  
4200 West Grove  
Dallas, TX 75248

October 23, 2000

As of October 18, 2000

File No.: 09842/60434

Re: Gas-Fired Artifl Logs & Coals-Burner Assembly

DATE	SERVICES	ATTY	HOURS	VALUE
07/14/00	Sketch views of patent drawings; consultation with patent draftsman.	MLR	1.50	502.50
10/11/00	Review of file and <del>corrections</del> <del>_____</del> <del>_____</del> <del>_____</del>	RWH	1.00	350.00
10/11/00	Begin research for case law to <del>_____</del> <del>_____</del>	MD	4.00	540.00
10/12/00	Continue research on <del>_____</del> <del>_____</del> <del>_____</del> <del>_____</del>	MD	8.25	1,113.75
10/18/00	Prepare Complaint for Patent Infringement--Golden Blount, Inc. v. Robert H. Peterson Company	MD	3.25	438.75
TOTAL HOURS			18.00	
TOTAL SERVICES . . . . .				\$2,945.00

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October 23, 2000

Golden Blount  
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As of October 18, 2000

File No.: 09842/60434

Re: Gas-Fired Artifl Logs & Coals-Burner Assembly

DATE	CHARGES	VALUE
	Photocopies @.20 per page	8.40
	TOTAL CHARGES . . . . .	\$8.40
	TOTAL SERVICES AND CHARGES . . . . .	\$2,953.40
	TOTAL DUE THIS STATEMENT . . . . .	\$2,953.40

Please remit payment to:  
Locke Liddell & Sapp LLP  
P. O. Box 911541  
Dallas, Texas 75391-1541

This statement is due upon receipt. Please call Roy W. Hardin (214) 740-8000 of this firm if you have questions concerning legal services covered by it or if you dispute the amount of the statement. Ms. Emily Teague in our Accounting Department (214) 740-8347 can answer questions concerning payments on your account.

Any payment for less than the full amount of this statement tendered in full satisfaction of this statement (or any portion of it) should be sent to: Locke Liddell & Sapp LLP, Attention: Accounts Receivable, 2200 Ross Avenue, Suite 2200, Dallas, Texas 75201-6776

PRIVACY NOTICE

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October 23, 2000

Golden Blount  
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As of October 18, 2000

File No.: 09842/60434

Re: Gas-Fired Artifl Logs & Coals-Burner Assembly

with, the services provided.

Locke Liddell & Sapp does not disclose, nor does Locke Liddell & Sapp reserve the right to disclose, any nonpublic personal information about clients or former clients, except as permitted by law.

Locke Liddell & Sapp restricts access to nonpublic personal information to those employees who need to know that information to provide the applicable services. Locke Liddell & Sapp maintains physical, electronic and procedural safeguards that comply with federal regulations to guard the nonpublic personal information of clients and former clients.

JT-APP 3040

**LOCKE LIDDELL & SAPP LLP**  
ATTORNEYS & COUNSELORS

P. O. Box 911541  
DALLAS, TEXAS 75391-1541  
TAX ID 74-1164324

February 21, 2001

Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison, TX 75001

As of January 31, 2001

File No.: 09842/60434

Re: Gas-Fired Artifl Logs & Coals-Burner Assembly

DATE	SERVICES	ATTY	HOURS	VALUE
10/17/00	Telecon with Mr. Blount and review of information necessary for [REDACTED]	RWH	.50	175.00
11/06/00	Telecon with Golden a [REDACTED]	RWH	.75	262.50
11/06/00	Prepare patent assignment form for assignment of '159 Patent to Golden Blount, Inc.; draft letter to Mr. Blount [REDACTED]	MD	2.00	270.00
11/07/00	Complete assignment of patent application and draft of letter to Mr. Blount concerning [REDACTED]	MD	2.50	337.50
01/08/01	Prepare letter and complaint and send to client for approval.	RWH	3.50	1,312.50
01/09/01	Review of file histories and considering [REDACTED]	RWH	3.50	1,312.50
TOTAL HOURS			12.75	
TOTAL SERVICES				\$3,670.00

JT-APP 3041

February 21, 2001

Golden Blount  
Page 2

As of January 31, 2001

File No.: 09842/60434

Re: Gas-Fired Artifl Logs & Coals-Burner.Assembly

LESS DISCOUNT	(\$1,170.00)
TOTAL SERVICES BILLED	\$2,500.00

DATE	CHARGES	VALUE
	Air Freight Shipments	19.66
	Messenger Services	13.00
	Photocopies @.20 per page	9.80
12/22/00	Comm. of Patents & Trademarks - Recordal of Assignment	40.00
01/18/01	Clerk, U.S. District Court - Filing fee for Complaint	150.00
	TOTAL CHARGES	\$232.46
	TOTAL SERVICES AND CHARGES	\$2,732.46
	TOTAL DUE THIS STATEMENT	\$2,732.46

Please remit payment to:  
 Locke Liddell & Sapp LLP  
 P. O. Box 911541  
 Dallas, Texas 75391-1541

This statement is due upon receipt. Please call Roy W. Hardin (214) 740-8000 of this firm if you have questions concerning legal services covered by it or if you dispute the amount of the statement. Ms. Emily Teague in our Accounting Department (214) 740-8347 can answer questions concerning payments on your account.

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JT-APP 3042

February 21, 2001

Golden Blount  
Page 3

As of January 31, 2001

File No.: 09842/60434

Re: Gas-Fired Artifl Logs & Coals-Burner Assembly

PRIVACY NOTICE

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JT-APP 3043

LOCKE LIDDELL & SAPP LLP  
ATTORNEYS & COUNSELORS

P. O. Box 911541  
DALLAS, TEXAS 75391-1541  
TAX ID 74-1164324

March 13, 2001

Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison, TX 75001

As of February 28, 2001

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

DATE	CHARGES	VALUE
	Messenger Services	26.00
	TOTAL CHARGES . . . . .	\$26.00
	TOTAL DUE THIS STATEMENT . . . . .	\$26.00

Please remit payment to:  
Locke Liddell & Sapp LLP  
P. O. Box 911541  
Dallas, Texas 75391-1541

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JT-APP 3044

March 13, 2001

Golden Blount

Page 2

As of February 28, 2001

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

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JT-APP 3045

LOCKE LIDDELL & SAPP LLP  
ATTORNEYS & COUNSELORS

P. O. Box 911541  
DALLAS, TEXAS 75391-1541  
TAX ID 74-1164324

May 15, 2001

Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison, TX 75001

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

DATE	SERVICES	ATTY	HOURS	VALUE
03/28/01	Review of Judge's Scheduling Order and conference regarding [REDACTED]	RWH	2.00	750.00
04/09/01	Review files and correspondence concerning the present action; discuss [REDACTED] with Roy Hardin; draft discovery requests.	CEP	2.00	460.00
04/10/01	Review pleadings and correspondence concerning the present action; review United State patent 5,988,159; draft discovery requests including document requests and interrogatories.	CEP	5.00	1,150.00
04/11/01	Review of proposed discovery requests	RWH	1.00	375.00
04/11/01	Revise drafts of Golden Blount's document requests and interrogatories to Robert Peterson Co.	CEP	1.00	230.00
04/12/01	Revise Golden Blount's document requests and interrogatories to Robert Peterson Co. in view of [REDACTED]	CEP	1.00	230.00
04/17/01	Letter to client and service of first wave of discovery.	RWH	.50	187.50
	TOTAL HOURS		12.50	

JT-APP 3046

May 15, 2001

Golden Blount  
Page 2

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

TOTAL SERVICES . . . . . \$3,382.50

DATE	CHARGES	VALUE
	Photocopies @ .20 per page	9.60
	Facsimiles @ 1.00 per page	24.00
	TOTAL CHARGES . . . . .	\$33.60
	TOTAL SERVICES AND CHARGES . . . . .	\$3,416.10
	TOTAL DUE THIS STATEMENT . . . . .	\$3,416.10

Please remit payment to:  
Locke Liddell & Sapp LLP  
P. O. Box 911541  
Dallas, Texas 75391-1541

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JT-APP 3047

May 15, 2001

Golden Blount  
Page 3

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

with, the services provided.

Locke Liddell & Sapp does not disclose, nor does Locke Liddell & Sapp reserve the right to disclose, any nonpublic personal information about clients or former clients, except as permitted by law.

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JT-APP 3048

A-102

LOCKE LIDDELL & SAPP LLP  
ATTORNEYS & COUNSELORS

P. O. Box 911541  
DALLAS, TEXAS 75391-1541  
TAX ID 74-1164324

June 19, 2001

Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison, TX 75001

As of May 31, 2001

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

DATE	SERVICES	ATTY	HOURS	VALUE
05/17/01	Attention to Scheduling Order and considering [REDACTED]; preparing and transmitting proposed form of Joint Status Conference paper to opposing counsel.	RWH	2.00	750.00
05/18/01	Attention to corrected joint report; telecon with opposing counsel.	RWH	.75	281.25
05/22/01	[REDACTED]	CEP	.50	115.00
05/23/01	Review discovery responses of Defendant Robert H. Peterson Co.; draft correspondence concerning same.	CEP	1.00	230.00
05/29/01	Review discovery requests of Defendant Robert Peterson to Plaintiff Golden Blount; draft written discovery responses of Plaintiff Golden Blount;	CEP	4.00	920.00
05/30/01	Revise written discovery responses of Plaintiff Golden Blount.	CEP	2.00	460.00

TOTAL HOURS 10.25

TOTAL SERVICES . . . . . \$2,756.25

JT-APP 3049

June 19, 2001

Golden Blount  
Page 2

As of May 31, 2001

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

DATE	CHARGES	VALUE
	Messenger Services	40.00
	Postage	5.63
	Photocopies @.20 per page	10.00
	Facsimiles @ 1.00 per page	10.00
	TOTAL CHARGES . . . . .	\$65.63
	TOTAL SERVICES AND CHARGES . . . . .	\$2,821.88
	TOTAL DUE THIS STATEMENT . . . . .	\$2,821.88

Please remit payment to:  
Locke Liddell & Sapp LLP  
P. O. Box 911541  
Dallas, Texas 75391-1541

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JT-APP 3050

June 19, 2001

Golden Blount  
Page 3

As of May 31, 2001

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

with, the services provided.

Locke Liddell & Sapp does not disclose, nor does Locke Liddell & Sapp reserve the right to disclose, any nonpublic personal information about clients or former clients, except as permitted by law.

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JT-APP 3051

LOCKE LIDDELL & SAPP LLP  
ATTORNEYS & COUNSELORS

P. O. Box 911541  
DALLAS, TEXAS 75391-1541  
TAX ID 74-1164324

July 17, 2001

Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison, TX 75001

As of June 30, 2002

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

DATE	SERVICES	ATTY	HOURS	VALUE
06/01/01	[REDACTED]; draft proposed Protective Order; revise draft of Golden Blount's response to RHP's discovery requests.	CEP	3.00	690.00
06/04/01	Attention to proposed Protective Order; [REDACTED]	RWH	.50	187.50
06/04/01	Draft Protective Order; [REDACTED]; draft joint motion for discovery of the agreed protective order; draft correspondence concerning the present action; revise draft of Golden Blount's response to RHP's document requests; revise draft of Golden Blount's response to RHP's Interrogatories; [REDACTED]	CEP	6.00	1,380.00
06/06/01	Prepare for meeting with client regarding [REDACTED]	RWH	.50	187.50
06/13/01	Review prosecution history of patent in suit; [REDACTED]	CEP	5.00	1,150.00

JT-APP 3052

Golden Blount  
Page 2

July 17, 2001

As of June 30, 2002

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

DATE	SERVICES	ATTY	HOURS	VALUE
06/14/01	Review files [REDACTED] [REDACTED] [REDACTED]; review correspondence concerning [REDACTED] [REDACTED].	CEP	2.00	460.00
06/18/01	[REDACTED] [REDACTED] review prior art in view of [REDACTED] in [REDACTED]; draft correspondence to client concerning same; review prosecution history of the patent in suit in view of [REDACTED] [REDACTED].	CEP	1.50	345.00
06/19/01	Review of prior art submitted by defendant; adding responses to interrogatory answers; [REDACTED] [REDACTED]	RWH	2.50	937.50
06/22/01	Attention to service of discovery responses and correction of document responses.	RWH	.50	187.50
06/29/01	Preparing for and conferring with opposing counsel to deliver offer to drop past infringement damage charge if attorney fees are paid and product removed from market - [REDACTED] [REDACTED]	RWH	.50	187.50
	TOTAL HOURS		22.00	
	TOTAL SERVICES			\$5,712.50

DATE	CHARGES	VALUE
	Air Freight Shipments	11.14
	Messenger Services	20.00
	Postage	24.50

JT-APP 3053

A-107

July 17, 2001

Golden Blount  
Page 3

As of June 30, 2002

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

DATE	CHARGES	VALUE
	Photocopies @.20 per page	158.80
	Facsimiles @ 1.00 per page	46.00
06/27/01	Computerized Research - Dialog (05/01)	24.21
	TOTAL CHARGES . . . . .	\$284.65
	TOTAL SERVICES AND CHARGES . . . . .	\$5,997.15
	TOTAL DUE THIS STATEMENT . . . . .	\$5,997.15

Please remit payment to:  
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P. O. Box 911541  
Dallas, Texas 75391-1541

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JT-APP 3054

July 17, 2001

Golden Blount

Page 4

As of June 30, 2002

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

with, the services provided.

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JT-APP 3055

**LOCKE LIDDELL & SAPP LLP**  
ATTORNEYS & COUNSELORS

P. O. Box 911541  
DALLAS, TEXAS 75391-1541  
TAX ID 74-1164324

August 14, 2001

Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison, TX 75001

As of July 31, 2001

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

DATE	SERVICES	ATTY	HOURS	VALUE
07/19/01	[REDACTED] a [REDACTED], call to opposing counsel regarding discovery matters.	RWH	.25	93.75
07/24/01	Review of Peterson claims regarding [REDACTED] [REDACTED] mt.	RWH	1.50	562.50
07/24/01	Telecon with opposing counsel to inquire whether Peterson to take product off market; [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	RWH	.50	187.50
07/31/01	Telecon with opposing counsel regarding position of defendants on invalidity.	RWH	.50	187.50

TOTAL HOURS 2.75

TOTAL SERVICES . . . . . \$1,031.25

TOTAL DUE THIS STATEMENT . . . . . \$1,031.25

JT-APP 3056

August 14, 2001

Golden Blount

Page 2

As of July 31, 2001

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

Please remit payment to:  
Locke Liddell & Sapp LLP  
P. O. Box 911541  
Dallas, Texas 75391-1541

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JT-APP 3057

**SUMMARY OF LOCKE, LIDDELL, & SAPP, LLP BILLING**  
(From January, 2000 to July, 2001)

<b>FEE EARNER</b>	<b>TOTAL HOURS</b>	<b>BILLING RATE</b>
L. Dan Tucker	1.90	\$325.00
Monty L. Ross	1.50	\$335.00
Roy W. Hardin	22.75	\$350.00 - \$375.00
Michael W. Dubner	20.00	\$135.00
Charles Phipps	34.00	\$130.00
<b>Total:</b>	<b>80.15 hours</b>	<b>\$18,967.50</b>

**SUMMARY OF HITT GAINES, P.C. BILLING**  
(From August, 2001 to June 10, 2004)

<b>FEE EARNER</b>	<b>TOTAL HOURS</b>	<b>BILLING RATE</b>
William D. Harris, Jr.	437.00	\$350.00
Charles W. Gaines	202.80	\$290.00
Charles W. Gaines	137.60	\$300.00
Greg H. Parker	965.10	\$175.00
Greg H. Parker	170.90	\$225.00
James Ortega	67.50	\$175.00
Carol Garland (Paralegal)	21.60	\$75.00
Carol Garland (Paralegal)	8.8	\$90.00
Trudy McGruder (Paralegal)	36.10	\$65.00
<b>Total:</b>	<b>2251.60 hours</b>	<b>\$548,428.00</b>

JT-APP 3058

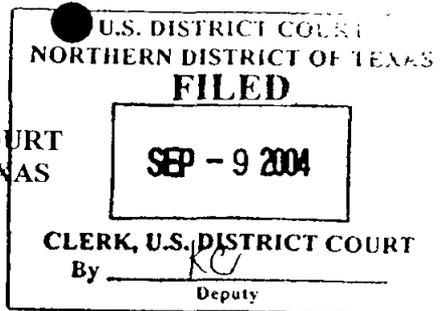
**SUMMARY OF SCHULTZ & ASSOCIATES, P.C. BILLING**  
(From September, 2003 to June 10, 2004)

<b>FEE EARNER</b>	<b>TOTAL HOURS</b>	<b>BILLING RATE</b>
William D. Harris, Jr.	162.6	\$325.00
John Pemberton	9.1	\$195.00
<b>Total:</b>	<b>171.7 hours</b>	<b>\$54,619.50</b>

JT-APP 3059

*R*  
ORIGINAL

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION



GOLDEN BLOUNT, INC.

Plaintiff,

v.

ROBERT H. PETERSON CO.,

Defendant.

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§

CIVIL ACTION NO.  
3-01-CV-0127-R

GOLDEN BLOUNT, INC.'S APPLICATION FOR COSTS

TO THE HONORABLE UNITED STATES JUDGE JERRY BUCHMEYER:

NOW COMES Plaintiff Golden Blount, Inc. (hereinafter "Golden Blount") to file this its Application for Costs (hereinafter "the Application") against Robert H. Peterson Co. (hereinafter "Robert H. Peterson"), and would show the Court as follows:

1. On September 2, 2004, the Court in the above-styled action adopted the Findings of Fact and Conclusions of Law submitted by Golden Blount on August 31, 2004, finding for Golden Blount on all issues. Among other things, the Court determined that Robert H. Peterson willfully infringed the Blount Patent. The Court further found that this was an "exceptional case," warranting an award of attorneys' fees to Golden Blount.

2. Golden Blount has expended approximately \$10,031.04 in Costs related to Robert H. Peterson's infringement of the '159 Patent.

3. Golden Blount now seeks to recover the Costs in the amount of \$10,031.04, which are clearly set forth and supported in the Bill of Costs filed with the Court on September 8, 2004.

**WHEREFORE, PREMISES CONSIDERED,** Plaintiff Golden Blount, Inc. requests that this Court grant Golden Blount's Costs, and award them against Robert H. Peterson.

DATE: September 9, 2004.

Respectfully submitted,

For Plaintiff Golden Blount, Inc.



Charles W. Gaines  
State Bar No. 07570580  
Greg H. Parker  
State Bar No. 24011301  
HITT GAINES, P.C.  
2435 North Central Plaza  
Suite 1300  
Richardson, Texas 75080  
972/480-8800 (Telephone)  
972/480-8865 (Facsimile)

William D. Harris, Jr.  
State Bar No. 09109000  
SCHULTZ & ASSOCIATES, P.C.  
5400 LBJ Freeway  
One Lincoln Center, Suite 525  
Dallas, Texas 75240  
214/210-5940 (Telephone)  
214/210-5941 (Facsimile)

CERTIFICATE OF CONFERENCE

I hereby certify that on or about September 9, 2004, a conference was held with counsel for Defendant, to determine whether agreement could be reached with regard to the relief sought herein. As a result of such conference, agreement could not be reached; accordingly, the matter is presented to the Court for determination.

  
Charles W. Gaines

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of Golden Blount, Inc.'s Application for Costs was served upon the following counsel of record, via first class mail on September 9, 2004.

Jerry R. Selinger  
Jenkins & Gilchrist  
1445 Ross Avenue, Suite 3200  
Dallas, Texas 75202  
(214) 855-4500  
(214) 855-4300 (Facsimile)

  
Charles W. Gaines

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

GOLDEN BLOUNT, INC.,	§	
	§	
Plaintiff,	§	
	§	Civil Action No.
v.	§	
	§	3-01CV0127-R
ROBERT H. PETERSON CO.,	§	
	§	
Defendant.	§	

ORDER

This Court, consistent with the Findings of Fact and Conclusions of Law adopted on September 2, 2004, in which Golden Blount was awarded treble damages and attorneys' fees, is of the opinion that Golden Blount Costs shall be taxed against Defendant.

IT IS SO ORDERED.

ENTERED: this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

\_\_\_\_\_  
JERRY BUCHMEYER  
SENIOR UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF TEXAS

ORIGINAL

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FILED  
SEP 16 2004  
CLERK, U.S. DISTRICT COURT  
By DB  
Deputy

GOLDEN BLOUNT, INC.,

Plaintiff,

VS.

ROBERT H. PETERSON CO.,

Defendant.

§  
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CA 3:01-CV-0127-R

ORDER OF REFERENCE

Plaintiff's APPLICATION FOR ATTORNEY FEES (filed September 8, 2004) and Plaintiff's APPLICATION FOR COSTS (filed September 9, 2004) are referred to United States Magistrate Judge Paul D. Stickney for hearing, if necessary, and recommendations or determination, to this Court. See 28 U.S.C.A. § 636(b) (1993).

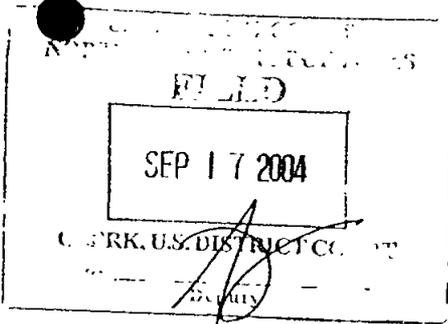
Future pleadings concerning these motions shall be filed with a transmittal letter addressed to Magistrate Judge Stickney so copies can be sent directly to him without delay.

It is so ORDERED.

SIGNED this 16 day of September, 2004.

  
JERRY BUCHMEYER  
SENIOR UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION



*Handwritten signatures and initials*

GOLDEN BLOUNT, INC.

Plaintiff,

v.

ROBERT H. PETERSON CO.

Defendant.

§  
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§

Civil Action No. 3-01CV0127-R

(JURY TRIAL DEMANDED)

NOTICE OF APPEAL

Notice is hereby given that the Robert H. Peterson Co., Defendant in the above-identified action, hereby appeals to the United States Court of Appeals for the Federal Circuit from this Court's August 18, 2004 Order, vacating Defendants findings of fact and conclusions of law and adopting Plaintiff's findings of fact and conclusions of law (attached hereto as Exhibit A).

In the alternative, Defendant Robert H. Peterson Co. appeals from the following:

- 1) Order entered September 2, 2004, vacating Defendant Robert H. Peterson's Application for Attorneys' Fees previously adopted on August 11, 2004 (attached hereto as Exhibit B);
- 2) Order entered September 2, 2004, vacating Defendant's Findings of Fact and Conclusions of Law previously adopted on June 22, 2004 and adopting Plaintiff's Findings of Fact and Conclusions of Law submitted on August 31, 2004 (attached hereto as Exhibit C); and

- 3) Findings of Fact and Conclusions of Law dated September 2, 2004 (attached hereto as Exhibit D).

Dated: September 17, 2004

Respectfully submitted,

  
Jerry R. Selinger  
State Bar No. 18008250  
JENKINS & GILCHRIST, A.P.C. *by permission P. Harty*  
1445 Ross Avenue, Suite 3200  
Dallas, Texas 75202  
214/855-4776 (Telephone)  
214/855-4300 (Facsimile)

OF COUNSEL:

Leland W. Hutchinson, Jr.  
Jennifer L. Fitzgerald  
David S. Becker  
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CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing document was served by first-class mail, postage prepaid, to counsel for Plaintiff, William D. Harris, Jr., Schultz & Associates, P.C., 5400 LBJ Freeway, One Lincoln Center, Suite 525, Dallas, Texas 75240. and Charles Gaines, Hitt Gaines, P.C., 2435 North Central Plaza, Suite 1300, Richardson, Texas 75080, this 17th day of September, 2004.

Steven Parker

**MINUTE ORDER**

**UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS**

PLACE: Dallas                      JUDGE: Jerry Buchmeyer                      DATE: August 18, 2004

REPORTER: Joe Belton                      COURTROOM DEPUTY : Tannica Stewart

INTERPRETER:                      CSO : Present                      COURT TIME: 2.0

**CIVIL ACTION**

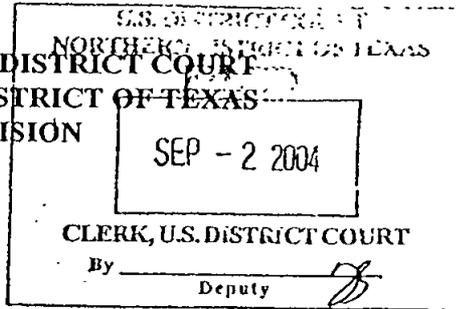
<u>TIME</u>	<u>CASE NUMBER &amp; STYLE</u>	<u>TYPE OF HEARING</u>	<u>ATTYS PRESENT</u>
10:00 a.m.	3:01-CV-127-R Golden Blount, v. Peterson	Motion Hearing	P - Charles Gaines D - Leland Hutchinson

Dft's findings of fact and conclusions of law  
VACATED....Plaintiff's findings of fact and  
conclusions of law adopted.

11:40 a.m.                      Court adjourned

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
**FILED**  
AUG 18 2004  
CLERK, U.S. DISTRICT COURT  
By \_\_\_\_\_ Deputy *JS*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION



GOLDEN BLOUNT, INC.,

Plaintiff,

v.

ROBERT H. PETERSON CO.,

Defendant.

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CLERK, U.S. DISTRICT COURT

By Deputy [Signature]

Civil Action No.

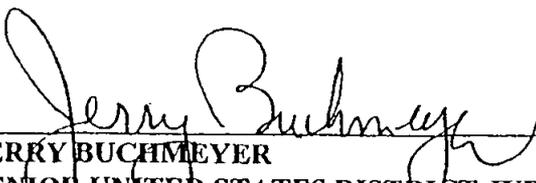
3-01CV0127-R

ORDER

This Court, consistent with its ruling at the conclusion of the Oral Hearing on August 18, 2004, hereby VACATES Defendant Robert H. Peterson's Application for Attorneys' Fees previously adopted on August 11, 2004.

IT IS SO ORDERED.

ENTERED: this 2 day of Sept., 2004.

  
\_\_\_\_\_  
JERRY BUCHMEYER  
SENIOR UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

SEP - 2 2004  
CLERK, U.S. DISTRICT COURT  
By \_\_\_\_\_ Deputy

GOLDEN BLOUNT, INC.,

Plaintiff,

v.

ROBERT H. PETERSON CO.,

Defendant.

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Civil Action No.

3-01CV0127-R

ORDER

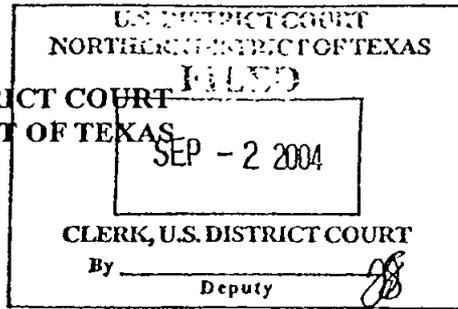
This Court, consistent with its ruling at the conclusion of the Oral Hearing on August 18, 2004, hereby VACATES Defendant's Findings of Fact and Conclusions of Law previously adopted on June 22, 2004. The Court, also consistent with its ruling at the conclusion of the Oral Hearing on August 18, 2004, is of the opinion that the Plaintiff's Findings of Fact and Conclusions of Law submitted on August 31, 2004, are correct, and they are hereby ADOPTED as the Findings and Conclusions of this Court.

IT IS SO ORDERED.

ENTERED: this 2 day of Sept., 2004.

  
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JERRY BUCHMEYER  
SENIOR UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION



GOLDEN BLOUNT, INC.,  
Plaintiff,

v.

ROBERT H. PETERSON CO.,  
Defendant.

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Civil Action No.

3-01CV0127-R

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has conducted a bench trial on plaintiff Golden Blount Inc.'s claims against defendant Robert H. Peterson for a finding of infringement of U.S. Patent No. 5,988,159 and permanent injunction, and on Peterson's counterclaims of invalidity and non-infringement. In accordance with FED. R. CIV. P. 52(a) and consistent with the Court of Appeals for the Federal Circuit's Opinion<sup>1</sup> decided April 19, 2004, the Court enters the following findings of fact and conclusions of law.<sup>2</sup>

**FINDINGS OF FACT**

1. This is an action for patent infringement. The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1338(a). The Court has personal jurisdiction over the parties. Venue in this judicial district is proper under 28 U.S.C. § 1391.

<sup>1</sup> While the Appellate Court held that the patent was not invalid, and that the defense of unenforceability was waived, this Court includes general reference to these elements for completeness. *Golden Blount, Inc. v. Robert H. Peterson Co.*, 365 F.3d 1054 (Fed. Cir. 2004).

<sup>2</sup> This order contains both findings of fact ("Findings") and conclusions of law ("Conclusions"). To the extent that any Findings may be deemed conclusions of law, they shall also be considered Conclusions. To the extent that any Conclusions may be deemed findings of fact, they shall also be considered Findings. See *Miller v. Fenton*, 474 U.S. 104, 113-14, 88 L. Ed. 2d 405, 106 S. Ct. 445 (1985).

2. Plaintiff Golden Blount, Inc. ("Blount") is a United States corporation having a principal place of business in Addison, Texas.

3. Defendant Robert H. Peterson Co. ("Peterson") is a United States corporation having a principal place of business in City of Industry, California.

4. Blount is the owner by assignment of U.S. Patent No. 5,988,159 ("the '159 patent"), entitled "Gas-Fired Artificial Logs and Coals-Burner Assembly," which issued on November 23, 1999. The '159 patent expires on November 23, 2016.

5. Blount filed this suit for infringement of the '159 patent under 35 U.S.C. §§ 271(a) thru 271 (c) on January 18, 2001.

6. On March 19, 2001, Peterson filed its Answer and Counterclaim. Peterson denied infringement and asserted counterclaims for noninfringement and invalidity of the '159 patent.

7. A bench trial, by agreement of the parties, commenced on July 29, 2002, and ended on July 31, 2002.

8. Claims 1, 2, 5, 7-9, 11-13 and 15-17 are at issue in this case. Claims 1 and 17 are independent claims. All the other claims at issue are dependent on claim 1.

9. Claim 1 of the '159 patent reads as follows:

A gas-fired artificial logs and coals-burner assembly for fireplace comprising:  
an elongated primary burner tube including a plurality of gas discharge ports;  
a secondary coals burner elongated tube positioned forwardly of the primary burner tube;

a support means for holding the elongated primary burner tube in a raised level relative to the forwardly position secondary coals burner elongated tube;

the secondary coals burner elongated tube including a plurality of gas discharge ports;

the elongated primary burner tube and the secondary coals burner elongated tube communicating through tubular connection means wherein the gas flow to the secondary elongated coals burner tube is fed through the primary burner tube and the tubular connection means;

a valve for adjusting gas flow to the secondary coals burner elongated tube positioned in the tubular gas connection means; and

the primary burner tube being in communication with a gas source with a gas flow control means therein for controlling gas flow into said primary burner tube.

10. Claim 2 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the support means for the primary burner tube is comprised of an open frame pan for supporting the primary burner tube in an elevated position relative to the fireplace floor.

11. Claim 5 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the secondary coals burner elongated tube is substantially parallel to the primary burner tube and has a smaller inside diameter than the primary burner tube with the valve adjusting gas flow for coals burn and forwarding heat radiation from the fireplace.

12. Claim 7 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the elongated primary burner tube and the secondary coals burner elongated tube are spaced apart on different planes at from about four to about eight inches.

13. Claim 8 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the secondary coals burner elongated tube is of a smaller diameter than the primary burner tube which allows for a lower profile of coals and sand coverage.

14. Claim 9 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the secondary coals burner elongated tube is adjustable in height relative to the floor of the fireplace and the elevated primary burner tube.

15. Claim 11 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the primary and secondary burner tubes have apertures of from about 1/32 inch to about 1/8 inch.

16. Claim 12 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the gas flow adjustment valve has a removable handle, the gas flow adjustment allowing a variety of settings from full closed to full open.

17. Claim 13 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the connection means is comprised of a connector attached to the terminal end of the primary burner tube at a first end of a connector and attached to the secondary coals burner elongated tube to a connector second end with the valve interposed between the primary burner tube and the secondary burner tube.

18. Claim 15 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the open frame pan and primary elongated burner tube is positioned under an artificial logs and grate support means.

19. Claim 16 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the primary elongated burner tube is covered with sand and the secondary

elongated burner tube is covered with sand, mica, and fibrous materials which simulate coals and ember burn.

20. Claim 17 of the '159 patent reads as follows:

A gas-fired artificial coals- and embers-burner apparatus suitable for attaching to a gas-fired primary artificial log burner tube said primary artificial log burner tube having a terminal end comprising:

a secondary coals burning elongated tube;

a connector means for connecting said terminal end in communication with the secondary burner tube, the secondary burner tube positioned substantially parallel, forward and below the primary burner tube, the connector means having interposed between the primary and secondary burner tubes a gas flow adjustment valve, the primary and secondary burner tubes having a plurality of gas discharge ports, the secondary burner tube being in gas flow communication with the primary burner tube being the connection means, a gas distribution ports of the secondary burner tube directed away from the fireplace opening.

21. At the time the patent issued, Blount's commercial structure covered by the '159 patent had been marketed for approximately six years. (Trial Transcript, hereafter referred to as "Tr.", vol. 1, pg. 158). The invention covered by the '159 patent is a simple yet very useful device that is to be used in artificial gas fireplaces. The general idea is that the device has two tubes, with the main or primary burner tube being higher than the ember burner tube to allow for artificial embers and sand to be fanned out over the tubes with a decreasing depth of materials to simulate a natural angle of repose of coals in a real fireplace. A secondary valve controls the flow of gas from the primary burner tube to the ember burner to allow for an adjustment of flame from the ember burner. Thus, with the presence of the ember burner forward the primary burner tube, more flame can be provided out front of the gas logs to better simulate a real fireplace and thereby make the artificial fireplace more aesthetically pleasing. Evidence presented at trial establishes that Peterson's accused device fulfills exactly the same purpose. (Tr. vol. 2, pg 175; Defendant's Ex. No. D-33).

22. Blount's sales of its commercial structure grew significantly during the time spanning the filing of the application that resulted in the '159 patent and the issuance of the '159 patent. (Tr., vol. 1, pg. 36-37).

23. In late 1996 or early 1997, Peterson began manufacturing, advertising and selling a device that was strikingly similar to, if not a virtual copy of, Blount's commercial structure. (Tr., vol. 2, pg. 76 and pg. 172).

24. Blount's '159 patent issued on November 23, 1999. (Plaintiff's Ex. No. 1).

25. Blount notified Peterson of the existence of the '159 patent and Peterson's infringing activities on December 16, 1999, using a certified letter postmarked December 10, 1999, from Mr. Dan Tucker (attorney for Blount) to Peterson's president, Mr. Leslie Bortz. (Plaintiff's Ex. No. 10).

26. This first certified letter included a copy of the '159 patent, and informed Peterson that Blount was prepared to take whatever steps were reasonable and necessary to prevent infringement. Blount requested a response regarding this matter from Peterson by January 14, 2000. (Plaintiff's Ex. No. 10).

27. On December 17, 1999, Mr. Tod Corrin (Peterson's Vice President) forwarded the December 10, 1999, certified letter onto Peterson's patent counsel, Mr. William McLaughlin. Mr. Corrin wrote, in a cover letter included with the copy of the first certified letter, "[e]nclosed is a *patent infringement* letter we received from Golden Blount's Attorney." (Plaintiff's Ex. No. 17, emphasis added). Given the letter from Blount's attorney and this acknowledgment by Mr. Corrin, this Court finds that Peterson had knowledge of its infringement of the '159 patent as of December 16, 1999.

28. On December 30, 1999, Peterson responded to Blount's letter of December 10, 1999, explaining that Peterson had forwarded the December 10, 1999, letter to its attorneys and that Peterson would get back with Blount as soon as possible. Given the December Holidays, as well as the New Year, Peterson informed Blount that Blount's January 14, 2000, response date was unreasonable. (Plaintiff's Ex. No. 11).

29. After receiving no response from Peterson for more than four months, Blount sent a second certified letter to Peterson on May 3, 2000, again informing Peterson of its patent infringement. The May 3, 2000, letter advised Peterson that Blount "will take [the] necessary steps to stop any such *infringement*." (Plaintiff's Ex. No. 12, emphasis added).

30. Peterson responded to the May 3, 2000, letter on May 16, 2000, that it disagreed with Blount's assertion that Peterson was marketing a device that was substantially similar to the burner assembly claimed in the '159 patent. Peterson further asked that Blount explain to it, in detail, the basis upon which Blount believed that Peterson was infringing the patent. (Plaintiff's Ex. No. 13).

This Court finds that Peterson's disagreement lacks any serious credibility, since a simple comparison of the device as illustrated in the '159 patent with Peterson's product would have revealed to any reasonable person that infringement was highly likely. Moreover, the record before this Court reveals that Peterson did not have any documents before it or its attorney at this time that provides a reasonable basis for this statement. Even though Blount did not give any explanation to Peterson, this did not relieve Peterson of its obligation to investigate in good faith whether it was in fact infringing the '159 patent. This Court further finds that the May 3, 2000, letter was written simply for the purpose of delay, or even with the hope that the infringement matter would go away. This Court, therefore, concludes that the request was not genuine.

31. On January 18, 2001, over a year after Peterson received its first notice of infringement letter, Blount filed suit. (Plaintiff's Ex. No. 14). Blount's initial notice letter of December 10, 1999, met the notice requirements under 35 U.S.C. § 287(a), and therefore, Peterson's additional information request did not relieve Peterson of its obligation to determine if it was infringing the '159 patent.

32. Blount sent a final letter on January 19, 2001, to Peterson advising Peterson that suit was brought in view of its failure to respond or indicate in any manner its intentions with respect to its infringing product. (Plaintiff's Ex. No. 14).

33. Peterson made no efforts to cease its infringing activities either in the time period spanning the December 10, 1999, letter and the January 19, 2001, letter, or for that matter, up and until the commencement of this trial. (Plaintiff's Ex. No. 17 & Updated Sales Figures provided by Peterson in response to this Court's request).

34. During the period between December 16, 1999, and September 19, 2002, Peterson sold 3,723 ember flame burner units ("ember burners"). (Tr., vol. 2, pg. 181 and Peterson Company's Objection to Golden Blount's Motion for Updated Damages filed on September 18, 2002).

35. Peterson's ember burner is intended to be attached to its G-4 series burner system or G-5 series burner system. (Joint Pretrial Order--Stipulations, pg. 6). In addition to selling the ember

burner, Peterson also sells log sets that can be used with the ember burner and often uses the ember burner to entice their customers to come back in and buy new log sets. (Tr. vol. 2, pg 178).

36. The G-4 and G-5 series burner systems are substantially identical except that Peterson pre-assembles the G-5 burner system according to certain Canadian Gas Association specifications. (Tr., vol. 2, pg. 179).

37. At least 10 of the 3,723 Ember burners sold by Peterson were included on the pre-assembled G-5 series burner systems. (Oct. 5, 2001, deposition of Mr. Leslie Bortz, pg. 154-55).

38. At trial, Blount introduced Plaintiff's Exhibit No. 4A, which is one of Peterson's manufactured products including a Peterson G-4 burner pan with Peterson's ember burner attached to it. Blount properly laid foundation for this Plaintiff's Exhibit No. 4A through the testimony of one of Peterson's own witnesses, Mr. Jankowski, who stated that he recognized Plaintiff's Exhibit No. 4A as Peterson's products. (Tr. vol. 2, pg. 145). Also, Mr. Blount, whose business competes with Peterson's, identified Plaintiff's Exhibit No. 4A as being Peterson's competing product. (Tr. vol. 1, pg. 144). This Court also finds that foundation for this device is further established because the Court finds it to be virtually identical to the picture on page 3 of Peterson's own general installation instructions (introduced at trial by Peterson as Defendant's Ex. No. D-34), except for the valve knob, which is not at issue.

#### LITERAL INFRINGEMENT-DIRECT

39. The construction of the claims appears under paragraphs 120 thru 123 of the Conclusions of Law section. The determination of infringement based on the construed claims is factual and is therefore organized here under the Findings of Fact.

40. The analysis with respect to the literal infringement of claim 1 is as follows:

The first element of claim 1 reads: "an elongated primary burner tube including a plurality of gas discharge ports." Based upon the totality of the evidence, including unrebutted testimony of Mr. Golden Blount and this Court's own observations of the accused device, it is this Court's finding that the primary burner tube is the fundamental burner tube used in a majority of all gas operated fireplaces. Similarly, the plurality of gas discharge ports allow the flammable gas to escape from the primary burner tube and be ignited to provide a flame. Blount presented the unrebutted oral testimony of Mr. Blount, who using an infringement chart (Plaintiff's Ex. No. 9) as a guide, testified

that Peterson's manufactured products include a primary burner tube having gas discharge ports therein. (Tr., vol. 1, pg. 45-50). In addition to this un rebutted testimony, this Court had the opportunity to closely observe an assembled version of Peterson's manufactured product<sup>3</sup>, wherein this Court observed Peterson's manufactured product having the primary burner tube including two or more gas discharge ports. (Tr., vol. 2, pg. 28). Peterson even admitted and stipulated to the presence of this element in its device. (Tr., vol. 2, pg. 173; Joint Pretrial Order--Stipulations, pg. 6). Further, Peterson never presented any evidence that its manufactured products did not contain the aforementioned claimed element. Thus, Peterson's manufactured products meet the first limitation of claim 1, which reads: "an elongated primary burner tube including a plurality of gas discharge ports."

41. The second element of claim 1 reads: "a secondary coals burner elongated tube positioned forwardly of the primary burner tube." Given the claim interpretation as set forth by the Court of Appeals for the Federal Circuit and based upon the totality of the evidence, the secondary coals burner elongated tube is positioned toward the opening of the fireplace, at least as compared to the primary burner tube, and is designed to provide a realistic flame, likened to a flame that might emanate from burning coals. Blount again presented evidence in the form of oral testimony of Mr. Blount, that Peterson's manufactured products include a secondary coals burner elongated tube, and that it is positioned forwardly of the primary burner tube. (Tr., vol. 1, pg. 45-50). Based on this Court's close observation of Peterson's manufactured product<sup>4</sup>, this Court finds that Peterson's manufactured products contain the claimed secondary coals burner elongated tube, which in Plaintiff's Exhibit No. 4A is Peterson's Ember Flame Booster (ember burner), and that it was positioned forwardly the primary burner tube. (Tr., vol. 2, pg. 28). Peterson even admitted and stipulated to the presence of this element in its device. (Tr., vol. 2, pg. 173; Joint Pretrial Order--Stipulations, pg. 6). Further, Peterson never presented evidence that conclusively established that its manufactured products did not contain the aforementioned claimed element. Thus, Peterson's manufactured products meet the second limitation of claim 1, which reads: "a secondary coals burner elongated tube positioned forwardly of the primary burner tube."

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<sup>3</sup> See Finding of Fact No. 38, discussed above.

<sup>4</sup> See Finding of Fact No. 38, discussed above.

42. The third element of claim 1 reads: "a support means for holding the elongated primary burner tube in a raised level relative to the forwardly position[ed] secondary coals burner elongated tube." The previous two paragraphs already demonstrate that Peterson's manufactured products include both the elongated primary burner tube and the forwardly positioned secondary coals burner elongated tube. The only additional limitation added by this element is that a support means holds the elongated primary burner tube in a raised level relative to the secondary coals burner elongated tube. Peterson's manufactured products include a support means that holds the primary burner tube. Actually, Peterson's support means, which is an industry standard pan, is substantially identical if not completely identical, in shape and function to the support means illustrated in the '159 patent. (Tr., vol. 1, pg. 47). The question for this Court to rule on is whether Peterson's support means holds Peterson's elongated primary burner tube in a raised level relative to its secondary coals burner elongated tube. As affirmed by the Court of Appeal for the Federal Circuit, this Court construes the term "raised level" to mean that the top of the primary burner tube is at a raised level with respect to the top of the secondary burner tube. Blount offered evidence at trial that the top of Peterson's primary burner tube was higher than the top of Peterson's ember burner tube, by demonstrating before this Court, using a carpenter's level laid across the tops of the tubes of Plaintiff's Exhibit No. 4A, that Peterson's primary burner tube was raised with respect to its secondary burner. (Tr., vol. 2, pg. 28). Even Peterson's own patent attorney, Mr. McLaughlin, admitted during the demonstration that "assuming the table is level, the top of the front burner is below the top of the rear burner." (Tr., vol. 2, pg. 29). Also, Peterson's executive Mr. Bortz admitted that the top of the ember burner was lower than the top of the primary burner. (Tr., vol. 2, pg. 42). Similarly, Mr. Corrin testified that the tube is below the top of the main burner tube. (Tr., vol. 2, pg. 173 and Defendant's Ex. No. 8). The above evidence was, for the most part, unrebutted because Peterson based the majority of its case in chief on the argument that the relative height of the primary burner tube with respect to the secondary coals burner elongated tube should be measured from the bottoms of the respective tubes, or the ports. This Court further observed a general set of instructions included within the box of each ember burner, (Defendant's Ex. No. D-34 at pg. 3), which instructs the person assembling the device to tighten the Ember Flame Booster (ember burner) so that the valve faces forward and flush with the burner pan. According to the testimony of Mr. Bortz, the normal configuration is to have the valve resting on the fireplace floor because it serves as a support

for the ember burner. (Leslie Bortz Deposition, vol. 1, pg. 70-71). At trial, and as observed by this Court, when the valve was resting on the table flush with the pan, the top of the primary burner was above the top of the ember burner. Additionally, Peterson actually offered to this Court, (Defendant's Ex. No. D-30), which it stated was provided to customers and installers to illustrate how to properly install the assembly. (Tr. vol. 2, pg. 183). While Defendant's Exhibit No. D-30 was offered in an attempt to establish non-infringement based upon Peterson's asserted bottoms test that it was proposing, the instructions clearly illustrate that Peterson's preferred installation has the tops of the primary burner tube being in a raised level with respect to the tops of the secondary coals burner elongated tube. Thus, given the above discussed interpretation, and in view of the evidence presented, Peterson's manufactured products meet the third limitation of claim 1, which reads: "a support means for holding the elongated primary burner tube in a raised level relative to the forwardly position[ed] secondary coals burner elongated tube."

43. The fourth element of claim 1 reads: "the secondary coals burner elongated tube including a plurality of gas discharge ports." Blount again presented oral testimony of Mr. Blount that the secondary coals burner elongated tube of Peterson's manufactured products include a plurality of gas discharge ports. (Tr., vol. 1, pg. 45-50). Further, this Court's close observation of Peterson's manufactured product<sup>5</sup> established that Peterson's secondary coals burner elongated tube includes a plurality of gas discharge ports. (Tr., vol. 2, pg. 28). Peterson also admitted to the presence of a plurality of gas discharge ports or jets, (Tr., vol. 2, pg. 174), and mentions this claimed element in its installation instructions. (Defendant's Ex. No. D-34). Further, Peterson never presented any evidence that its manufactured products did not contain the aforementioned claimed element that successfully rebuts Blount's evidence on this point. Thus, Peterson's manufactured products meet the fourth limitation of claim 1, which reads: "the secondary coals burner elongated tube including a plurality of gas discharge ports."

44. The fifth element of claim 1 reads: "the elongated primary burner tube and the secondary coals burner elongated tube communicating through tubular connection means wherein the gas flow to the secondary elongated coals burner tube is fed through the primary burner tube and the tubular connection means." Blount presented the oral testimony of Mr. Blount that Peterson's manufactured

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<sup>5</sup> See Finding of Fact No. 38, discussed above.

products include the tubular connection means and that the gas flow to the secondary elongated coals burner tube is fed through the primary burner tube and tubular connection means. (Tr., vol. 1, pg. 45-50). Additionally, this Court physically observed this claimed element in Peterson's manufactured product<sup>6</sup>, (Tr., vol. 2, pg. 28), and again notes that the illustration in Defendant's Exhibit No. D-34 shows this tubular connection means. Moreover, Peterson never presented any evidence that its manufactured products did not contain the aforementioned claimed element. Thus, Peterson's manufactured products meet the fifth limitation of claim 1, which reads: "the elongated primary burner tube and the secondary coals burner elongated tube communicating through tubular connection means wherein the gas flow to the secondary elongated coals burner tube is fed through the primary burner tube and the tubular connection means."

45. The sixth element of claim 1 reads: "a valve for adjusting gas flow to the secondary coals burner elongated tube positioned in the tubular gas connection means." The evidence as established by Mr. Blount's testimony, Peterson's general instructions (Defendant's Ex. No. D-34), and this Court's own inspection of Plaintiff's Exhibit No. 4A, confirms the presence of the valve. (Tr., vol. 1, pg. 45-50 and vol. 2, pg. 28). Peterson even admitted and stipulated to the presence of this element in its device. (Tr., vol. 2, pg. 173; Joint Pretrial Order--Stipulations, pg. 6). Further, Peterson never presented any evidence that its manufactured products did not contain the aforementioned claimed element. Thus, Peterson's manufactured products meet the sixth limitation of claim 1, which reads: "a valve for adjusting gas flow to the secondary coals burner elongated tube positioned in the tubular gas connection means."

46. The seventh element of claim 1 reads: "the primary burner tube being in communication with a gas source with a gas flow control means therein for controlling gas flow into said primary burner tube." Blount again presented the oral testimony of Mr. Blount that the primary burner tube of Peterson's manufactured products would ultimately be coupled to a gas source with a gas flow control means therein for controlling gas flow into the primary burner tube. (Tr., vol. 1, pg. 45-50). Furthermore, the parties stipulated prior to the commencement of the trial that "Robert H. Peterson Co.'s ember burner is intended to be attached to its G-4 series burner system or G-5 series burner system and the combined unit comprises a primary burner pipe, an ember pan that supports the

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<sup>6</sup> See Finding of Fact No. 38, discussed above.

primary burner pipe, a secondary burner tube and a valve that controls a flow of gas between the primary burner pipe and the secondary burner tube, and that an end user *would* connect the primary burner pipe to a gas source having a valve associated therewith." (Joint Pretrial Order--Stipulations, pg. 6). Thus, Peterson's manufactured products would ultimately meet the seventh limitation of claim 1, which reads: "the primary burner tube being in communication with a gas source with a gas flow control means therein for controlling gas flow into said primary burner tube."

47. This Court finds that the above evidence is substantial and it clearly establishes that Peterson's accused device contains each and every element of claim 1 of the '159 patent.

48. The evidence presented at trial establishes that Peterson provided its customers with two sets of installation instructions. One set was a general set of instructions, (Defendant's Ex. No. D-34 at pg. 3), which instructs the person assembling the device to tighten the Ember Flame Booster (ember burner) so that the valve faces forward and flush with the burner pan. According to the testimony of Mr. Bortz, the normal configuration is to have the valve resting on the fireplace floor because it serves as a support for the ember burner. (Leslie Bortz Deposition, vol. 1, pg. 70-71). At trial, and as observed by this Court, when the valve is resting on the table flush with the pan, the top of the primary burner is above the top of the ember burner. The other set of instructions, (Defendant's Ex. No. D-30), was very specific in the way in which the ember burner was to be oriented with respect to the primary burner. When the device is installed pursuant to these instructions, Defendant's Exhibit No. D-30 clearly shows that the top of the primary burner is above the top of the ember burner. Thus, both of these instructions consistently show that when the G-4 or the G-5 and the ember burner of Peterson's accused device are installed pursuant to these instructions, it would result in an infringing configuration.

49. Although Peterson did not make this argument at any time during trial, Peterson asserts on remand that Blount has not established direct infringement by it or its customers because Blount never directly proved how the devices were actually assembled. Peterson, instead relied on its case-in-chief that it did not infringe because of its urged claim construction and that the '159 patent was invalid, both of which this Court and the Federal Circuit rejected. Moreover, Peterson's position is against the weight of the evidence, both direct and circumstantial, in this case. This Court finds that the evidence clearly supports a case of direct infringement, not only by Peterson, but by its customers as well. Case law holds that when instructions are provided with an infringing device, it can be

circumstantially inferred that the customer follows those instructions with respect to the accused device. Thus, it is reasonable for this Court to conclude that both Peterson and its customers would have assembled the devices in the way set forth in both sets of Peterson's assembly instructions. Peterson's direct infringement of claim 1 is established by the testimony of Messrs. Bortz and Corrin, both corporate officers of Peterson, who testified that Peterson assembled and operated the infringing device for distributors so they had the opportunity to see how the item worked. (Tr., vol. 2, pg. 65-66 and 199). In addition, Peterson itself assembled and sold at least 10 G-5 devices with a preassembled ember burner, which are the same as the G-4 except for being preassembled to comply with ANSI regulations. Mr. Bortz testified that he was sure that the ember burner was used with the G-5 because Peterson preassembled it and put it together, presumably in accordance with its own instructions. (Leslie Bortz Deposition, vol. 1, pg. 36). There has been no reasons given to this Court why Peterson didn't assemble these devices in accordance with its own instructions. Thus, the record establishes direct infringement on the part of Peterson itself.

50. Direct infringement by the ultimate purchasers of claim 1 is established by the evidence that proves that Peterson supplied all the required elements of claims 1, 15 and 17 of the '159 patent, as well as installation instructions, (Defendant's Ex. Nos. D-34 & D-30; Tr. vol. 2, pg. 177, 183), to its ultimate purchasers. It is reasonable to conclude that these instructions were used by Peterson's ultimate customers to assemble the ember burner, its associated components, and connect it to a gas source as stipulated by the parties. (Tr., vol. 1, pg. 45-50). These facts provide this Court with both direct and circumstantial evidence to find that direct infringement of claim 1 did indeed occur by Peterson's ultimate consumers.

51. Therefore, Blount has clearly established direct infringement on the part of Peterson and the ultimate purchaser of claim 1 of the '159 patent.

52. Dependent claim 15 includes all of the elements of independent claim 1 plus the element that "the open frame pan and primary elongated burner tube is positioned under an artificial logs and grate support means." Literal infringement of dependent claim 15 is particularly important because claim 15 includes the artificial logs and the grate support means. As set forth above, Peterson also manufactures and sells logs and other accessory items that can be sold with its G-4 or G-5 and the ember burner, and in fact uses the ember burner to entice customers to come back and buy new logs. (Tr., vol. 2, pg 178).

53. Sufficient evidence exists in the record to establish that Peterson's burner will ultimately be positioned under an artificial logs and grate support means. Therefore, Blount has clearly established direct infringement on the part of Peterson and the ultimate purchaser of claim 15 of the '159 patent.

54. This Court further concludes that in addition to directly infringing independent claims 1 & 15 of the '159 patent, Peterson and the ultimate purchasers directly infringe independent claim 17 of the '159 patent.

55. With the exception of a few additional elements included in independent claim 17 not included in independent claim 1, and a few elements included within independent claim 1 that are not included within independent claim 17, claims 1 and 17 are substantially similar.

56. Independent claim 17 does not include the claim limitation of independent claim 1 that the primary burner is in communication with a gas flow control means. Thus, this element need not be found in Peterson's manufactured products to find direct infringement by Peterson of independent claim 17.

57. The first element of independent claim 17 recites: "a secondary coals burning elongated tube," and is similar to the fourth element of independent claim 1. Accordingly, the discussion above with respect to the fourth element of independent claim 1 may be applied to the first element of independent claim 17. Thus, Peterson's manufactured products will ultimately meet the first limitation of claim 17, which reads: "a secondary coals burning elongated tube."

58. The second element of independent claim 17 recites: "a connector means for connecting said terminal end in communication with the secondary burner tube, the secondary burner tube positioned substantially parallel, forward and below the primary burner tube, the connector means having interposed between the primary and secondary burner tubes a gas flow adjustment valve, the primary and secondary burner tubes having a plurality of gas discharge ports, the secondary burner tube being in gas flow communication with the primary burner tube being the connection means, gas distribution ports of the secondary burner tube directed away from the fireplace opening."

59. Thus, independent claim 17 requires that the gas distribution ports of the secondary burner tube be directed away from the fireplace opening. As specifically construed and affirmed by the Court of Appeals for the Federal Circuit, this Court previously construed the term "directed away from" to mean that the gas ports of the secondary burner tube may be positioned in any direction that does not include a horizontal component pointed toward the vertical plane of the fireplace opening.

*Golden Blount, Inc. v. Robert H. Peterson Co.*, 365 F.3d 1054, 1059-60 (Fed. Cir. 2004). Blount presented oral testimony of Mr. Blount that the gas ports of Peterson's manufactured products are positioned directly down, which according to the above-referenced interpretation, are away from the fireplace opening. (Tr., vol. 1, pg. 45-50). In addition to this testimony, this Court closely observed an assembled version of Peterson's manufactured product<sup>7</sup>, wherein it observed the manufactured product having the gas ports directed away from the fireplace opening. (Tr., vol. 2, pg. 28). Because Peterson believed the term "directed away from" would ultimately be construed to mean that the ports must be directed at least partially toward the back of the fireplace, Peterson went so far as to require the ports of its secondary burner tube to be positioned directly downward. Given the claim construction as construed and affirmed by the Federal Circuit, this required configuration results in a device that meets the "directed away from" limitation of claim 17.

60. As the other claimed elements of the second limitation of independent claim 17 have been found in Peterson's manufactured products, as established above with respect to paragraphs 40 thru 46, this Court finds that the evidence establishes direct infringement by Peterson and by the ultimate purchasers of Peterson's products of claim 17. Moreover, the evidence establishes that Peterson itself directly infringed claim 17 when Peterson assembled the G-5 series burner systems and then sold them to customers.

61. Therefore, this Court finds that Peterson and the ultimate purchaser directly infringed at least claims 1, 15 and 17, as construed under paragraphs 120 thru 123 below, of the '159 patent.

#### LITERAL INFRINGEMENT-CONTRIBUTORY

62. Blount established at trial, through stipulation, that Robert H. Peterson Co.'s ember burner is intended to be attached to its G-4 series burner system or G-5 series burner system and the combined unit comprises a primary burner pipe, an ember pan that supports the primary burner pipe, a secondary burner tube and a valve that controls a flow of gas between the primary burner pipe and the secondary burner tube, and that an end user would connect the primary burner pipe to a gas source having a valve associated therewith. (Joint Pretrial Order--Stipulations, pg. 6).

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<sup>7</sup> See Finding of Fact No. 38, discussed above.

63. Peterson was made aware of the '159 patent as early as December 16, 1999, by the letter from Mr. Tucker, which is referenced above. (Plaintiff's Ex. No. 10). Given these facts, it is clear that Peterson was aware that the combination for which its components were especially made was patented and infringing, as required by 35 U.S.C. § 271(c).

64. Blount further established through the testimony of Mr. Bortz that Peterson's ember burner is especially adapted for use in an infringement of the '159 patent, had no substantial non-infringing uses, and that it was intended to be used with both the G-4 and G-5 burner pans. (Tr., vol. 2, pg. 67; Leslie Bortz Deposition, vol. 1, pg. 36). Thus, the Court also finds that the testimony of Mr. Bortz and Mr. Corrin, as well as Mr. Blount, supports the fact that the ember burner was not a staple article of commerce.

65. As discussed above, this Court finds that direct infringement existed. For those units covered by stipulation for hookup, they were normally hooked up by professional installers or persons from the dealer. With their experience and relation to Peterson and with all of Peterson's literature (including Defendant's Ex. Nos. D-34 & D-30) one can count on proper installations pursuant to Peterson's installation instructions as discussed above. Thus, each installation ultimately results in a direct infringement. (Tr., vol. 2, pg. 189). Blount has clearly proven contributory infringement on the part of Peterson of claims 1, 15 and 17 for those units.

#### LITERAL INFRINGEMENT-INDUCEMENT

66. The record establishes that Peterson sold the ember burner. In addition, the record also establishes that Peterson sold the G-4, which includes the primary burner and support pan, and sold the G-5, ten at least of which, had the ember burner attached. Further, given the stipulation that the ultimate assembly would be connected to a gas source, there is sufficient basis to conclude that Peterson knew or should have known that this ultimate configuration would infringe independent claims 1 and 17. (Joint Pretrial Order--Stipulations, pg. 6).

67. Peterson was made aware of the '159 patent as early as December 16, 1999, by the letter of December 10, 1999, from Mr. Tucker, which is referenced above. (Plaintiff's Ex. No. 10). Given these facts, it is clear that Peterson was aware that the combination for which its components were especially made was patented and infringing.

68. The record is also clear that Peterson provided literature and assembly instructions to consumers, as discussed above, detailing how to install the components in a preferred configuration, which induced its customers to install the components in an infringing manner. (Tr., vol. 2, pg. 173-174, 177, 183; Defendant's Ex. Nos. D-34 & D-30). Also, Peterson fully assembled and hooked up in a fireplace an accused structure and demonstrated it and its use to independent distributors, which this Court finds to be a substantial inducement.

69. Because Peterson provided the consumers with detailed instructions, (Defendant's Ex. Nos. D-34 & D-30), how to assemble the parts in an infringing manner, and given the fact that Peterson had knowledge of the '159 patent by way of the notice letter of December 16, 1999, Peterson knew or should have known that such actions would induce direct infringement. Thus, there is little doubt and almost a certainty that the installation was in fact done in accordance with Peterson's published installation instructions. The demonstrations of a properly connected device to distributors further shows inducement because this information was passed on to dealers and ultimately to assemblers and customers. Invariably, infringement occurred. (Tr., vol. 2, pg. 189).

70. As found by this Court in paragraphs 40 thru 61 above, there was direct infringement by Peterson or its ultimate purchasers of claims 1, 15 and 17 of the '159 patent.

71. Accordingly, this Court finds that in those instances where direct infringement by Peterson was not conclusively established on a unit by unit basis, Blount has clearly proven induced infringement on the part of Peterson of claims 1, 15 and 17 for those units.

72. Because Peterson's manufactured products literally infringe claims 1, 15 and 17 of the '159 patent, they infringe the patent. Thus, comparison of Peterson's product to the remaining claims depending from independent claim 1, whether it be in determining direct infringement, contributory infringement or induced infringement, is generally unnecessary and is therefore not addressed herein.

#### INFRINGEMENT-DOCTRINE OF EQUIVALENTS

73. Blount offered un rebutted testimony at trial that every element of Peterson's manufactured products perform substantially the same function in substantially the same way to obtain the same result as the claimed elements of the '159 patent. (Tr., vol. 1, pg. 59-60).

74. Blount further offered un rebutted testimony by Mr. Blount at trial that any difference between Peterson's manufactured products and the claim elements were insubstantial at best. Mr. Blount

actually testified that they were an exact copy. (Tr., vol. 1, pg. 30, 37, 46, 48, 56 and 60). In addition, through this Court's own observance of the accused product 4A, this Court finds that there was a substantial equivalent of each and every element of at least claims 1, 15 and 17 in Peterson's accused products.

75. Based on the evidence presented to it, this Court finds that there is no prosecution history estoppel that limits the range of equivalents regarding the claimed elements.

76. Thus, this Court finds that in those instances where literal infringement might not exist, there is infringement of the claims of the '159 patent under the doctrine of equivalence.

77. In summation, this Court concludes that Blount established literal infringement (e.g., directly, by inducement, or contributorily) or infringement under the doctrine of equivalents, each of claims 1, 15 and 17 of the '159 patent, by Peterson by at least a preponderance of the evidence.

#### DAMAGES

78. Damages have been determined using the *Panduit* factors. Mr. Blount testified for Blount at trial as to the demand that existed for the product during the period in question. (Tr., vol. 1, pg. 61). Thus, Blount has conclusively established the first required element of *Panduit*.<sup>8</sup>

79. In addition to establishing a demand for the patented product during the period in question, Blount established an absence, during the period of infringement, of acceptable non-infringing substitutes. (Tr., vol. 1, pg. 63-65).

80. Peterson argued that other acceptable non-infringing substitutes exist.

81. Here the patented product offers quite unique and novel results. (Tr., vol. 1, pg. 28-30). The so called "acceptable non-infringing substitutes" Peterson has introduced are either not acceptable, or they too infringe, although no third party infringing device was offered by either side.

82. Blount established at trial that Peterson's front flame director was not an acceptable substitute. (Tr., vol. 2, pgs. 184, 195). Peterson's own Vice President, Mr. Corrin, testified that the front flame director lacked the valve for adjusting the height of the front flame. Even more telling, Mr. Corrin testified that the front flame director was not as good as their ember burner. (Tr., vol. 2, pgs. 184, 195).

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<sup>8</sup> See the Conclusions of Law section, paragraph 151, where the *Panduit* factors are set forth.

83. As the valve to adjust the height of the front flame is one of the particular features available only from the patented product, under the law set forth in *Standard Havens*, the front flame director, lacking that valve or any adjustment means, is not an acceptable non-infringing substitute.

84. Peterson further argues that Blount admitted at trial that at least five products on the market perform roughly the same function as Blount's patented device. (Tr., vol. 1, pg. 63). The record is clear that those five products were infringing substitutes and not acceptable non-infringing substitutes. (Tr., vol. 1, pg. 63). In fact, the record indicates that Blount sent the manufactures of those five products the identical notice of infringement letter at the same time it sent Peterson its letter. (Tr., vol. 1, pg. 63). No evidence exists in the record that the aforementioned five instances of infringement continued after the notice of infringement letters were received. In fact, Mr. Blount's testimony indicates that while the other companies were moving in and were interested in the outcome of this trial, none were still infringing after receipt of their notice of infringement letter. (Tr., vol. 1, pg. 62-64).

85. Therefore, this Court finds that Blount provided sufficient evidence to support the finding that there were no acceptable non-infringing substitutes that could have decreased the market share Blount and Peterson together held. Thus, Blount has conclusively established the second required element of *Panduit*.

86. Blount also offered sufficient evidence through Mr. Blount's testimony that Blount had more than enough manufacturing and marketing capability to promote the device, thus entitling Blount to actual damages. (Tr., vol. 1, pgs. 62, 66). Thus, Blount has conclusively established the third required element of *Panduit*.

87. Because the *Panduit* factors have been established, it is reasonable for this Court to infer that the lost profits claimed were in fact caused by Peterson's infringing sales. This Court now only needs to determine a detailed computation of the amount of profit Blount would have made, to meet the final required element of *Panduit*.

88. In addition, however, the Court also finds that the facts of the present case establish a two-supplier market. Blount offered evidence through the testimony of Mr. Blount that Blount and Peterson together held approximately 95 percent or more of the market associated with ember burners similar to that covered by the '159 patent. (Tr., vol. 1, pg. 64). While Peterson attempted to impeach Mr. Blount's testimony on this point, this Court finds that Peterson failed to do so.

Therefore, this Court finds that Mr. Blount's testimony is sufficient to establish a two supplier market. The supposed 5 percent of the market that Blount and Peterson might not have held is de minimus, and therefore, for damage calculations a two-supplier market has been found to exist in this case. Therefore, causation may be inferred, that is, "but for" Peterson's infringing activities, Blount would have made the sales it normally would have made.

89. To determine the actual damage amount in a lost profit case, the Court can multiply Blount's per unit profit times the number of infringing devices that Peterson sold.

90. To do this, however, the Court must determine the device upon which lost profits are to be calculated.

91. Using two different approaches, Blount has established that the device for calculating lost profits includes the entire burner assembly (including the secondary burner and valve), the grate, and a full set of artificial logs. This Court finds that Blount ultimately lost the sale of the entire burner assembly (including the secondary burner and valve), the grate, and a full set of artificial logs.

92. Dependent claim 15, which was established as literally infringed above, recites that the gas-fired artificial logs and coals-burner of claim 1 are positioned under artificial logs and a grate support means. Because the artificial logs and the grate support means are positively claimed in dependent claim 15, the artificial logs and the grate support means should be included in the device upon which damages for direct infringement as well as lost profits are to be calculated.

93. Accordingly, the device for calculating lost profits includes the entire burner assembly (including the secondary burner and valve), the grate and a full set of artificial logs, which must be the case here, because apart from the artificial logs and grate, the coals burner unit has no purpose or function.

94. Given the circumstances, the entire market value rule is appropriate here as an alternative, second approach. Evidence was offered at trial by Peterson's own officer, Mr. Corrin, that Peterson used the ember burner to entice customers to come back to the store to purchase newer log sets, and at the same time, purchase Peterson's ember burner, which improved the overall appearance of the fireplace. (Tr., vol. 2, pg. 177-79). These facts are sufficient to establish that the ember burner is the basis for the customer's demand, as set forth by *TWM*, see *infra*.

95. Blount also offered evidence that the glowing embers from the ember burner are what draws a customer's attention to a particular log and burner set, and what ultimately makes the sale. (Tr., vol. 1, pg. 157-63).

96. Blount also offered testimony at trial that the elements of independent claims 1 and 17 constitute a functional unit with the artificial logs and the grate support.

97. Blount presented a third-party witness retailer, Mr. Charlie Hanft of Atlanta, with extensive sales experience with gas fireplaces and ember burner and gas log sets. He testified that 97 ½ percent of the time that he sells an ember burner, he also sells an entire burner assembly and log set with it. (Tr., vol. 1, pg. 160). Peterson did not successfully rebut Blount's evidence on this point because Peterson presented no testimony to quantify even in a general way when the two would not ultimately be sold together.

98. Peterson failed to rebut Blount's evidence because it did not offer any numerical evidence regarding how often it sells one of its Ember burners with the entire burner and log set.

99. In summation of this point, Blount introduced testimony as to the standard practice in the industry for selling the ember burner, and Peterson failed to introduce its own testimony to rebut Blount's testimony.

100. Because the evidence establishes that 97 ½ percent of the sales of the ember burner would also encompass the sale of the entire burner assembly and log set, the record supports a proration of the damage amount based upon this percentage.

101. Based on the record, of the 3,723 EMB's sold by Peterson, 2 ½ percent (i.e., 94 EMB's) were sold without an associated burner assembly and log set, and the remaining 97 ½ percent (i.e., 3,629) were sold with an associated burner assembly and log set.

102. Blount established at trial that its profit on the ember burner alone is \$14.09 per unit and its profit on the ember burner, entire burner assembly and full set of logs is \$117.92 per unit. (Plaintiff's Ex. No. 18).

103. This Court finds, based on the percentages and profits established in the paragraphs above, that the total actual damages amount to \$429,256.

WILLFULNESS / EXCEPTIONAL CASE

104. Having carefully reviewed the record herein, the Court concludes that Peterson's minimal attempt to attain a competent opinion is permeated by a lack of due care and was willful, which leads this Court to find that the case is exceptional. Blount has established by clear and convincing evidence that Peterson's supposed oral opinion was an incompetent, conclusory opinion to be used only as an illusory shield against a later charge of willful infringement, rather than in a good faith attempt to avoid infringing another's patent.

105. Throughout the 2½ years from the time the first notice letter was sent, Peterson simply never obtained a single written opinion suggesting that their commercial embodiment avoided infringement. Also, the denial that the first letter related to notice of infringement is shown unlikely by Mr. Corrin's own characterization of it as an "*infringement letter*" in his correspondence with his patent counsel. (Tr., vol. 2, pg. 192). Also, this Court finds it disingenuous for Peterson to argue at trial that the interrogatories answered well after suit was filed and during discovery, form the written opinion upon which they relied.

106. The first time Peterson spoke to Mr. McLaughlin was on or about December 30, 1999, however, Mr. McLaughlin did not have the accused infringing device at this time. (Tr., vol. 1, pg. 181). The record establishes that Mr. McLaughlin, at this time, only had a picture of the accused infringing device. (Tr., vol. 1, pg. 181). Neither did Mr. McLaughlin have the prosecution history of the '159 patent at this time, which is an important element of any competent opinion. (Tr., vol. 1, pgs. 183, 202-03).

107. This non-substantive conversation cannot be construed to be an opinion upon which Peterson could reasonably rely because it was based solely on a supposition. This supposition amounted to a representation on the part of Mr. Bortz that the invention had been around 20 to 30 years. (Tr., vol. 2, pg. 55-56). Mr. McLaughlin, with only the evidence listed above, said that "if we *could* prove that the invention had been around for 20 to 30 years then it *would* be a strong argument of invalidity." (Tr., vol. 2, pg. 55-56, emphasis added). This "if this, then that" statement plainly does not amount to an opinion upon which a prudent person could reasonably rely.

108. Importantly, this Court has found that Peterson made no further efforts to determine whether it was truly infringing or not, until after suit was filed, almost a year and two months after receiving the first notice letter. (Tr., vol. 1, pg. 202-03).

109. Peterson argues that it did nothing further because it was awaiting "additional information or further explanation from Blount's attorney." This Court finds this argument lacking merit. Blount did not, after sending multiple notice of infringement letters to Peterson under the law, owe Peterson any obligation with regard to advising Peterson how they actually were infringing.

110. Nevertheless, Blount's failure to respond to Peterson's additional information request did not relieve Peterson of its obligation to determine if it was willfully infringing the '159 patent.<sup>9</sup> To the contrary, Peterson continued its infringing activities even after May 16, 2000, and actually even through the trial proceedings. (Tr., vol. 2, pg. 181 and Peterson Company's Objection to Golden Blount's Motion for Updated Damages filed on September 18, 2002). This reflects an egregious and willful disregard for the '159 patent.

111. It was not until after the lawsuit was filed in January 2001 that Peterson finally became concerned, not with the damages associated with the infringing activity, but apparently with the attorney's fees that Peterson might be required to pay as a willful infringer. (Tr., vol. 2, pg. 60-62). By Mr. Bortz' own admission, he told Mr. McLaughlin that this was not a very meaningful case "dollar wise" but that he heard a person might have to pay attorneys' fees if he loses a patent lawsuit, and he asked Mr. McLaughlin what he should do. (Tr., vol. 2, pg. 60-62 & Dec. 19, 2001, deposition of Mr. Leslie Bortz, pg. 60). Mr. McLaughlin told him that one way that attorney's fees could be avoided was by obtaining an opinion. (Id). This set of facts underscores Peterson's true intentions with respect to its willful disregard of the '159 patent, that it was concerned more with having to pay attorneys' fees than it was with its own infringement. The Court finds that this constitutes an intentional disregard for the '159 patent on the part of Peterson.

112. At no time when Mr. McLaughlin gave Mr. Bortz advice did Mr. McLaughlin ever see the actual accused structure. (Tr., vol. 1, pg. 181). While some advertisements of Peterson's structure were shown, detailed drawings were never provided at this time to Mr. McLaughlin, including the installation instructions that were apparently sold with the device. Thus, Mr. McLaughlin never had a full understanding of the accused structure, (Tr., vol. 1, pg. 200), and Mr. McLaughlin should have known that his opinion would not be reasonable without such an understanding.

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<sup>9</sup> See also, Finding of Fact No. 30.

113. While Peterson argues that three oral consultations occurred, this Court finds that only one oral opinion of counsel, if it can even be called that, was rendered. This oral opinion was rendered by Mr. McLaughlin on or about May 1, 2001, about 4 months after suit had been filed and 2½ years after Peterson was first noticed of its infringing activity. (Tr., vol. 1, pg. 179-83).

114. This Court believes that Peterson did get what it asked for, a statement that there was no infringement. Peterson's primary desire, however, was to avoid paying attorneys' fees or increased damages, and this appears to have been the sole reason for consultation with counsel, and these actions show a willful and egregious disregard for the '159 patent.

115. In summary, this Court finds that Peterson had three consultations with its Attorney. All were oral. Only the last oral consultation approached what was needed to determine infringement and validity issues, and even it was made with a search limited to the company's own records and with there having been no accused structure shown the patent attorney. This third consultation occurred a number of months after suit had been filed and was motivated by the apprehension of Peterson having to pay attorneys' fees, and not for a concern of infringement of the '159 patent.

116. Peterson's cavalier attempt to obtain an opinion and the non-persuasive trial testimony of Peterson's witnesses are classic examples of conduct that clearly and convincingly demonstrates an exceptional case, an indication of which is gross wilfulness.

117. This Court therefore finds that the infringement of Peterson was willful, thus the actual damages are trebled, totaling \$1,287,766.

118. Given Peterson's conduct and its overall willful disregard for the '159 patent, such an award is appropriate here. The Court finds that as a result of Peterson's continued infringement, without a reasonable basis for believing that it had a right to make, use or sell its product prior to the expiration of the '159 patent, Blount has been compelled to prosecute an infringement claim at great expense. Under these circumstances, an award of attorneys' fees is proper in addition to the enhanced damage award.

119. This Court therefore finds this to be an exceptional case under 35 U.S.C. § 285, thus reasonable attorneys' fees are awarded to Blount.

## CONCLUSIONS OF LAW

### CLAIM CONSTRUCTION

120. The parties dispute the meaning of two terms in the claims of the patent in suit, namely the phrase "raised level," as recited in claim 1, and the term "below" and the phrase "away from the fire place opening," as recited in claim 17.

121. As affirmed by the Court of Appeals for the Federal Circuit in its opinion dated April 19, 2004, this Court construes that the term "at a raised level" in claim 1 refers to the top of the two burner tubes, and that the tops of the tubes should be used to determine whether the primary burner tube is held at a raised level with respect to the secondary burner tube as recited in claim 1. This Court also construes that the term "below" in claim 17 refers to the tops of the two burner tubes, and that the tops of the tubes should be used to determine whether the secondary burner tube is positioned below the primary burner tube as recited in claim 17. *Golden Blount, Inc. v. Robert H. Peterson Co.*, 365 F.3d 1054, 1059-60 (Fed. Cir. 2004).

122. As affirmed by the Court of Appeals for the Federal Circuit in its opinion dated April 19, 2004, this Court construes the term "away from the fireplace opening" to mean that the gas ports may be positioned in any direction that does not include a horizontal component pointed toward the vertical plane of the fireplace opening. *Id.*

123. All the other terms in the claims at issue are construed to have a plain and ordinary meaning, which appear not to have been contested at trial.

### VALIDITY

124. A validity analysis begins with the presumption of validity. An issued patent is presumed valid. 35 U.S.C. § 282.

125. An "accused infringer who raises patent invalidity as a defense bears the burden of showing invalidity by facts supported by clear and convincing evidence." *Robotic Vision Systems, Inc. v. View Engineering, Inc.*, 189 F.3d 1370, 1377 (Fed. Cir. 1999); *Weatherchem Corp. v. J.L. Clark, Inc.*, 163 F.3d 1326, 1334-35 (Fed. Cir. 1998).

126. As affirmed and determined by the Court of Appeals for the Federal Circuit on April 19, 2004, this Court concludes that Peterson has failed to prove by clear and convincing evidence that

the '159 patent is invalid. This Court therefore finds the '159 patent not to be invalid. *Golden Blount, Inc.* at 1061-62.

#### LITERAL INFRINGEMENT-DIRECT

127. The claims define the metes and bounds of the invention, and only they may be infringed. *SmithKline Diagnostics, Inc. v. Helena Labs. Corp.*, 859 F.2d 878, 882 (Fed. Cir. 1988); *Corning Glass Works v. Sumitomo Elec. USA, Inc.*, 868 F.2d 1251 (Fed. Cir. 1989).

128. The patentee's burden is to show literal infringement by a preponderance of the evidence. *Braun v. Dynamics Corp.*, 975 F.2d 815 (Fed. Cir. 1992).

129. A patent claim is literally infringed if the accused product or process contains each element of the claim. *Tate Access Floors v. Maxcess Techs.*, 222 F.3d 958, 964 (Fed. Cir. 2000); *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1054 (Fed. Cir. 1988). If each element is present, literal infringement exists and "that is the end of it." *Graver Tank v. Linde Co.*, 339 U.S. 605, 607, 94 L. Ed. 1097, 70 S. Ct. 854, 1950 Dec. Comm'r Pat. 597 (1950).

130. In determining infringement, the accused product is compared to the patent claims, not the patentee's product. *Zenith Laboratories, Inc. v. Bristol-Myers Squibb Co.*, 19 F.3d 1418, 1423 (Fed. Cir. 1994); *Glaxo Inc. v. TorPharm Inc.*, 153 F.3d 1366, 1373 (Fed. Cir. 1998).

131. Infringement of a single claim is infringement, *Panduit Corp. v. Dennison Mfg. Co. Inc.*, 836 F.2d 1329, 1330 n.1 (Fed. Cir. 1987); *Intervet America v. Kee-Vet Laboratories*, 887 F.2d 1050, 1055 (Fed. Cir. 1989), and entitles the patentee to the full panoply of statutory remedies. *Intervet*, 887 F.2d at 1055.

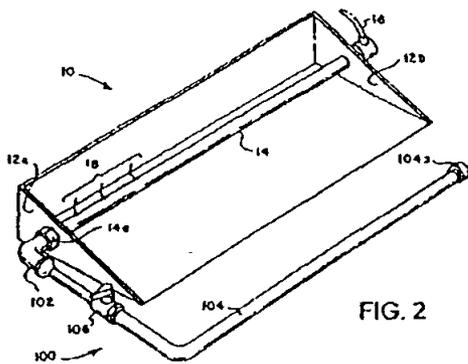
132. If one is arguing that proof of inducing infringement or direct infringement requires *direct*, as opposed to *circumstantial evidence*, the Federal Circuit disagrees. It is hornbook law that direct evidence of a fact is not necessary. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Metabolite Laboratories, Inc. v. Laboratory Corp. of America*, 370 F.3d 1354, 1365 (Fed. Cir. 2004) (citing *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 1272 (Fed. Cir. 1986)).

133. In determining whether a product claim is infringed, the Federal Circuit has held that an accused device may be found to infringe if it is reasonably capable of satisfying the claim limitations,

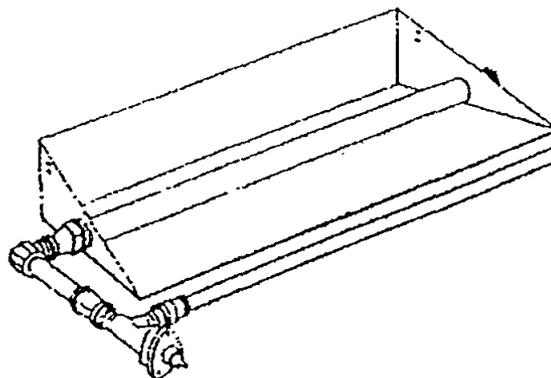
even though it may also be capable of non-infringing modes of operation. See, *Intel Corp. v. United States Int'l Trade Comm'n*, 946 F.2d 821, 832, 20 USPQ2d 1161, 1171 (Fed.Cir.1991); *Key Pharms., Inc. v. Hercon Labs. Corp.*, 981 F.Supp. 299, 310 (D.DcL.1997), *aff'd*, 161 F.3d 709, 48 USPQ2d 1911 (Fed.Cir.1998); *Huck Mfg. Co. v. Textron, Inc.*, 187 USPQ 388, 408 (E.D.Mich.1975) ("The fact that a device may be used in a manner so as not to infringe the patent is not a defense to a claim of infringement against a manufacturer of the device if it is also reasonably capable of a use that infringes the patent."); *cf. High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551, 1556, 33 USPQ2d 2005, 2009 (Fed.Cir.1995).

134. Circumstantial evidence of product sales and instructions indicating how to use the product is sufficient to prove third party direct infringement. *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 1272 (Fed. Cir. 1986).

135. This Court understands that in determining infringement, the accused product is compared to the patent claims, not the patentee's product. However, FIG. 2 of the '159 patent is representative of the claims of the '159 patent and the claims may be read on the FIG. 2 structure. For this reason a comparison of one of Blount's devices and Peterson's manufactured product is highly instructive for purposes of this Court's analysis, and is, therefore, provided.



**Blount's Patented Device**  
FIG. 2 of the '159 Patent



**Peterson's Manufactured Product**  
Figure 2 of Peterson's Installation Instructions  
without the control knob shown

136. The findings in the sections above make out a clear case of direct infringement on all of the devices sold.

#### LITERAL INFRINGEMENT-CONTRIBUTORY

137. Contributory infringement liability arises when one "sells within the United States . . . a component of a patented machine . . . constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantially noninfringing use." 35 U.S.C. § 271(c) (2002).

138. Thus, Blount must show that Peterson "knew that the combination for which its components were especially made was both patented and infringing." *Preemption Devices, Inc. v. Minn. Mining & Mfg. Co.*, 803 F.2d 1170, 1174 (Fed. Cir. 1986).

139. An appropriate infringement notice letter from the patentee to the accused infringer provides the requisite knowledge required by 35 U.S.C. § 271(c). *Aro Manufacturing Co., Inc. v. Convertible Top Replacement Co.*, 377 U.S. 476, 490 (1964).

140. Further, Blount must show that Peterson's components have no substantially noninfringing uses, while meeting the other elements of the statute. *Alloc, Inc. v. ITC*, 342 F.3d 1361, 1374 (Fed. Cir. 2003).

141. It is not necessary for a plaintiff to make the direct infringer a party defendant in order to recover on a claim of contributory infringement. It is enough for the plaintiff to prove, by either circumstantial or direct evidence, that a direct infringement has occurred. *Amersham International PLC v. Corning Glass Works*, 618 F. Supp. 507 (D. Mich., 1985).

142. The findings in the sections above make out a clear case of Contributory infringement on all of the devices sold.

#### LITERAL INFRINGEMENT-INDUCEMENT

143. In order to find Peterson liable for inducing infringement under 35 U.S.C. § 271 (b), Blount must show that Peterson took actions that actually induced infringement. *Met-Coil Sys. Corp. v. Korners Unlimited, Inc.*, 803 F.2d 684, 687 (Fed. Cir. 1986) ("There can be no inducement of infringement without direct infringement by some party.")

144. Further, Blount must show that Peterson knew or should have known that such actions would induce direct infringement. *Micro Chem. Inc. v. Great Plains Chem. Co.*, 194 F.3d 1250 (Fed. Cir. 1999).

145. Dissemination of instructions along with sale of the product to an ultimate consumer is sufficient to prove infringement by an inducement. *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 1272 (Fed. Cir. 1986). Thus, Blount has met its burden of showing infringement under section 35 U.S.C. 271(b).

146. The findings in the sections above make out a clear case of induced infringement on all of the devices sold.

#### INFRINGEMENT-DOCTRINE OF EQUIVALENTS

147. Infringement under the doctrine of equivalents occurs when a claimed limitation and the accused product perform substantially the same function in substantially the same way to obtain the same result. See *Warner-Jenkinson Co. v. Hilton-Davis Chem. Co.*, 520 U.S. 17, 39-40, 137 L. Ed. 2d 146, 117 S. Ct. 1040 (1997).

148. Infringement under the doctrine of equivalents also requires that any difference between the claim elements at issue and the corresponding elements of the accused product be insubstantial. *Id.*

149. This Court finds alternatively (or cumulatively) that there was infringement under the doctrine of equivalents.

#### DAMAGES

150. To recover lost profit damages, the patentee need only show causation and the factual basis for causation between the infringement and the lost profits. *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1065, 219 U.S.P.Q. 670 (Fed. Cir. 1983).

151. To do this, *Panduit* established that the patent owner need only demonstrate:

- 1) a demand for the product during the period in question;
- 2) an absence, during that period, of acceptable non-infringing substitutes;
- 3) its own manufacturing and marketing capability to meet or exploit that demand; and
- 4) a detailed computation of the amount of the profit it would have made.

*Panduit Corp. v. Stahl Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1156, 197 U.S.P.Q. 726 (6th Cir. Mich. 1978); *Radio Steel & Mfg. Co. v. MTD Prods., Inc.*, 788 F.2d 1554, 1555, 229 U.S.P.Q. 431 (Fed. Cir. 1986).

152. In a two-supplier market it is reasonable to assume, provided the patent owner has the manufacturing capabilities, that the patent owner would have made the infringer's sales but for the infringement. *State Indus. v. Mor-Flo Indus.*, 883 F.2d 1573, 1578, 12 U.S.P.Q.2d 1026 (Fed. Cir. 1989).

153. The "[m]ere existence of a competing device does not make that device an acceptable substitute." *TWM Mfg. Co., Inc. v. Dura Corp.*, 789 F.2d 895, 901, 229 U.S.P.Q. 525 (Fed. Cir. 1986), *cert. denied*. A product on the market that lacks the advantages of the patented product can hardly be termed a substitute acceptable to the customer who wants those advantages. *Standard Havens Products, Inc. v. Gencor Industries, Inc.*, 953 F.2d 1360, 1373, 21 U.S.P.Q.2d 1321 (Fed. Cir. 1991), *cert. denied*. If purchasers are motivated to purchase because of particular features available only from the patented product, products without such features would most certainly not be acceptable non-infringing substitutes. *Id.*

154. Also, courts have generally held that an infringer's acceptable substitute argument is of "limited influence" when it [the infringer] ignores those substitutes while selling the patented invention. (Emphasis added). *TWM*, 789 F.2d at 902. This is exactly what Peterson did.

155. In an alternative approach, however, the "entire market value rule" may be used to determine the device for calculating lost profits. In *Beatrice Foods*, the Court stated that the law does not bar the inclusion of convoyed sales in an award of lost profits damages. *Beatrice Foods Co. v. New England Printing & Lithographic Co.*, 899 F.2d 1171, 1175, 14 U.S.P.Q.2d 1020 (Fed. Cir. 1991).

156. The "entire market value rule" allows for the recovery of damages based on the value of an entire apparatus containing several features, even though only one feature is patented. *Paper Converting Machine Co., v. Magna-Graphics, Corp.*, 745 F.2d 11, 33, 223 U.S.P.Q. 591 (Fed. Cir. 1984).

157. The "entire market value rule" further permits recovery of damages based on the value of the entire apparatus containing several features, when the patent-related feature is the basis for customer demand. See *TWM*, 789 F.2d at 901.

158. The "entire market value rule" is appropriate where both the patented and unpatented components together are analogous to components of a single assembly, parts of a complete machine, or constitute a functional unit. See *Rite-Hite v. Kelly Co.*, 56 F.3d 1538, 1550, 35 U.S.P.Q.2d 1065 (Fed. Cir. 1995).

#### WILLFULNESS / EXCEPTIONAL CASE

159. In addition to requiring "damages adequate to compensate for the infringement," Section 284 of the Patent Act authorizes a district court to "increase damages up to three times the amount found or assessed." 35 U.S.C. § 284.

160. The Federal Circuit has interpreted this provision of Section 284 as requiring a two-step process: "First the fact-finder must determine whether an infringer is guilty of conduct upon which increased damages may be based." *Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1570, 38 U.S.P.Q.2d 1397 (Fed. Cir. 1996). "If so, the Court then determines, exercising its sound discretion, whether, and to what extent, to increase the damage award given the totality of the circumstances." *Id.*

161. "An act of willful infringement satisfies this culpability requirement, and is, without doubt, sufficient to meet the first requirement to increase a compensatory damages award." *Id.* Thus, once a proper willfulness finding is made, the first step in determining whether damages should be enhanced is complete. *Id.* At that point, the Court need consider only whether, and to what extent, the compensatory damages awarded by the fact finder should be increased, in light of "the egregiousness of the Defendant's conduct based on all the facts and circumstances of the case." *Id.*

162. "A potential infringer having actual notice of another's patent rights has an affirmative duty of care." *Spindelfabrik Suessen-Schurr, Stahlecker & Grill GmbH v. Schubert & Salzer Maschinenfabrik Aktiengesellschaft*, 829 F.2d 1075, 1084 (Fed. Cir. 1987). An act of infringement is thus deemed willful when the infringer is aware of another's patent and fails to exercise due care to avoid infringement. *Electro Medical Sys., S.A. v. Cooper Life Sciences, Inc.*, 34 F.3d 1048, 1056 (Fed. Cir. 1994); *Rolls-Royce Ltd. v. GTE Valeron Corp.*, 800 F.2d 1101, 1109 (Fed. Cir. 1986). This standard of care typically requires an opinion from competent patent counsel prior to engaging in any potentially infringing activities. *Underwater Devices, Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380, 1389-90 (Fed. Cir. 1983). To establish willfulness, Blount must demonstrate by clear and convincing

evidence, considering the "totality of the circumstances," that Peterson willfully infringed its patent. *Electro Medical*, 34 F.2d at 1056.

163. The prosecution history of a patent in question is an important element of any competent opinion. *Underwater Devices*, 717 F.2d at 1389-90.

164. A holding of willful infringement is usually sufficient to make a case exceptional and entitles the opposing party to its attorney's fees. 35 U.S.C. § 285 (2002); *Avia Group Intl. Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1567 (Fed. Cir. 1988).

### CONCLUSION

For the reasons set forth above, the Court concludes that Peterson's manufactured products infringe the claims of the '159 patent. Blount is entitled to actual damages from Peterson in the amount of \$429,256. The infringement of Peterson was willful, thus the actual damages are trebled, totaling \$1,287,768. Blount is also awarded prejudgment interest, which shall be calculated on a simple rather than compound basis, on the actual damages of \$429,256 at the rate of 5.0% for the period from December 16, 1999, to August 9, 2002. This is an exceptional case under 35 U.S.C. § 285, thus reasonable attorneys' fees are awarded to Blount. Blount is further awarded post judgment interest, calculated pursuant to 28 U.S.C. §1961, on the sum of the trebled damages and attorney's fees at the highest rate allowed by the law from the date of August 9, 2002, to April 19, 2004, and resuming from the date of the signing of the final judgment. Based upon the fact that infringement causes irreparable harm, an injunction is granted against Peterson.

It is so ORDERED

SIGNED:   2   day of September, 2004.

  
JUDGE JERRY BUCHMEYER  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

U.S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS <b>FILED</b> SEP 17 2004 CLERK, U.S. DISTRICT COURT By _____ Deputy
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GOLDEN BLOUNT, INC.

Plaintiff,

v.

ROBERT H. PETERSON CO.

Defendant.

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§

Civil Action No. 3-01CV0127-R

(JURY TRIAL DEMANDED)

**DEFENDANT ROBERT H. PETERSON CO.'S  
OPPOSITION TO PLAINTIFF'S APPLICATIONS FOR  
ATTORNEYS' FEES AND COSTS**

**INTRODUCTION**

This Court lacks jurisdiction to entertain or grant either plaintiff's Application for Attorneys' Fees (filed September 8, 2004) or its Application for Costs (filed September 9, 2004) because both are untimely under Rules 52(b) and 54(d), Fed.R.Civ.P.

Judgment for the plaintiff was originally entered in this case on August 9, 2002. On April 19, 2004, that judgment was vacated by the United States Court of Appeals for the Federal Circuit and the cause was remanded for entry of specific findings of fact and conclusions of law. On May 11, 2004, this Court ordered both parties to simultaneously file proposed findings and conclusions on June 10, 2004. Both parties did so. (A copy of plaintiff's June 10 Proposed Findings and Conclusions, hereinafter the "June 10 Findings," is included in our Appendix as Exhibit A).

On June 22, 2004, this Court adopted and entered defendant's proposed findings and conclusions. On July 6, 2004, plaintiff filed its Motion to Amend Findings and Conclusions and

its Motion for Reconsideration or, in the Alternative, for a New Trial. The parties briefed these motions and argued them on August 18, 2004. At the conclusion of the August 18 hearing, this Court ordered that defendants' findings be stricken and that plaintiffs June 10 Findings be adopted. This verbal ruling was confirmed by a minute order entered in the Court's civil docket on August 18, 2004 (collectively, the "August 18 Order," a copy of which is included in our Appendix as Exhibit B).

The Court's August 18 Order expressly adopting plaintiff's June 10 Findings which completely and finally resolved all issues between the parties within the mandate on remand, including awarding specific treble damages (\$1,287,766), attorneys' fees (\$332,349) and costs (\$10,031.04). See Appendix A, p. 30. At the end of the August 18 hearing, no merits issue remained to be decided. As such, the August 18 Order constitutes a "final judgment" within the meaning of Rule 54(a), F.R.Civ.P.

Because the August 18 Order resolved pending motions under Rules 52 and 59, no separate document was required for it to become effective as a final judgment for time limitation purposes. Rule 58(a)(1)(D) (Under Rule 58, as amended effective December 1, 2002, no separate document is required for an order disposing of a motion made under Rules 52 or 59 to become effective as a final judgment). Thus, the August 18 Order became effective as a judgment when it was docketed on August 18, 2004. The time for appeal and for further post trial motions ran from August 18, 2004, even if the Court contemplated the ministerial act of later signing a written order expressly adopting the findings.

Because the plaintiff's June 10 Findings specifically adopted on August 18 included an award of attorneys' fees, any subsequent motion by plaintiff to amend and increase that award must be brought as a Rule 52(b) motion to amend existing findings within 10 days of August 18,

2004. This time limit, which is jurisdictional, expired on September 1, 2004. Plaintiff's Application for Attorneys' Fees filed on September 8, 2004 is thus untimely.

Alternatively, if plaintiff is considered to be applying for additional fees within the 14 day period specified by Rule 54(d)(2)(B), that period also expired on September 1, 2004. *See* Rule 6(a), F.R.Civ.P. (14 day period includes weekends; intervening Saturdays, Sundays and holidays only excluded from time computation if the original time period is "less than 11 days"). Both plaintiff's Application for Attorneys' Fees and Application for Costs are, thus, also untimely under Rule 54(d).

On August 31, 2004, plaintiff submitted a new version of its Proposed Findings and Conclusions (the "August 31 Version," a copy of which is included in our Appendix as Exhibit C). The August 31 Version contains significant additional findings and conclusions which alter and amend those set forth in the June 10 Findings adopted by the August 18 Order. The Court expressly entered the August 31 Version on September 2, 2004.

It is not clear whether, in entering its September 2 order, the Court was aware that plaintiff's August 31 Version of the findings was materially different from plaintiff's June 10 Findings that the Court adopted on August 18 when it made its substantive rulings. Assuming that the Court intended on September 2, 2004, to formally enter the June 10 Findings adopted at the August 18 hearing in the form of a separate order, the Court's September 2 order is insufficient to extend or restart the time limits under Rules 52, 54 and 59 because no separate document requirement prevented the August 18 Order from becoming effective as a final judgment when it was initially docketed on August 18.

Had plaintiff filed a timely Rule 52(b) motion to further amend the June 10 Findings adopted on August 18 to include the changes set forth in the August 31 Version, the Court could

have decided such a motion after appropriate briefing and argument. The entry of such an amended judgment would have permitted another 10 days for either party to file additional Rule 52(b) motions seeking further amendments. Absent a proper and timely Rule 52(b) motion, however, the Court lacked jurisdiction after September 1 to supplement, amend or modify the June 10 Findings expressly adopted on August 18.

Between August 18 and September 1, plaintiff filed no Rule 52(b) motion. The only filing reflected on the Court's docket sheet is the August 31 Version of the findings. This document, however, cannot constitute a proper Rule 52(b) motion. It was not styled as a motion. The writing did not "state with particularity the grounds" for modifying the June 10 Findings expressly adopted by the Court on August 18. Rule 7(b)(1), F.R.Civ.P. Moreover, the Court did not treat this filing as a motion as to which defendant would be provided with an opportunity to brief and argue. As such, the Court's September 2 order cannot be regarded as an order amending the Findings entered on August 18 and cannot have restarted the time period for seeking further amendment.

#### ARGUMENT

#### I. THE AUGUST 18 ORDER IS A FINAL JUDGMENT FOR PURPOSES OF THE APPEAL AND POST-TRIAL MOTION TIME PERIODS.

The federal rules define "Judgment" broadly:

"Judgment," as used in these rules, includes a decree and any order from which an appeal lies.

Rule 54(a), F.R.Civ.P. The Court's oral ruling at the end of the August 18 hearing and the August 18 Order satisfy this definition.

*Finality.* The key to Rule 54(a)'s definition of a judgment is appealability. Literally, any appealable order qualifies as a judgment. The key to appealability is finality. 28 U.S.C., §§ 1291, 1295 (final decisions are appealable); *Nystrom v. Trex Co.*, 339 F.3d 1347, 1350 (Fed.Cir.

2003) (final judgment rule of 28 U.S.C. § 1291 is fully applicable to patent cases). An order is final when it “ends litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Catlin v. United States*, 324 U.S. 229, 233 (1945). *Accord, Moreau v. Harris County*, 158 F.3d 241, 244 (5<sup>th</sup> Cir. 1998) (language calculated to conclude all claims before the court qualifies as final); *Aluminum Co. of America v. Beazer East, Inc.*, 124 F.3d 551, 559-62 (3<sup>rd</sup> Cir. 1997) (an order leaving nothing further to be decided by the court is final). *See also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (ruling that makes further litigation improbable is final).

Rule 52 leaves the Court broad discretion concerning the form of its findings and conclusions. A memorandum opinion has been held to satisfy Rule 52 when the basis for the decision is clear. *Wynn Oil Co. v. Purolator Chem. Corp.*, 536 F.2d 84, 85-86 (5<sup>th</sup> Cir. 1976). The court may also announce findings and conclusions orally from the bench. *Chandler v. City of Dallas*, 958 F.2d 85, 89 (5<sup>th</sup> Cir. 1992) (“nothing in the rule precludes verbal announcement of findings and conclusions of law”). Rule 52 also does not prohibit a district court from adopting one party’s proposed findings and conclusions verbatim. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964) (verbatim adoption must not be “rejected out-of-hand”).

A final judgment must resolve all outstanding issues. *Wikoff v. Vanderveld*, 897 F.2d 232, 237 (7<sup>th</sup> Cir. 1990) (Minute order granting Rule 59 motion constituted final judgment: “In our opinion, the district court intended the minute order amending the judgment to represent the final decision in this case.”) A final judgment must specify who prevailed and what relief was granted. *Stamatakis v. J. Walter Thompson, U.S.A., Inc.*, 944 F.2d 382, 383 (7<sup>th</sup> Cir. 1991) (order which “does not specify the relief to which the prevailing side is entitled” is not a final judgment).

By these tests, the Court's August 18 in-court ruling and the August 18 Order memorializing that ruling were final and appealable when made. The Federal Circuit's mandate required this Court to "find facts specially and state separately its conclusions of law." Mandate, Slip Opin. at 10. The August 18 Order and ruling adopting the June 10 Findings fully complied with this directive. Rule 52 permits the Court to have adopted these Findings verbatim without restating them in any particular form. The June 10 Findings resolve every issue. They provide who is to prevail and they award specific damages, fees and costs. Appendix, Exhibit A., p. 30. After the Court's adoption of these Findings, nothing remained to be decided. These are the hallmarks of a final decision.

*The "Separate Document" Requirement.* Prior to the 1963 amendments to Rule 58, an opinion or ruling by the Court containing provisions completely disposing of all claims could constitute a final judgment. 12 MOORE'S FED. PRAC., ¶ 58.05[1]; *Republic Natural Gas Co. v. State of Oklahoma*, 334 U.S. 62, 68 (1948) (final order held immediately appealable without waiting for a "ministerial act ... such as the entry of judgment"). The separate document requirement added to Rule 58 in 1963 was intended to preclude the times for appeal and post-trial motions from running until a document separate from the memorandum or opinion was entered.

Since 1963, however, many courts have refused to use a mechanical application of the separate document rule to extend these critical time limits. *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) (order granting dismissal became final when entered and time periods commenced despite lack of separate document); *Wright v. Preferred Research*, 937 F.2d 1556, 1560-61 (11<sup>th</sup> Cir. 1991) (no separate document required where district court amends a judgment under Rule 59); *Interfirst Bank Dallas v. Federal Deposit Ins. Corp.*, 808 F.2d 1105, 1108 (5<sup>th</sup> Cir. 1987)

(order combining opinion and ruling on Rule 59 motion held a final judgment despite no separate document); *Kanematsu-Gosho, Ltd. v. Massiniaki Aigli*, 805 F.2d 47, 49 (2<sup>nd</sup> Cir. 1986) (“a document denominated an order can be a judgment that satisfies the separate document requirement”). Too frequently, clerks have ignored the separate document requirement, particularly with regard to rulings on post-trial motions. This has resulted in confusion concerning critical time limits for further amendment or appeal after the court had entered a dispositive order or opinion.

As a result, Rule 58 was again amended effective December 1, 2002 to prevent the separate document requirement from delaying the running of the critical post-trial motion and appeal time periods after a ruling on a Rule 52 or Rule 59 motion. Amended rule 58 specifically exempts from the separate document requirement any “order disposing of a motion ... to amend or make additional findings of fact under Rule 52(b) ... [or] for a new trial, or to alter or amend the judgment, under Rule 59 ...” Rule 58(a)(1), F.R.Civ.P. Plaintiff’s July 6, 2004 motions were clearly brought under Rules 52 and 59 and thus fall squarely within the ambit of Rule 58(a)(1).<sup>1</sup>

Under Rule 58(b)(1), the August 18 Order completely and finally disposing of plaintiff’s Rule 52 and 59 motions is deemed effective as a judgment and for purposes of starting the time clocks running when it was docketed on August 18. Rule 58(b)(1) (“judgment is entered” when an order excused from the separate document requirement by Rule 58(a)(1) is docketed). Because of this change in the law, the time periods for seeking to amend the June 10 Findings or to petition for further attorneys fees and costs started running (and, in this case, expired) before

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<sup>1</sup> One of plaintiff’s motions specifically cited Rule 52(b). The other sought “reconsideration.” Because federal practice recognizes no motion for reconsideration, however, plaintiff’s second motion was necessarily governed by Rule 59(e), F.R.Civ.P. *St. Paul Mercury Ins. Co. v. Fair Ground Corp.*, 123 F.3d 336, 339 (5<sup>th</sup> Cir. 1997).

this Court entered its order of September 2, 2004. If the September 2, 2004 order was intended merely to be a separate document formally setting forth the Court's ruling of August 18, amended Rule 58(b) operates to prevent that order from extending or restarting the time periods for seeking further amendment of the Findings or from appealing them.

**II. THE COURT'S SEPTEMBER 2, 2004 ORDER IS NOT EFFECTIVE TO AMEND OR TO MAKE ADDITIONAL FINDINGS.**

To the extent that the September 2 order was intended to modify the June 10 Findings expressly adopted on August 18 by entering additional findings and conclusions set forth in the August 31 Version submitted by plaintiff, that order was ineffective to do so. Once a Court makes findings, neither party may seek any additional or amended findings, except by a proper Rule 52(b) motion:

*On a party's motion* filed no later than 10 days after entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly.

Rule 52(b), F.R.Civ.P. (Emphasis added).

To seek any such modification, plaintiff would have had to have filed a proper Rule 52(b) motion on or prior to the running of the 10 day time period on September 1, 2004. *Glass v. Seaboard Coast Line Railroad Co.*, 714 F.2d 1107, 1109 (11<sup>th</sup> Cir. 1983) (the 10 day time periods for post-trial motions to amend are “jurisdictional”); *Gribble v. Harris*, 625 F.2d 1173, 1174 (5<sup>th</sup> Cir. 1980) (10 day time period “cannot be extended in the discretion of the trial court”). Here, plaintiff filed no such motion.

Rule 52(b) motions must be in writing and must “state with particularity the grounds therefore.” Rule 7(b)(1), F.R.Civ.P.; *Riley v. Northwestern Bell Telephone Co.*, 1 F.3d 725, 726-27 (8<sup>th</sup> Cir. 1993) (conclusory Rule 52(b) motion violated Rule 7(b); memorandum in support setting forth particular arguments filed after 10 day time limit barred as untimely). The August

31 Version of the findings (the only document filed by plaintiff within the 10 day time period) does not itself constitute a proper Rule 52(b) motion because it fails to state in writing any accepted reason why its modified findings should be adopted. See *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219-20 (5<sup>th</sup> Cir. 1986) (The sole purpose of a motion to amend findings “is to correct manifest errors of law or fact or, in some limited situations, to present newly discovered evidence”).

Plaintiff claims that the “Court requested Golden Blount to submit updated Findings of Fact and Conclusions of Law, which were submitted on August 31, 2004.” Mem. Supp. Atty. Fees, ¶ 6. This Court, however, could not have properly invited plaintiff to submit either amended or additional findings without doing so by motion as to which defendant would necessarily have had to be permitted notice and an opportunity to be heard that plaintiff had not satisfied the controlling standard for amending the then existing findings.

Had the September 2, 2004, order been a decision on a proper and timely Rule 52(b) motion to further amend the plaintiff’s findings adopted on August 18, an additional 10 days would then have been available running from September 2 for all parties to seek further amendment under Rule 52(b). Because no proper Rule 52(b) motion was filed before September 1, however, the court lacked jurisdiction on September 2 to further amend or to supplement the findings adopted on August 18.

The relief which plaintiff now seeks is clearly an amendment of the existing finding awarding it attorneys’ fees to increase that award. Because there was no proper Rule 52(b) motion filed on or before September 1, however, that amendment is now untimely. Absent a proper and timely Rule 52(b) motion, the Court’s September 2 order cannot have extended the time period for making such amendments. *Gribble, supra*, 625 F.2d at 1174.

CONCLUSION

For the above stated reasons, plaintiff's Application for Attorneys' Fees (filed September 8, 2004) and its Application for Costs (filed September 9, 2004) must both be denied as untimely.

Dated: September 17, 2004

Respectfully submitted,

  
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#631661

CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing document was served by first-class mail, postage prepaid, to counsel for Plaintiff, William D. Harris, Jr., Schultz & Associates, P.C., 5400 LBJ Freeway, One Lincoln Center, Suite 525, Dallas, Texas 75240. and Charles Gaines, Hitt Gaines, P.C., 2435 North Central Plaza, Suite 1300, Richardson, Texas 75080, this 17th day of September, 2004.

Steven Parker

ORIGINAL

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
**FILED**  
SEP 23 2004  
CLERK, U.S. DISTRICT COURT  
By CR  
Deputy

GOLDEN BLOUNT, INC.,

Plaintiff,

v.

ROBERT H. PETERSON CO.,

Defendant.

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Civil Action No.

3-01CV0127-R

**PLAINTIFF, GOLDEN BLOUNT, INC.'S  
REPLY TO DEFENDANT'S OPPOSITION TO  
PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS AND  
OBJECTION TO DEFENDANT'S UNTIMELY FILING OF NOTICE OF APPEAL**

Introduction

Robert H. Peterson Co., Defendant, has challenged Golden Blount, Inc.'s, Plaintiff's, Application for Attorneys' Fee and its Application for Costs by arguing that they were untimely filed and that this Court lacks jurisdiction to change any of its findings. Contrary to Defendant's assertions, as explained herein, the Court does have jurisdiction to entertain and grant Plaintiff's application for its attorneys' fees and costs because both were timely filed under Federal Rule of Civil Procedure 54(d). Moreover, because there are matters remaining for the Court to rule on, and there is no final judgement presently entered in this case, the Defendant's Notice of Appeal is untimely, and therefore improper. For the record, the Plaintiff objects to Defendant's Notice of Appeal on those grounds. In view of Defendant's untimely Notice of Appeal, Plaintiff respectfully requests that, upon U.S. Magistrate Judge Stickney's determination of Plaintiff's pending Application for Attorneys' Fees and Application for Costs, that a **Final Judgment** be entered pursuant to Federal Rule of Civil Procedure 58, as expeditiously as possible.

## Argument

### **1. The August 18 Order Is Not a Final Judgment for Purposes Of Appeal**

Defendant's position is based on the mistaken presumption that this Court entered a judgment from which an appeal could be taken on August 18, 2004, by way of a Minute Order dated August 18, 2004. Defendant's position is incorrect and not supported by relevant case law. There is no final judgement presently in this case that is sufficient to serve as a basis for an appeal.

Defendant relies on Seventh Circuit law as support for its argument<sup>1</sup>, but since, the Northern District of Texas is within the district of the United State Court of Appeals for the Fifth Circuit, the law of the Fifth Circuit governs all matters related to procedure. Accordingly, with respect to the question of whether a Minute Order or entry can serve as a separate document for purposes of Federal Rule of Civil Procedure 58, which is needed to comply with Federal Rule of Appellate Procedure 4(a)(7), the answer lies within the purview of the Fifth Circuit. The Fifth Circuit has specifically, and recently, addressed this point and has held that a Minute Entry (Order) on the district court's docket cannot constitute a separate document for the purposes of meeting the Rule 58 requirement, regardless of whether that judgment was otherwise appealable as a final order or as an interlocutory order. *Freudensprung v. Offshore Technical Services, Inc., et al.*, 379 F.3d 327, 336 (5th Cir. 2004). In addition, the Fifth Circuit, in *Freudensprung*, stated that the December 1, 2002, amendments were made to both the Federal Rule of Civil Procedure 58 and the Federal Rule of Appellate Procedure 4(a)(7) to resolve uncertainties concerning how Rule 4(a)(7)'s definition of when a judgment or order is deemed "entered" interacts with the requirement in Rule 58 that to be "effective," a judgment must be set forth on a separate document. *Id.* At 334. Thus, the Fifth Circuit, in *Freudensprung*, strongly affirmed that Rule 58 requires a separate document, unless it falls into one of the specified exceptions listed in Rule 58 and that a Minute Order cannot serve as a separate document for the purposes of Rule 58. Thus, under the law of the Fifth Circuit as it

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<sup>1</sup>The Fifth Circuit's law differs from that of the Seventh Circuit's, which is the law on which Defendant relies upon to support its position that the Minute Order satisfies the separate document requirement as required by Rule 58. See, page 5 of Defendant Robert H. Peterson Co.'s Opposition to Plaintiff's Applications For Attorneys' Fees and Costs, citing *Wikoff v. Vanderveld*, 897 F.2d 232, 237 (7th Cir. 1990).

concerns this case, there is no separate document, and there is no order that can be construed to fall within the exceptions listed in Federal Rule of Civil Procedure 58(a)(1)(A through E).

Moreover, the Court's actions during and following August 18, 2004, clearly reflect the Courts intent that no final judgment had been rendered. At the conclusion of the Oral Hearing on August 18, 2004, Judge Buchmeyer from the bench order Plaintiff "to present [the Court] with the necessary findings and necessary final judgment...." Inasmuch as the Judge was asking that the Plaintiff submit a final judgment, this, unquestionably, reflects the fact that the Court did not render a final judgment on August 18, 2004. Additionally, in accordance with the Court's bench order, Plaintiff submitted Findings of Fact and Conclusions of Law, which the Court signed on September 2. Concurrently, the Court entered an order vacating Defendant's Findings of Fact and Conclusions of Law previously adopted on 6/22/04, and adopted Plaintiff's Findings of Fact and Conclusions of Law submitted 8/31/04 (Findings), which is after Defendant's argued final judgment date of August 18, 2004. Then, on September 16, 2004, the Court entered an Order of Reference directing matters relating to the Plaintiff's Application for Attorneys' Fees and Costs to U.S. Magistrate Judge Stickney. If the Court had truly intended that all matters before it were determined, it would not have issued the specific bench order it did or entered Plaintiff's Findings that it submitted to the Court on August 31, 2004, and it would not have, *sua sponte*, referred matters relating to the Plaintiff's Application for Attorneys' Fees and Costs to U.S. Magistrate Judge Stickney. These actions plainly demonstrate that the Court did not intend the August 18, 2004, Minute Order to be a final judgment.

Therefore, since there is no final judgment or order from which an appeal can be taken, the Plaintiff's submission of its Application of Attorneys' Fees and its Application of Costs to the Court on September 8 and 9, 2004, respectively, which was within ten days of the Court's entry of the Findings on September 2, 2004, was timely.

## **2. The Court's September 2, 2004, Order is Effective**

Defendant further argues that the Court's September 2, 2004, order is not effective to amend or make additional findings, because on August 18, 2004, the Court expressly adopted Plaintiff's Findings of Fact and Conclusions of Law dated June 10, 2004, thus making the judgment final. As

such, Defendant asserts the Court lacks jurisdiction to modify those findings on its own, and that any modification to those findings must have been done by Plaintiff using a motion pursuant to Federal Rule of Civil Procedure 52(b).

Defendant's argument fails in at least two respects. First, as discussed above, under Fifth Circuit law, a Minute Order is not sufficient to meet the separate document rule required by Rule 58(a). Moreover, given the Court's actions at the end of and subsequent to the August 18, 2004, Oral Hearing, it did not intend the August 18, 2004, Minute Order to be a final judgment. Thus, there is no final judgment and the Court's jurisdiction remains intact. Accordingly, the Court has the authority and jurisdiction to change its decision in any way it chooses.

Second, Plaintiff was not obliged to file the Findings under Rule 52(b) as a motion, because the Plaintiff submitted those Findings pursuant to an order that the Court issued from the bench on August 18, 2004, instructing the Plaintiff, among other things, to "present [the Court] with the necessary findings and the necessary final judgment...." The Plaintiff did nothing less than comply with the Court's bench order. This procedure tracks exactly what both parties did when they filed their respective findings and conclusions on June 10, 2004, pursuant to an order of the Court and without motion. Moreover, the Defendant had every opportunity to challenge the Court's September 2, 2004, Findings if it wanted, but it chose not to do this. Obviously, the Court did intend the Plaintiff to make the requested submission because Judge Buchmeyer signed those Findings on September 2, 2004, and the Court adopted them by its order also dated September 2, 2004. Since there is no final order or judgment in the present case, as explained above, the Court has jurisdiction to change its findings in any way it deems proper.

### Conclusion

For the reasons set forth above, Plaintiff's Application of Attorneys' Fees and Plaintiff's Application for Costs should be granted. In view of Defendant's untimely appeal in this case, the Plaintiff respectfully requests that U.S. Magistrate Judge Stickney consider and rule upon these motions without delay and that a **Final Judgment** be entered pursuant to Federal Rule of Civil Procedure 58, as expeditiously as possible.

Respectfully submitted,

For Plaintiff Golden Blount, Inc.



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the enclosed Plaintiff, Golden Blount, Inc.'s Reply To Defendant's Opposition to Plaintiff's Application For Attorneys' Fees and Costs and Objection to Defendant's Untimely Filing of Notice of Appeal was served on the following counsel of record on September 23, 2004, by first class mail:

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Charles W. Gaines

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

GOLDEN BLOUNT, INC. ) 3:01-CV-0127-R  
 )  
VS. ) Dallas, Texas  
 )  
ROBERT H. PETERSON COMPANY ) August 18, 2004

TRANSCRIPT OF ORAL ARGUMENTS  
BEFORE THE HONORABLE JERRY BUCHMEYER  
UNITED STATES SENIOR DISTRICT JUDGE

APPEARANCES:

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Court Reporter:

JOE BELTON  
United States District Court  
1100 Commerce  
Room 1544  
Dallas, Texas 75242

JT-APP 3122

1 P R O C E E D I N G S

2 THE COURT: Have a seat, please.

3 This is Civil Action 3-01-127, Golden Blount versus  
4 Robert Peterson. We have a hearing on the Motion to Amend  
5 Findings of Fact and Conclusions of Law.

6 Ready to proceed with argument?

7 MR. GAINES: Yes, Your Honor, we are.

8 Your Honor, do you have any of the hearing sets  
9 for Mr. Harris? He is wondering if you had some of those.

10 THE COURT: Yes, we do.

11 MR. HARRIS: How are you, judge?

12 THE COURT: Good. Good to see you.

13 MR. HARRIS: A minor thing.

14 MR. GAINES: May it please the court, Your Honor.

15 THE COURT: Yes.

16 MR. GAINES: First we wish to express our  
17 appreciation for this court taking its time to hear these  
18 oral arguments regarding this case. We do believe that due  
19 to the disparate findings that exist in this case it is  
20 imperative that the court hear and thoroughly consider these  
21 oral arguments before entering final judgment.

22 Please note that I'll be happen to answer any  
23 questions that Your Honor might have during oral arguments.

24 I think that it would be helpful to just briefly  
25 go -- since it has been about two and a half years, to go

1 over some background of the previous case. About two years  
2 ago and after a two and a half day trial, we believe this  
3 court rightfully found the defendant Robert H. Peterson  
4 willfully infringed the '159 patent, found the case to be  
5 exceptional and awarded damages and attorney's fees to  
6 plaintiff in amount of about 1.7 minimum dollars. The  
7 defendant appealed. The Federal Circuit found that the  
8 Findings of Fact lacked detail in order to make a through  
9 review and remanded it back to the court.

10 We think it's highly significant for the court to  
11 note that in its remand the Federal Circuit affirmed this  
12 court's claim construction, found the patent not to be  
13 invalid and found that defendant had waived its inequitable  
14 conduct claim. Moreover, the Federal Circuit never said that  
15 this court's findings were wrong in any respect and it only  
16 instructed this court to make specific factual findings.

17 Now by its adoption of Defendant's Findings of Fact  
18 and Conclusions of Law, exactly the same set of facts and  
19 based on exactly the same set of facts and evidence, this  
20 court has now found that the defendant has not infringed the  
21 '159 patent and awarded attorney's fees to defendant in the  
22 amount of about half a million dollars.

23 Your Honor, these findings are a complete reversal  
24 of the original judgment of this court, and the only reason  
25 for this reversal the plaintiffs can think of at this time is

1 that the court has been misled by defendant's erroneous  
2 findings and that's what we would like to present to you this  
3 morning.

4 We know that a lot of time has passed and we  
5 thought that refreshing the court's recollection on some of  
6 the pertinent facts of the case would be very helpful and  
7 instructive to the court in making its final judgment. But  
8 before we get into the facts of the case, the first thing  
9 that we want to address is defendant's attorney's fees, Your  
10 Honor.

11 As plaintiff has set forth in its request for  
12 reconsideration and subsequent reply, there are numerous  
13 reversible errors in defendant's findings which we will  
14 present later to this court. One of the most those notable  
15 errors, however, and we do believe it to be reversible error  
16 in every sense, Your Honor, is the finding that defendant is  
17 entitled to its attorneys' fees because supposedly, plaintiff  
18 brought a vexatious and unjustified case against defendant.  
19 Its position is based on nothing more than the bald  
20 conclusory finding that it should have been obvious to  
21 plaintiff that it didn't have a case. That's the only thing  
22 that the defendant ever argued in any of its pleadings and  
23 that is the only finding that there is on record. There is  
24 no evidence of any kind that has been proven or shown by  
25 defendant.

1           This is simply not sufficient under the law. The  
2 case law is very clear that for an exceptional case to be  
3 found the one that is moving for exceptional case must prove  
4 that case by clear and convincing evidence. And, Your Honor,  
5 there's just simply nothing on the record that shows that the  
6 plaintiff, Golden Blount, was vexatious or willful in any way  
7 during these court proceedings. Defendant hasn't proven  
8 anything along those lines. In fact, the defendant has not  
9 pointed to any evidence to support this other than its own  
10 conclusory statement and there's not one shred of evidence  
11 that plaintiff acted in bad faith or was vexatious in any  
12 respect in bringing this lawsuit.

13           To the contrary, we believe that plaintiff's  
14 prosecution of its case was not vexatious or unjustified.  
15 Plaintiff has never engaged in any type of unreasonable  
16 conduct in prosecuting its case which might support an award  
17 of attorneys' fees to defendant, and plaintiff at all times  
18 during these proceedings, Your Honor, has been reasonable and  
19 justified in prosecuting its case and has pressed its case in  
20 the best of faith.

21           This is not a complicated case, Your Honor. The  
22 accused device, as you see over here, is virtually a copy of  
23 a commercial embodiment, both of which are covered by the  
24 claims of patent. Just one look at it and you can tell that  
25 there is something going on here. The defendant totally

1 ignored the notice letters presented to it early on and  
2 continued its infringing activities even up through to the  
3 time of trial.

4           Moreover, the claim interpretation that raised the  
5 level, and that was the issue that turned at trial, Your  
6 Honor, whose claim construction was going to win. There were  
7 two claim constructions that were being proffered at that  
8 time, Your Honor, and, of course, the court held its reserve  
9 the claim construction until the end of trial, and so the  
10 defendant was promoting a bottoms test and we were promoting  
11 or urging the court to adopt a tops test. Well, the Federal  
12 Circuit found that the tops test was the test that -- that  
13 determined whether something was raised with respect to  
14 something else.

15           I'd like to turn the court's attention to Exhibit  
16 D-30 which was an exhibit that was admitted into evidence by  
17 defendant and it's further proof that plaintiff was not  
18 unreasonable, vexatious or unjustified in bringing and  
19 prosecuting its case of infringement against the defendant.  
20 This was a claim interpretation that plaintiff asserted  
21 during trial and used as its basis for pressing its  
22 infringement case and it continues to press that case, Your  
23 Honor. We still believe that -- that the defendant's device  
24 infringes the claims of the '159 patent.

25           And finally, this court's previous judgment was

1 entirely in plaintiff's favor and that judgment was affirmed  
2 by the Federal Circuit in part and only remanded back for  
3 more specific findings. The fact that this court found for  
4 plaintiff at the end of trial is clear proof that reasonable  
5 minds could differ about whether defendant infringed, since  
6 the court, at least at the end of trial, was thoroughly  
7 convinced that defendant not only infringed but willfully  
8 did so. There is no way that this judicial history should be  
9 ignored in now determining whether plaintiff's case  
10 was vexatious or unjustified. In giving its history there  
11 can only be one conclusion, Your Honor, it just simply  
12 wasn't.

13           Given these facts, how could they form the basis of  
14 an unjustified or vexatious lawsuit? There is simply no  
15 evidence at all currently on the record that supports the  
16 finding that defendant is entitled to its attorney's fees  
17 and there is no other justifiable basis on which to award the  
18 defendant its attorney's fees in this case. In effect, and  
19 based on the totality of the record, the plaintiff is being  
20 punished because it brought a justified lawsuit and defendant  
21 is essentially being awarded for willful infringing on a  
22 valid U.S. patent. Accordingly, Your Honor, we believe that  
23 this finding is grossly erroneous because defendant has not  
24 presented clear and convincing evidence, as required by law,  
25 and a finding is not supported by the facts in this case in

1 any respect. They have simply produced no evidence.

2 Your Honor, there is one case that I would like to  
3 just quickly point out to the court regarding what it takes  
4 to have or what the threshold, I guess, is of a vexatious  
5 lawsuit. And it's an unpublished opinion. It's Centex, and  
6 we do have a copy for the court if the court is so obliged to  
7 receive one from us. As soon as I can find it here. Sorry,  
8 Your Honor, for the delay. As you can see I've brought one  
9 too many cases up here, Your Honor.

10 Let me just briefly say what it was. There were  
11 several things that the defendant was urging, said that the  
12 plaintiff was vexatious, that they did several things wrong,  
13 they took inconsistent claim positions. They didn't allow an  
14 opinion to be made known to the other side. They said that  
15 they should have given that opinion up, that they shouldn't  
16 have taken those inconsistent claims positions. They also  
17 argue, Your Honor, that there was inequitable conduct before  
18 the patent office. None of those things we have here. And  
19 yet, the Federal Circuit overruled the district court's  
20 finding that the -- that there was an exceptional case.

21 Now, again, this is an unpublished opinion so I  
22 know precedent is somewhat questionable, but I do think it is  
23 certainly indicative of the standards that the Federal  
24 Circuit looks at in finding an exceptional case. There has  
25 to be something on the record, Your Honor, and there just

1 simply isn't. There was no testimony ever taken from  
2 Mr. Blount or any of the witnesses presented by plaintiff  
3 that indicated that they acted in bad faith, that they  
4 brought this case just on a whim or anything like that. They  
5 proved none of that. They were trying to prove their case.  
6 They were trying to prove that they didn't infringe because  
7 the patent was invalid, which the Federal rejected, and they  
8 were also trying to prove they didn't infringe because you  
9 measure raised level or determine raised level from the  
10 bottoms of the tubes. So the standard is fairly high, Your  
11 Honor, and I certainly think that the record is totally  
12 absent of any evidence on this point.

13 Well, with that out of the way, I would like to  
14 turn the court's attention now to some of the evidence that  
15 we presented at trial. Basically defendant's findings state  
16 that there is no substantial evidence of proof of  
17 infringement. And the main thing that they're trying to  
18 argue here, Your Honor, is that because we didn't get  
19 somebody up on the stand and say, do you set this up in  
20 exactly this way, and they say, yes, because we did not show  
21 that. They said we did not prove our case. They completely  
22 ignore all of the other compelling circumstantial evidence  
23 that exists in this case and that is -- of course,  
24 circumstantial evidence can be as strong as anything, Your  
25 Honor, and which we will get to some case law in just a few

1 minutes that will highlight that aspect further.

2 But first of all, I want to go over -- they say  
3 that we didn't establish our case of infringement generally.  
4 Well, at trial we introduced devices 3-A and 4-A.

5 Your Honor, may I approach the exhibit table here?

6 THE COURT: Yes.

7 MR. GAINES: This is Exhibit 3-A, Your Honor, which  
8 is the commercial involved in plaintiff's device covered by  
9 the plaintiff's '159 patent and this is Exhibit 4-A which is  
10 defendant's accused device which we also believe is covered  
11 by the plaintiff's '159 patent. We introduced those at  
12 trial. The court had a chance to look and examine very  
13 closely. We even did a little level test for you and the  
14 level sitting there and, by golly, it's still unlevel, Your  
15 Honor. Those pipes have not moved after two years. And note  
16 for the record for opposing counsel that these have been in  
17 the registry of the court since that period of time. And so  
18 we haven't fiddled with them or anything like that. We just  
19 brought them out and put them on the table.

20 Defendant's findings erroneously state that the  
21 evidence is not before this court because it has no probative  
22 value and lacks foundation. They're saying basically 4-A  
23 didn't lay any foundation for it, and they're saying it was  
24 not accepted by the court and, therefore, it's probativeness  
25 is questionable and, you know -- so it doesn't establish

1 anything. It doesn't establish direct infringement by either  
2 Peterson or its customers. But, Your Honor, 4-A -- now the  
3 findings state that presently.

4 4-A there was foundation established for it. We  
5 brought this out and ironically it was established by one of  
6 the defendant's own witnesses, Mr. Jankowski. And his  
7 testimony is here before you, Your Honor. And Mr. Harris was  
8 questioning him, "Pick out which is which." "Answer: This  
9 is Peterson." "This is what?" "This is Peterson's product."  
10 "How do you know? How can you tell?" "I can tell about the  
11 assembly." "How do you know that 4-A is Peterson?" "I know  
12 the component parts. I have seen them."

13 Your Honor, their own witness identified 4-A as a  
14 Peterson product. The fact that the argument that this lacks  
15 foundation is just totally unfounded, but yet their findings  
16 state that lacks no foundation and it's not even probative.  
17 How can that be? Look at them. They are almost virtually  
18 copies of one another. Of course it's probative infringement  
19 and foundation was established.

20 Moreover, Mr. Blount also established foundation to  
21 this exhibit in his testimony where he said, "Look at  
22 Plaintiff's Exhibit 4-A and 3-A." "Now, of course, I've  
23 never seen them or have a hard time telling which is  
24 yours and which was theirs so you need to come over here and  
25 help me do that." And Mr. Blount said, "This is ours,"

1 pointing to 3-A "and this is the copy" pointing to 4-A,  
2 again, Your Honor, further foundation established 4-A. This  
3 is contrary to the findings. The findings say there's no  
4 foundation established and it's not probative. This is very  
5 clear error.

6 We also established our case of infringement  
7 through Mr. Blount's testimony. He established the presence  
8 of each and every element of the claims of the accused  
9 device, 4-A, at trial, and I'm not going to take Your Honor's  
10 time to go through all of those, but you can certainly look  
11 at those at pages 45 through 60. He went through every  
12 element and identified every element of the accused device --  
13 of the claims in the accused device.

14 We also, you may recall, Your Honor, had a video  
15 that showed a side-by-side comparison of the units bare  
16 without anything and then a side-by-side comparison of the  
17 two burners burning in a fireplace. Now, the defendant did  
18 object to this, the introduction of this video, but the court  
19 overruled that, and because Mr. Blount was there, he said he  
20 directed it and established foundation, so there's no  
21 question that that also is very probative on the issue of  
22 infringement.

23 Now, I'd like to turn the court's attention back to  
24 D-30 very quickly because we think this exhibit is very  
25 telling, Your Honor. D-30 is a CAD drawing presented at

1 trial by defendant and it shows the configuration that they  
2 recommend their device be set up in. Now, keep in mind, Your  
3 Honor, it was important to them at the time to prove that the  
4 top of the little -- the bottom of the little tube was above  
5 the bottom of the big tube, and that's what that bottom line  
6 clearly shows because they were saying if we do that we don't  
7 infringe the claim. Well, that's not the claim construction  
8 adopted by this court and it's not the claim construction  
9 that was affirmed by the Federal Circuit.

10 But look at the tops, Your Honor. You will notice  
11 that there is a red box, and we've added that for  
12 illustration purposes. It shows that there is a .06 inch  
13 difference between the top of the big tube and the top of the  
14 small tube. This falls precisely into the scope of the  
15 claims, Your Honor. One tub is raised with respect to  
16 another.

17 Now, they make an argument, defendant makes an  
18 argument that we're no longer entitled to rely on D-30  
19 because we questioned it at the appeal level and the only  
20 thing that we questioned at the appeal level about this  
21 exhibit, Your Honor, was its timeliness and, you know, its  
22 purpose because we had never seen this exhibit before. This  
23 was never presented to us in discovery. It looked like it  
24 was made for trial, but we never questioned the authenticity  
25 of it.

1           We also questioned the purpose of it; ie., that it  
2 was designed specifically to show that the bottom of the  
3 tubes, one was raised with respect to the other; in other  
4 words, the primary was lower than the secondary which would  
5 fall outside the scope of the claims. So that's all we did,  
6 Your Honor.

7           But please keep in mind this is an exhibit that  
8 they introduced, that they laid the foundation for through  
9 Todd Corrin, their senior vice-president, and that this court  
10 accepted. And so, you know, the court can give its  
11 appropriate weight. Of course that's entirely up to the  
12 court. But to say that we can't rely on that to prove our  
13 point that their instructions indicate that you arrange this  
14 in a configuration. In other words, when you arrange it in  
15 the configuration, Your Honor, that they suggest, just about  
16 like this right here. The top of this tube is above the top  
17 of that tube. And that's exactly what the claims require.

18           There is another thing that I want to direct the  
19 court's attention to and that's page 3. Well, let me go over  
20 some testimony of Todd Corrin, Your Honor, because the reason  
21 I have to do this is because the defendant is arguing that  
22 Mr. Corrin didn't really testify to D-30. He testified to an  
23 alternative form of D-30 and I just want to clear that up  
24 that that is not -- that's not what the record really shows  
25 in totality. If you read the fourcorners of the record, Your

1 Honor, it's very clear that all through Mr. Corrin's  
2 testimony he was talking about D-30.

3 And we start out at page 172 and Dean Monco asked,  
4 "Would you please turn to Exhibit D-30?" He says, "Yes." He  
5 said, "What is this?" He said, "It's a drawing. It's a  
6 drawing of D-31 and 32 that's assembled together, the pan and  
7 the burner. It's the ember booster assembly for the G-4 pan.  
8 It's a side drawing of that." "Did you have responsibility  
9 for preparing this Exhibit D-30" "Yes, I requested that it  
10 be prepared." "What is shown?" "It's the relationship of  
11 the ember booster, which is also called the secondary burner,  
12 to the primary burner that's in the glowing ember burner,  
13 G-4, which more precisely shows exactly what's being shown in  
14 the drawing here. It shows that the ember booster is  
15 generally level to the main burner tube."

16 Then he goes on and says, "Okay. What I would ask  
17 you then, please, to continue with your explanation of what's  
18 shown on the drawing." "It shows the ember booster to  
19 normally would be installed just slightly below the top of  
20 the main burner and would be about a quarter of an inch above  
21 the bottom of the main burner tube."

22 Your Honor, this is very telling as far as  
23 infringement goes. Raised level, there was virtually no  
24 dispute about they had a pan -- both they have a pan, they  
25 have two tubes, they have a valve. That was totally

1 undisputed -- practically undisputed at trial. But what was  
2 disputed was what raised level meant. And this court and the  
3 Federal Circuit both determined that it was determined from  
4 the tops of the tubes, not from the bottoms of the tubes  
5 like they urged and the Federal Circuit rejected. And here  
6 in their own testimony by their own person, their own  
7 witness, Your Honor, he says, "The top of the primary burner  
8 tube is above the top of the secondary burner tube."

9 Now, Your Honor, defendant is going to say, they're  
10 going to argue this is all well and good, Your Honor, but,  
11 you know, what does that have to do? They never showed --  
12 they never showed at all that this -- that this thing was  
13 distributed to its customers or that once they did it they  
14 did it in the way that we describe here in this drawing.

15 Well, I know we're all given not to read the  
16 instructions, Your Honor. You know, many of us assemble  
17 things we've gotten. Most of us men have gotten about  
18 halfway into the project and realized that, gee whiz, it  
19 would have really been nice if we had read the instructions  
20 along the way. But Your Honor, in dealing with gas  
21 contraptions that go into a home where there's potential of  
22 damage and explosion and fire, people are going to follow  
23 those instructions. And, yes, it was distributed.

24 Let me draw the court's attention to some testimony  
25 again by Todd Corrin at page 183. "Was D-30 distributed to

1 anyone or drawings like D-30 distributed to any Peterson  
2 customer, to your knowledge?" "Yes, it has been." They  
3 distributed this to their customers. Now, they're trying  
4 to -- defendant is trying to wave a little magic wand and say  
5 that -- that, you know, well, it doesn't say that D-30 was  
6 distributed. It says or drawings like this and we're  
7 supposed to believe that he was talking about an alternative  
8 drawing of some kind that wasn't even before the court. But  
9 if you take his earlier testimony, Your Honor, they were  
10 talking about D-30, plain and simple.

11           When he was asked the question whether it was  
12 distributed or not, it was distributed to -- you know,  
13 according to Mr. Corrin was distributed to their customers.  
14 So the customers had instructions on how to put this thing  
15 together. Moreover, they had the general instructions which  
16 went out with every ember burner, which is Defendant's  
17 Exhibit 34, defendant's exhibit again. The highlighted  
18 portion of the red box you see shows that -- says, "Tighten  
19 securely so the ember flame booster valve faces forward and  
20 flush with the burner pan. The ember flame booster burner  
21 port should be face downward flush with the burner pan both  
22 on the hard floor."

23           There was testimony regarding this, about the hard  
24 floor. First of all it was given by Mr. Bortz in his  
25 deposition, his first deposition, "And the difference that

1 we've have in discussion is how does the support for the  
2 ember flame booster or the secondary ember -- ember is that  
3 you believe that the valve serves as a support that it sits  
4 on the fireplace floor and serves as support. Is that true."  
5 "I believe that the valve serves as the support, but I don't  
6 know what the difference is." And then he even goes on down  
7 a little bit further, "Which is not -- what is not exactly  
8 highlighted?" "Well, I mean that that's what I think -- " at  
9 line 17, "I think that that's -- that's the unit supported by  
10 the valve." Well, Your Honor, again, this is firmly -- this  
11 valve right here is firmly on that table as well as this pan  
12 here and you can still see that the tops are level. Todd  
13 Corrin also talked about the ember flame booster being  
14 supported by the valve, said it's below the point to which it  
15 can go, at 200 and 201.

16 I think we'll move on, Your Honor. I think you've  
17 got the point that -- that D-30, which was an exhibit  
18 produced by them, was distributed to the customers. It does  
19 encourage an infringing configuration. Despite the fact that  
20 defendant wants us to believe that nobody ever set it up that  
21 way. Nobody ever set it up that way. Even though you had  
22 the general instructions and even though you had more  
23 specific instructions, nobody ever set it up that way and we  
24 didn't prove that anybody set it up that way.

25 Your Honor, you've been through many patent cases.

1 How many times has the defendant sat there and agreed that  
2 they infringed the device? They don't do that. You have to  
3 rely on circumstantial evidence sometimes and that's  
4 certainly what we have an abundance of here and it is as good  
5 as any direct evidence.

6 Now, the defendant says that they didn't directly  
7 infringe, that we did not establish direct infringement on  
8 their part. Well, again, Your Honor, this is contrary to  
9 what the testimony states. We have got Bortz's deposition at  
10 page 68 where he said that, "The distributors, the  
11 manufacturer come in and they look at the devices, that they  
12 can see it set up." And Mr. Harris says, "Well, do you set  
13 the product up?" On page 69, "Do you set the product up just  
14 like it would be in a home?" "Yes, sometimes." "And do you  
15 sometimes, when you do that, have the axillary burner  
16 installed along with the main burner?" "We may in one place  
17 in the showroom." So they even invited their customers in  
18 and set it up.

19 Now, we're to believe that the defendant would not  
20 set it up pursuant to its own instructions. They're going to  
21 set it up in some other way. Your Honor, this is just not a  
22 believable argument to me. They're going to follow their own  
23 instructions. There's liability here, Your Honor. There's  
24 no reason why they would set that up or encourage anybody to  
25 set it up other than exactly the way that they recommend it

1 to be set up.

2           Todd Corrin -- we also have Mr. Bortz's -- let me  
3 say this. Mr. Bortz testified that 10 of the G-5's assembled  
4 with the ember burner were sold by defendant. Now the G-5 is  
5 exactly like the G-4. Now, defendant is arguing that they're  
6 different and that D-30 does not apply to G-5 while  
7 Mr. Corrin at page 179 of his testimony, and we will get to  
8 that in just a second -- I know I'm going to run a little  
9 ahead of you here but trying to be conscious of the court's  
10 time.

11           But Mr. Bortz said on pages 154 and 155 that there  
12 may be 10 or 12 G-10s that they had assembled themselves, put  
13 the burner on and sent them out. And again we're supposed to  
14 believe that they did not set it up in an infringing  
15 configuration, that they set it up some other way. Well,  
16 Your Honor, I just don't believe that that's what the --  
17 that's what these documents and this testimony is really  
18 saying.

19           They specifically took the time to bring in an  
20 exhibit that clearly showed how they want this thing set up,  
21 and it's just -- it's just not believable that they would set  
22 it up in any way regardless of what they would like to argue  
23 now.

24           So, without any supporting evidence whatsoever  
25 defendant takes the untenable position that it would have

1 been necessary to set the device up in the same way as it  
2 recommended to its customers. Why would defendant do this?  
3 The answer is they wouldn't. This is strongly compelling  
4 circumstantial evidence that cuts against defendant's  
5 erroneous finding.

6 They say that there is no direct infringement by  
7 others. Well, Your Honor, again D-30 is the thing to look at  
8 that was given, according to Todd Corrin, to customers. Look  
9 at the general instructions, valve and pan flush with each  
10 other. It all results in the configuration that you see  
11 right there. We didn't do anything to that. We brought  
12 it out, sat it down and put it on the table and there  
13 it is, just like any customer would do. And particularly  
14 we give instructions, say, be sure that it's set up  
15 this way.

16 Now, I would like to direct the court's attention  
17 to Electro Scientific which is Federal Circuit case, at page  
18 1353. There were two different devices, Your Honor and --  
19 there were two different devices, Your Honor, one infringed  
20 and one didn't. And the General Scanning customers purchased  
21 the infringing because -- General Scanning who the -- the  
22 defendant here asserts that the district court should have  
23 reduced them because either side did not show which of  
24 General Scanning's customers purchased the infringing units  
25 for glowing metal links. This was a semiconductor device.

1           The district court placed the burden of showing the  
2 extent of noninfringing use on General Scanning, and because  
3 General Scanning did not meet this burden the district court  
4 denied remittitur. Your Honor, that's the very same thing  
5 that we have here. They're arguing this thing can be set up  
6 in several configurations. We can put the tube here, we can  
7 put the tube there, we can put the tube everywhere. But they  
8 never -- they never really proved that it was done that way,  
9 Your Honor. And that burden is on them.

10           What we do have before the court is we have a  
11 device that infringes, accused device that infringes. We  
12 have instructions, two different sets of instructions that  
13 result in infringing configuration, and now they're trying  
14 make us believe that it's set up in some other way all the  
15 time and that nobody ever really infringes this thing. Well,  
16 the court here said if they want to prove that, that's their  
17 burden, not the plaintiffs.

18           Also I want to direct the court's attention to  
19 Moleculon. Moleculon is the Rubik's Cube, Your Honor, the  
20 best I can determine, or certainly something similar, you  
21 know, one of those little puzzles that drive you nuts and you  
22 twist the different portions of the cube. I never could  
23 figure one of those things out.

24           There was a suit brought on that and CBS, who was  
25 the defendant there, argued that it could not be liable for

1 inducing infringement of the claims featured by because  
2 there's no evidence of direct infringement of the method  
3 claim. The district court held that Moleculon had met its  
4 burden of -- the district court held that Moleculon had met  
5 its burden of showing infringement under Section 71(b)  
6 inducement with circumstantial evidence of extensive puzzle  
7 sales, dissemination of instruction sheet teaching a method  
8 of restoring the preselected pattern with each puzzle and the  
9 availability of solution booklet on how to solve the puzzle.  
10 The court goes on to say, "If CBS is arguing the truth of  
11 inducing infringement or direct infringement requires direct  
12 as opposed to circumstantial evidence, we must disagree. It  
13 is hornbook law that the direct evidence of fact is not  
14 necessary. Circumstantial evidence is not only sufficient  
15 but may also be more certain satisfying and persuasive than  
16 direct evidence."

17           Your Honor, we didn't get anybody up here and say,  
18 yeah, I set it up that way. But we had Todd Corrin testify  
19 to an exhibit that they prepared and submitted before this  
20 court. We had the instruction sheet that they -- that they  
21 set forth. We have a device itself for which foundation was  
22 laid. All of them point to infringing configuration. And  
23 yet the findings say there's no substantial evidence of  
24 infringement on the record. That's what the findings say  
25 right now, Your Honor. And it's just hard to believe that

1 that is true in view of all the evidence that we see here  
2 before us.

3 Now, you know the defendant also says, of course,  
4 there's no contributory infringement, that it didn't -- that  
5 its product has, you know, noninfringing uses, that's it's  
6 not -- it's not a staple of commerce. I mean it is a staple  
7 article of commerce and those sorts of things. But, again,  
8 Your Honor, that rings a little hollow in the fact that  
9 there's only one purpose, and we're going to get into some  
10 testimony in just a minute where we show -- where Mr. Bortz  
11 himself testified that, look, he says, I don't know that you  
12 can use this for anything else. It's intended to be used  
13 this way and in fact that's the way, you know, we want it to  
14 be used.

15 What else could contributory infringement be? You  
16 could certainly take that and drive a hammer with it. And  
17 you could also put it in several different alternative  
18 infringing configurations but we're going to find that case  
19 law says that's not enough. If that's the purpose of it and  
20 has that configuration, whether it can be contorted into  
21 something else is totally beside the issue. That is  
22 sufficient to find contributory infringement. Again, D-30  
23 goes a long way in establishing defendant's contribution in  
24 assisting and encouraging its customer to assemble the  
25 components in an infringing configuration and their general

1 instructions as well.

2           Contrary to defendant's erroneous findings this  
3 device is not a staple article of commerce because it does --  
4 simply because it does have other noninfringing uses. It  
5 doesn't have any other substantial noninfringing uses. Just  
6 because the device can be used in a noninfringing way does  
7 not make it a staple article of commerce and the court's  
8 attention is respectfully directed to Hillgrave which is a  
9 Federal Circuit case, and there the court said, "In  
10 determining whether a product claim is infringed we have  
11 held that an accused device may be found to infringe even if  
12 it is reasonably capable of satisfying the claim limitations  
13 even though it may also be capable of noninfringing modes  
14 of operation." The fact a device may be used in a manner  
15 so as not to infringe the patent is not a defense to a  
16 claim of infringement against a manufacturer of a device if  
17 it is also reasonably capable of a use that infringes the  
18 patent.

19           Your Honor, this thing is meant to be a burner.  
20 And, yes, while they're making some people up, you know, that  
21 might want to really put that front tube way up high, which  
22 is very remote, you know it still doesn't take away from the  
23 fact that this thing can still have -- that it still has  
24 reasonable infringing uses.

25           Mr. Bortz testified to this, in effect, Your Honor

1 on page 67. It says, "And as a matter of fact, it's  
2 intended, is it not, that this item be used on the G-4 pan.  
3 That its use, isn't it?" "Yes." "Does it have any  
4 substantial use other than with the G-4 or some related set  
5 you have like the G-5? Does it have any other use?" "No."  
6 Your Honor, you know that's just -- that's just contributory  
7 infringement, plain and simple.

8 36, Mr. Bortz says, "Well, I can't really swear  
9 what our customers do with the product that they use from us.  
10 That's the way we -- that was the intent. That's the way  
11 that we would believe they would use the product on the G-5,  
12 I'm pretty sure, because we preassembled it and put it  
13 together." Right there he's saying, Your Honor, we assembled  
14 the thing and put it together for them. And the intent is to  
15 be used in this way. Your Honor, this is just nothing short  
16 of contributory infringement.

17 Inducement quickly follows. Inducement quickly  
18 follows again from D-30 and general instructions. And the  
19 fact that these two components, even though they're sold  
20 separately by defendant, are meant to be put together and  
21 used together. What else do you need for inducement? I  
22 don't know. I don't think anything else is needed under the  
23 law.

24 The Federal Circuit has held that an advertisement  
25 or an advertisement that describes a range of configurations

1 is sufficient to infringe under inducement when that range  
2 includes infringing configuration and for that the court's  
3 attention is respectfully directed to Chiuminatta, Your  
4 Honor, which is a Federal Circuit case. This is about a  
5 concrete saw that you could use for cutting concrete when it  
6 was still green, when it hasn't totally set up yet.

7 And the court had this to say about that. There  
8 were method claims involved, Your Honor. There were  
9 apparatus claims that they didn't -- they were found not to  
10 infringe the apparatus claims, but they were found to  
11 infringe the method claims.

12 "Cardinal -- , " who is the defendant, " -- also  
13 asserting that there's no evidence that the accused saws are  
14 used during the claim time period or that Cardinal induces  
15 its customers to use the saws during that time period. This  
16 argument is without merit. "Cardinal's advertisement concede  
17 the ability of the accused saw to cut concrete starting at a  
18 time period earlier than that claimed in the '675 patent, but  
19 they encourage use from that time period onward and thus  
20 encourage use during the claimed hardness range."

21 Your Honor, that's very similar to here. While,  
22 yes, that may be -- have several different configurations  
23 that somebody may want to put that thing in, the fact of the  
24 matter is their instructions and D-30, their more specific  
25 instructions, encourage an infringing configuration.

1 Inducement, plain and simple.

2 But yet the finding as submitted by defendant,  
3 there's no inducement infringement here, Your Honor. There's  
4 no contributory infringement. There's not even direct  
5 infringement. Nobody infringed anything here, Your Honor.  
6 This device just doesn't infringe and they haven't proved or  
7 they say they have not proved -- they don't say that, they  
8 haven't proved that this device infringes.

9 Your Honor, I just want to briefly go over the  
10 damage portion of the case because, you know, right now my --  
11 our client faces an award of attorney's fees in the amount  
12 \$500,000 because it brought a vexatious and unjustified  
13 lawsuit. And, you know, so defendant is saying this is an  
14 exceptional case, Your Honor, in favor of the defendant. But  
15 I'm going to tell, Your Honor, respectfully, that if there is  
16 an exceptional case here, it's really in favor of the  
17 plaintiff.

18 The damages that this court found, Your Honor, were  
19 just at the beginning -- at the end of trial two years ago.  
20 We proved the damages using defendant's own numbers of the  
21 number of units that they sold and we showed that through a  
22 two-supplier market and a third party witness that 97 and a  
23 half percent of the time that thing is sold along with a set  
24 of logs and a grate, as claimed in claim 15 of the '159  
25 patent, but yet there was something else, and really what I

1 think what is a just result, Your Honor, and that was this  
2 court found that this case was exceptional.

3 Why was it exceptional? I'll tell you why.  
4 Because Mr. Bortz, who I'm sure is a fine gentleman and I do  
5 not question his integrity or anything like that, but he  
6 willfully disregarded the '159 patent. He ignored -- he  
7 ignored the notice letters, he went and spoke with his  
8 attorney, had a few oral conversations with him, nothing  
9 ever, not one time ever was written down as the law  
10 encourages, he didn't have all the information until an event  
11 happened.

12 When he was sued by the plaintiff, he comes to his  
13 attorney all concerned about attorney's fees. He wasn't  
14 concerned about infringement, Your Honor, because he thought,  
15 what are we talking about here. This is a pipe and some  
16 connections. This case means nothing financially. But now  
17 those attorney's fees I know how much those attorneys charge  
18 and I don't want to have to pay double of those. What can we  
19 do? Now, this is after suit was filed, Your Honor, after  
20 suit was filed and his attorney said, you get an opinion, a  
21 competent -- opinion from a competent attorney. At that  
22 point in time that's when the final wrapper histories were  
23 ordered and that's when Mr. McLaughlin considered all the  
24 materials that he really needed to consider.

25 So, Your Honor, you know, that is a willful

1 disregard for a valid U.S. patent and Mr. Bortz exhibited  
2 that because he wasn't concerned about infringing the patent.  
3 He was concerned about -- he was concerned about avoiding  
4 attorney's fees and only then after he was sued.

5 Well, Your Honor, that we think that we have laid  
6 out a pretty clear case that the defendant's findings, as  
7 presently adopted by this court, are erroneous in many  
8 respects. First and foremost, in respect to attorney fees,  
9 there's not one bit of evidence that supports that. Second  
10 of all, how can this evidence be ignored? I mean substantial  
11 evidence, I think it's here. And I think there's -- that  
12 plaintiff has more than met its burden of showing  
13 infringement by clear and convincing evidence.

14 What more is necessary? Well, in the event that  
15 Your Honor chooses not to vacate defendant's findings and  
16 adopt plaintiff's findings, we ask for a new trial. The  
17 reason we do is because a new trial is proper. Now, they  
18 say a new trial is basically outside the mandate of the  
19 Federal Circuit's remand, but however, there is an exception  
20 to that.

21 A new trial is proper when there's an absolute  
22 absence of evidence to support the verdict. This is Booth v.  
23 Holmes, Fifth Circuit, Mississippi, 1968. Your Honor, not  
24 one shred of evidence exists on the record that supports the  
25 verdict that the plaintiff was involved in unjustifying

1 vexatious litigation. The court support the finding that  
2 plaintiff was involved in unjustified and vexatious  
3 litigation this court would be required to grant a new trial  
4 such that this issue, as well as other issues, could be fully  
5 litigated.

6 In addition, new evidence has been uncovered as  
7 pertinent to infringement which serves as the basis for a new  
8 trial. In Brown v. Wright, Ninth Circuit, 1978, reviewed  
9 defendant's attorney fees submitted to this court on July  
10 22nd, 2004 come to plaintiff's attention for the first time  
11 that the defendant failed to fully and accurately respond to  
12 plaintiff's document request discovery providing all  
13 documents and things concerning the United States Patent  
14 5988159, the '159 patent as I've been referring to it.

15 The defendant's time entries, Your Honor, entered  
16 merely a few days after trial referred to a G-44 burner and  
17 ensuing opinion related to the G-44 written, Your Honor, this  
18 time, which constitutes new evidence. Neither the G-44  
19 burner nor the ensuing opinion was ever brought to the  
20 attention of the plaintiffs and it never had a chance -- it's  
21 never had a chance to investigate that device, Your Honor.  
22 This is the first time we have ever heard of it.

23 The defendant obviously believed the G-44 burner to  
24 relate to the '159 patent or would not have obtained an  
25 opinion of counsel with respect to it and certainly wouldn't

1 have shown up in application for attorney's fees that they're  
2 asking my client to pay. So obviously they think it's  
3 relevant.

4           Additionally, even if the defendant were unaware of  
5 the G-44 at the time of responding to the document request,  
6 Federal Rule of Civil 26(e) requires that all parties  
7 supplement disclosures, when required, thus a new trial is  
8 warranted for this reason also.

9           Additionally, in view of invoices plaintiff has  
10 noted that the attorneys time entries referred to a  
11 malpractice claim by the defendant against the firm Wood  
12 Phillips, et al and F. William Laughlin who originally issued  
13 the oral opinion upon which this court based its first  
14 willfulness finding and this new evidence, at the very least,  
15 is relevant to attorney's fees.

16           In closing, Your Honor, I would like to sincerely  
17 request that you vacate the defendant's findings and adopt  
18 plaintiff's findings. I understand that a lot of time has  
19 passed and clear facts can be become obscured by overreal  
20 causement presented in a flood of paper. But this really a  
21 very simple case of infringement. Just look at the device  
22 itself, Your Honor. There's nothing complicated about this.  
23 And a grave injustice will have been to a patentee holding a  
24 valid patent if this court chooses to hold to its present  
25 course. In fact, if the court holds to its decision to award

1 defendant its attorney's fees, it will be in essence  
2 rewarding defendant for willfully infringing a valid U.S.  
3 patent. This is contrary to the whole of patent law and  
4 plaintiff earnestly prays that this court will vacate  
5 defendant's findings and adopt plaintiff's findings so this  
6 that case can be brought back to a just course.

7 Your Honor, thank you very much for your attention  
8 and time. I would like to the reserve time for surrebuttal.

9 THE COURT: That will be fine. Thank you.

10 MR. SELINGER: Your Honor, I would like to  
11 introduce Mr. Leland Hutchinson who will be arguing today.

12 THE COURT: Yes. Good to see you.

13 MR. HUTCHINSON: Thank you.

14 Your Honor, coming here this morning I've got to  
15 catch my breath for a minute because it's not often that I've  
16 got five brand new cases that plaintiffs never cited in any  
17 of their briefs, including their reply briefs and I'm trying  
18 to read on the fly over here but I will do my best --

19 THE COURT: Okay.

20 MR. HUTCHINSON: -- to respond to them.

21 There's a critical -- a critical fact on which this  
22 case turns, judge. And if I approach the exhibit table. On  
23 the right is Plaintiff's Exhibit 4. I will tell you  
24 unequivocally that this is not a Peterson product. This is  
25 most likely, although the record doesn't show it, an assembly

1 of two separate Peterson products manufactured separately and  
2 sold separately; the G-4 primary burner and burner can  
3 assembly, which I'm indicating in the back, and the EMB  
4 secondary burner, which is in front or part of it.

5 The way the defendant manufactured the EMB there's  
6 actually a valve stem with a turning knob that extends  
7 forward from the valve here, and it's missing in this exhibit  
8 probably because it is possible by taking that valve stem off  
9 to lower the secondary burner further than you could lower it  
10 if you leave the valve on as the product was intended to be  
11 manufactured.

12 Now, in this situation, Your Honor, the record is  
13 clear that Peterson did not assemble Plaintiff's Exhibit 4.  
14 Mr. Jankowski testified that he recognized those as Peterson  
15 components, and even though Mr. Jankowski was testifying  
16 during defendant's case after plaintiff rested, even though  
17 the evidence during plaintiff's case in chief had no  
18 foundation whatsoever about that exhibit, I will not for the  
19 moment dispute that that exhibit consists of Peterson  
20 components.

21 But as we pointed out in our brief, counsel  
22 for Peterson and counsel for the plaintiff, had a meeting  
23 during the second of Mr. Bortz depositions that occurred on  
24 October 5th, 2001. That was the final day of the extended  
25 discovery cutoff period. They had a conversation about

1 whether there would be proof of customer infringement or  
2 discovery of a customer list from Peterson to the plaintiff.  
3 And what they settled on was that they would reach a  
4 stipulation to the effect that the EMB secondary burn, which  
5 is the accused product, not the G-4, was normally meant to be  
6 attached to a G-4, which is true, and also that plaintiff  
7 would receive, -- would purchase from Peterson a G-4 burner  
8 and burner pan.

9           It's evident in the record of the Bortz deposition  
10 that the plaintiff already had an EMB secondary burner tube  
11 and, therefore, didn't require it. And on October 30th, I  
12 believe, it's a letter we have attach to our brief,  
13 Mr. McLaughlin sent the G-4 burner down to the plaintiff.  
14 And so basically what happened was that Peterson sold the  
15 Blum Company this portion of its exhibit, but not the EMB  
16 secondary burner portion. The Blum Company already had  
17 purchased one of these and if assembled, this assembly as you  
18 see it in court, Peterson did not, no Peterson customer, no  
19 Peterson dealer did. And the valve stem, which permits that  
20 secondary burn to be lower than it would be in normal life,  
21 is missing.

22           So what you have is a situation in which the  
23 plaintiff tried this case on the assumption, and we heard it  
24 again in argument today, that once you attach an EMB  
25 secondary burner to a G-4 primary burner you have

1 infringement. And were that the case plaintiff would have  
2 won before Your Honor the first time and they would have won  
3 in the Federal Circuit.

4 The problem is that you can install this EMB  
5 secondary burn. There's a pipe wrench fitting here, judge.  
6 This rotates. You can install it here, you can install it  
7 there, you can install it in any degree of rotation limited  
8 by the floor and with the valve stem on it or by the back of  
9 the pan.

10 In this situation we proposed several findings  
11 about that subject. First of all, we proposed finding 188  
12 which said that whenever the top of the EMB is installed  
13 level with or above the top of this G-4, no infringement of  
14 the '159 patent occurred.

15 In responding to our findings in these post-trial  
16 motions, plaintiff's response to that finding was, yes, but,  
17 and the but doesn't matter here. The yes does. They readily  
18 admit that a customer can install the EMB, or Peterson could  
19 install -- Peterson never installed a EMB on G-4 it sold.  
20 Those were sold separately. But a customer could install one  
21 in a noninfringing manner.

22 Now, one of the cases that was shown this morning  
23 and not cited in the brief, is the Hillgrave vs. Symantec  
24 Corporation case, Your Honor, and I would note that along  
25 with headnote 10, 11 and 12 the analysis that counsel shows

1 you, that relates to a direct infringement. This is not a  
2 contributory or induced infringement case. This is a direct  
3 infringement case and, therefore, it is in apposite here.

4           What Your Honor needs to look at is the opinion of  
5 the Federal Circuit which was granted in the Golden Blount  
6 case. And on page 1061 the Federal Circuit lays out the  
7 logical progression which Your Honor needs to do in making  
8 findings. It says, starting at headnote 9, "On remand the  
9 district court shall find the fact specifically and state  
10 separately its conclusions of law thereon. Further on  
11 remanded, if the district court finds no direct infringement  
12 by Peterson but concludes that the '159 patent is infringed,  
13 either literally or under the doctrine of equivalence by a  
14 customer of Peterson or other party using Peterson  
15 components, the district court must then consider the claim  
16 of contributory induced infringement to find Peterson in  
17 violation of the patent."

18           They set a precondition here and this is the law  
19 that directly controls this case. This is stare decisis. In  
20 order to find contributory or induced infringement you have  
21 to first find that a customer or other third party using  
22 Peterson components actually infringed this patent. And in  
23 order to do that, you have to find that a customer or other  
24 third party using Peterson components installed the secondary  
25 burner with the top below the top of the primary burner. As

1 plaintiff itself admits, if the customer installed that level  
2 with or above, there is no infringement.

3 So the situation here is, as counsel readily  
4 admits, and I wrote this quote down directly, "We did not get  
5 anybody up here and say yeah we set it up that way." That's  
6 right. They didn't.

7 The only thing they're relying on to show that  
8 customers did this was Defendant's Exhibit 30. Now, let me  
9 make a couple of points about Defendant's Exhibit 30. First  
10 of all, it was a demonstrative exhibit created for trial by  
11 defense. The document --

12 Would you mind bringing it up again so we can take  
13 a look at this.

14 Sorry for the delay, Your Honor. Can you scan  
15 down a little bit where see the data -- here we go.

16 You see right at the bottom, Your Honor, where it  
17 says EMB G-4 reference No. 2, right to the left of that is  
18 the date February 15, 2002. Now, this complaint for  
19 infringement was filed in January of 2001. Discovery was  
20 taken and closed on October 5th, 2001. This document was not  
21 given to the plaintiff during discovery because it hadn't  
22 been created at that point. This document was created, as  
23 they argue, as a trial exhibit. It was not sent to any  
24 customer prior to its creation date. That's pretty obvious.  
25 Therefore, if customers were infringing this patent before

1 the complaint was filed, they weren't doing it because of  
2 this document.

3 The evidence is clear that this was not a document  
4 that was regularly sent out to customers as part of  
5 Peterson's instructions. Peterson's instructions were not  
6 anywhere close to this type of a drawing. They were text and  
7 an isometric drawing as Your Honor was shown by plaintiff's  
8 counsel. This is a situation in which, and I would suggest,  
9 Your Honor, that what this document shows is that  
10 infringement is possible by .06 of an inch. That's the most  
11 it shows if you indulge all inferences in plaintiff's favor.

12 I would remind Your Honor that on post-trial  
13 motions under Rule 52 and Rule 59, all inferences are  
14 required to be taken in our favor. But turning the world  
15 upside down and taking inferences in their favor, the most  
16 that this document shows is that, in fact, infringement is  
17 possible by .06 of an inch. And this drawing doesn't show  
18 where the valve is, the valve stem.

19 You've got a situation, Your Honor, where this was  
20 not regularly distributed to customers and Mr. Corrin  
21 testified to that. It is not our regular instruction set.  
22 Our regular instruction set merely says, as plaintiff showed  
23 you, that you should install the secondary burner level with  
24 the floor. Now, there's no proof in the record whether such  
25 an installation would or would not infringe.

1           Would you please bring up that one again? Sorry.

2           The other thing I would note for the record, Your  
3 Honor, is that if you see this, this is an EMB G-4 reference  
4 as it says here. Mr. Corrin testified that this shows how an  
5 EMB and G-4 product are supposed to be installed. Peterson's  
6 G-5 product is a different product. Peterson makes, and we  
7 cited Mr. Bortz's testimony in our brief, over 50 different  
8 types of artificial fireplace products, Your Honor; many,  
9 many different product lines.

10           There is no affirmative evidence in the record  
11 whatsoever that shows that the G-4 and the G-5 are assembled  
12 the same way or that a G-5 that has an EMB attached to it is  
13 assembled the same way that this drawing shows that a G-4  
14 ought to be assembled. There is no evidence of about how  
15 Peterson assembled G-5 at all. And that being plaintiff's  
16 burden of proof shows direct infringement is plaintiff's  
17 problem.

18           Plaintiff never put a witness up there to show how  
19 G-5's were assembled. Mr. Bortz testified that, yes, we have  
20 a unit in which we have a secondary and primary burner that  
21 we showed customers, but he was never asked how that unit is  
22 assembled. He was never asked whether it was assembled in an  
23 infringing configuration or in a noninfringing configuration.  
24 For all we know the secondary burner in that instance could  
25 be level with or above the primary burner. And as plaintiffs

1 themselves admit in response to finding 188, that's not an  
2 infringement. There's no basis for infringement along those  
3 lines.

4           It's plaintiff's burden to prove infringing  
5 installation. They tried this entire case on the basis that  
6 they could show infringement merely by proving that A  
7 attached to B, the secondary burner attached to the primary  
8 burner. If every secondary burner attachment to a primary  
9 burner was infringing, then they might have an argument and  
10 they would have won in the Federal Circuit. This case would  
11 not have come back to you because they made this exact  
12 argument up there. The Federal Circuit said, no. Federal  
13 Circuit said, where is the evidence that the secondary burner  
14 here is installed consistent with the vertical limitations of  
15 claims 1 and 17 of the patent lower than the top of the  
16 primary burner. And there is no evidence in this record of  
17 that at all, thus, we don't have any evidence.

18           The only possible evidence that Peterson itself is  
19 guilty of direct infringement has nothing to do with  
20 Peterson's manufacture and sale of the EMB as an accessory  
21 product. Those sales could only be possibly contributory  
22 inducement infringement because the patent claims a  
23 combination of a primary and secondary burner. Peterson's  
24 sale of a secondary burner standing alone cannot by itself be  
25 an infringement. The only times that this record reflects

1 that Peterson ever assembled the primary and secondary burner  
2 together are 10 to 12 G-5 units, and there's no evidence  
3 about how they did that, and the one unit in their laboratory  
4 and there's no evidence of how that unit was installed  
5 either.

6 Mr. Blount testified about the claim chart,  
7 Plaintiff's Exhibit 9, that was introduced without  
8 authentication. You can sit that down now. Thanks.

9 The claim chart had drawings of an assembled  
10 two-burner unit on it. There was no proof that Peterson or  
11 any Peterson customer ever assembled any Peterson components  
12 in the configuration of the drawings that were on Plaintiff's  
13 Exhibit 9. When Mr. Blount was asked about that, he was  
14 asked how many installation of Peterson secondary burners  
15 have you witnessed and he said, zero. He did not have the  
16 personal knowledge about how Peterson sells its product and  
17 how Peterson customers installed their product to be able to  
18 provide any evidence that anyone has ever infringed this  
19 patent.

20 We have a situation in which Defendant's Exhibit  
21 30, a document that wasn't created at the time of suit,  
22 wasn't created prior to the discovery cutoff, was created as  
23 a demonstrative exhibit for the defendant at trial, wasn't  
24 offered as part of plaintiff's case in chief is the sole  
25 thing that they're pointing to as evidence of infringement

1 because it's the only evidence that even suggests that, in  
2 fact, infringement is possible, but it doesn't prove that  
3 infringement occurred.

4 And because the inferences must be taken in our  
5 favor and not in theirs, when we have Mr. Corrin testifying  
6 that Defendant's Exhibit 30 or a drawing like it was  
7 occasionally distributed to customers when they made a  
8 special request, we don't know that Defendant's Exhibit 30,  
9 created only months before trial, was ever itself  
10 distributed.

11 That inference must be taken in our favor that a  
12 drawing like Defendant's Exhibit 30 was, in fact,  
13 distributed. Because Defendant's Exhibit 30 shows only .06  
14 of an inch of possible infringement. And what's really  
15 interesting here, Your Honor, Mr. Corrin testified that, in  
16 fact, and plaintiff's counsel showed you his testimony, that,  
17 in fact, Defendant's Exhibit 30 shows the burner being  
18 substantially level and narrow and that was Peterson's  
19 desired installation.

20 When Mr. Blount was asked whether Defendant's  
21 Exhibit 30 showed the secondary burner being below the  
22 primary burner, his answer was not really. Now, he reversed  
23 himself within a few minutes, but the inference from that is  
24 that the first answer might be correct. And that inference  
25 must be taken in our favor and not in theirs.

1           To get Findings of Fact vacated, it's almost like a  
2 manifest weight of the evidence argument with a jury.  
3 There's got to be no evidence from which our findings could  
4 be sustained. And a lot of our findings are sustained merely  
5 by the burden of proof. That in carefully searching the  
6 record there is no evidence about what any customer did or  
7 about what any dealership did. There's no evidence of what  
8 Peterson did when they installed themselves.

9           Let me turn for the moment to the mandate rule and  
10 new trial. We have here a situation in which I argued in  
11 our brief opposite these motions that no new trial was  
12 jurisdictionally possible because the mandate here is not  
13 general. It's very specific for entry of more detailed  
14 findings. There was no response to the mandate rule per se  
15 in the reply brief. The cases I've read that counsel cites  
16 in the reply brief, do not refer to the mandate rule, they're  
17 not an exception to it. There is no jurisdiction to grant a  
18 new trial here, but there's also no reason to grant a new  
19 trial here.

20           Counsel argues that there's two elements of newly  
21 discovered evidence. And in doing so, he is confusing newly  
22 discovered evidence with alleged, and I use the word alleged,  
23 discovery violations. He claims -- he has no evidence at all  
24 that he's offered this morning. I heard none. He's saying  
25 that the possible way that newly discovered evidence could

1 be, in fact, located would be had we produced the names of  
2 our customers. They could have deposed those customers and  
3 they could have found how the customers, in fact, installed  
4 our two products together and they could have shown  
5 infringement by doing so.

6 I would point out, Your Honor, that the  
7 conversation between Mr. Monco and Mr. Harris about that  
8 discovery occurred during Mr. Bortz's deposition on  
9 October 5, 2001, during the middle of the day on the last day  
10 of the extended discovery cutoff period. I will point out,  
11 as I did in my brief, that Peterson has, and has for some  
12 time, had a website which identifies to the public its  
13 dealers. If they wanted to find a Peterson dealer it was  
14 easy for them to do so. If they wanted to subpoena one it  
15 was easy for them to do so. This is a small business.  
16 Mr. Blount knows this as well as anyone else does. He knows  
17 who the dealers are. They could have pursued that discovery  
18 if they wanted to.

19 We made an argument in our brief that a failure to  
20 compel discovery prior to trial, but going to trial without  
21 compelling discovery is a waiver for new trial purposes of  
22 any newly discovered evidence argument that but for discovery  
23 I would have found the evidence that would have proved my  
24 case. They didn't respond to that. Their briefs and their  
25 arguments this morning were completely silent as to that.

1           The only other piece of, quote, newly discovered  
2 evidence they raised this morning is a reference to a G-44  
3 which they found in our fee petition. Your Honor, I brought  
4 a copy of Mr. McLaughlin's affidavit. And I note that the  
5 first reference I could find to the G-44 is on August 16,  
6 2002. Now, that is to me after Your Honor entered the  
7 verdict in this case on August -- I believe it was August 9th  
8 a judgment was entered. The G-44, I'm informed, Your Honor,  
9 is a new product Peterson introduced in the fall of 2002. It  
10 didn't exist during the discovery period in this case. There  
11 are no documents regarding the G-44 that existed before trial  
12 that I'm aware of, and I asked my client yesterday about it  
13 when I was read the reply brief. Peterson having 50  
14 different product lines in this field, is constantly  
15 introducing new products.

16           After having just lost a patent case in front of  
17 Your Honor, of course Peterson was interested in making sure  
18 that whatever new product was coming on the market was not  
19 going to infringe the same patent that they had just found to  
20 have violated. Of course they sought a legal opinion. They  
21 had just been schooled on how you get those opinions and when  
22 you need to do so early on in the case.

23           But there's no evidence here that the G-44 product  
24 infringes or that it was subject to discovery. It was a new  
25 product introduced after this case was tried. It's nothing

1 regarding other than a grasp at straws with regard to these  
2 arguments. There's no basis for either a new trial based on  
3 newly discovered evidence or for any of the findings or  
4 conclusions to be changed. I would note, Your Honor, that  
5 there are a number of findings that we submitted that they do  
6 not oppose. And we argue too, Your Honor, citing a case  
7 that, in fact, under Rule 7, unless you specifically set  
8 forth within the 10 day time limit for filing a post-trial  
9 motion, your arguments about the findings under Rule 52  
10 you have waived those arguments, so there is really no  
11 possibility that all of our findings could be vacated  
12 as counsel suggested at the end of his argument this  
13 morning.

14           The only possibility would be that they ask you to  
15 change some of the findings. And in order to do so they have  
16 got to show that those changes are based on manifest error of  
17 law or fact with all the inferences taken in our favor and  
18 that they change the outcome of the case.

19           Now, all I heard counsel do this morning was argue  
20 facts to Your Honor as if he was arguing to a jury for a  
21 different result. And that is simply not sufficient under  
22 Rule 52 or Rule 59(e). And we have cited in our brief cases  
23 which indicate that a motion for reconsideration is unknown  
24 under federal procedure and is customarily treated as a Rule  
25 59(e) motion. And Rule 59(e) and Rule 52 do not permit the

1 arguments of the facts for a different result. They only  
2 permit correction of manifest errors, and there aren't any  
3 here other than they disagree with the result.

4 Now, let me talk for a moment about attorney's  
5 fees. I took a look at this case, the Centex Systems case  
6 that they cited to Your Honor and I note that -- I'm not sure  
7 what page number it is on, but in the middle of the case it  
8 says, quote, "In the instant case the district court did not  
9 find that Centex was manifestly unreasonable in assessing  
10 infringement at the time the infringement suit was filed."  
11 What happened in this case, Your Honor, was that claim  
12 construction occurred midway during the case. And the  
13 argument about attorney's fees against the patent plaintiff,  
14 the patentee plaintiff, was that after they lost the claim  
15 construction hearing they should have been continued to  
16 persist.

17 The Federal Circuit in this case, unpublished,  
18 suggests that that may not be an appropriate way of finding  
19 an exceptional case. That's not what we have here. In this  
20 case there was no evidence of infringement at the time the  
21 complaint was filed. The patentee in this case should have  
22 known that there was a vertical limitation claim one and,  
23 therefore, all of the defendant claims 2 through 16, a  
24 vertical limitation in claim 17, and that in order to prove  
25 infringement they had to prove not only that the secondary

1 burner was attached to the primary burner but that it was  
2 attached to the primary burner below the primary burner's  
3 top. They never had any evidence of that. They never  
4 offered any evidence of that. To the extent that they judged  
5 that they could prove their case without such evidence that  
6 was manifestly unreasonable.

7           The Centex case actually cites Eltec Systems. The  
8 Eltec Systems case is one we cited, Your Honor, in our brief  
9 and the Eltec System case sets up the rule -- that by the way  
10 is a published opinion that, in fact, attorney's fees against  
11 the patent plaintiff are warranted and in an exceptional case  
12 can be found when it's, quote, "Manifestly unreasonable in  
13 assessing infringement." And that's 903 F.2d at 811. The  
14 Porter case says that arguments not based on sound common  
15 sense and intelligent judgment, 790 F.2d at 887, can warrant  
16 an award of attorney's fees against the patent plaintiff.  
17 The Algren Watch case said, quote, deficiency of proof  
18 offered at trial -- I guess I'm paraphrasing here. The  
19 deficiency of proof offered at trial can be an indication of  
20 bad faith, 197 F.2d at 72.

21           We don't have to have introduced evidence in the  
22 record that plaintiff acted in bad faith in pursuing this  
23 case. The evidence that establishes the egregiousness and  
24 vexatiousness of the plaintiff's prosecution of this case is  
25 the difference between what would be required to prove it and

1 what was actually offered. It's the absence of evidence in  
2 the record. Just as under Rule 11, 25 U.S.C. Section 285  
3 permits the court to make a finding based on unreasonable  
4 arguments, manifestly unjust evaluation of the possibility of  
5 proving infringement by the patent plaintiff and also a  
6 deficiency in proof.

7 Now, we have all of those things here. We have a  
8 situation where Your Honor entered a judgment originally  
9 without the benefit I would suggest at the time of detailed  
10 presentation about their vertical limitation. I looked at  
11 the proposed findings and conclusions that prior counsel for  
12 Peterson submitted to you and also that counsel for Blount  
13 submitted to you and those issues were not addressed in great  
14 detail. So perhaps Your Honor was under the assumption at  
15 the time that plaintiff had proved its case merely by showing  
16 that the secondary burner was intended to and did attach to  
17 the primary burner. Under those circumstances I can  
18 understand the ruling that Your Honor entered. However, the  
19 Federal Circuit vacated it, and they not only vacated the  
20 ruling, they sent it back with instructions such as the one I  
21 read to you earlier that detailed what findings had to be  
22 made and they very specifically set forth the fact that in  
23 order to find direct infringement you have got to show the  
24 vertical limitations. They talk about vertical limitation in  
25 their opinion. And that wasn't shown in the 10 G-5 one unit

1 Peterson itself manufactured.

2 And to show induced infringement or contributory  
3 infringement, you actually have to show that some customer  
4 infringed, point one. And the contributory infringement  
5 argument is interesting because if all the customers, who  
6 installed this pipe iron by just a little bit, there's no  
7 infringement. That's a substantial noninfringing use.  
8 That's an argument we made to the Federal Circuit and the  
9 Federal Circuit accepted it.

10 If plaintiffs were right about the fact that a  
11 possible infringing use was enough to prove contributory  
12 infringement, we wouldn't be back here because they made that  
13 argument in Washington and it did not succeed.

14 In order to prove induced infringement you have got  
15 to show several additional elements by clear and convincing  
16 evidence, first of all that some customer actually infringed.  
17 Secondly, you have got to show an affirmative act by Peterson  
18 inducing infringement. They claim that that act was the  
19 distribution of Defendant's Exhibit 30. Well, to whom? To  
20 how many people? That's a document created a year after the  
21 complaint was filed. We certainly couldn't have induced  
22 anyone prior to the creation of that document being infringed  
23 based on it.

24 We're in a situation where in order to recover  
25 induced infringement damages plaintiff also has to show how

1 many people were induced to infringe by distribution of that  
2 document. The document was not readily distributed. Even if  
3 Your Honor were to believe that that document would induce a  
4 normal person who received it to infringe, absent proof in  
5 the record of how many people got it; one, a hundred, a  
6 thousand, there can be no proof of the scope of infringement.

7 I cited the Celotex vs. Catrett case to Your Honor  
8 in our brief. It's a summary judgment case but it does talk  
9 about judgment and it says, that where a plaintiff fails to  
10 put in competent evidence of any element as to which they  
11 bear the burden of proof, judgment for the defendant is  
12 warranted. As to induced infringement you have to show the  
13 customer did it, that there was affirmative act by the  
14 inducer, that that act was willful. Mr. Corrin's testimony  
15 is that, in fact, Peterson believed that the best  
16 installation was level or parallel. He didn't believe that  
17 Defendant's Exhibit 30 showed that it was important to have  
18 the secondary burner below the primary burner, a key element  
19 of the patent. He believed that Peterson's customers should  
20 install that burner level with the main burner or parallel  
21 with the main burner. That's at 172, 173 and 198 of the  
22 transcript. And you have no evidence of the scope.

23 So plaintiff's induced infringement case  
24 necessarily fails here because there's no proof of any of  
25 such element. Contributory infringement case fails here

1 because there is substantial noninfringing uses for the  
2 product, the secondary burner.

3           You measure that, there's proof against those  
4 standards and you see that the case was vexatious. Your  
5 Honor may recall that -- I don't know if the percentage is  
6 right but 99 percent, 98 percent of the damages in this case  
7 that are claimed arise out of the sale of these EMB secondary  
8 burners, separately boxed to Peterson customers as an  
9 accessory. There are only 10 units of G-5's that Peterson  
10 ever manufactured and sold itself, so this really isn't much  
11 of a direct infringement case which is why plaintiff spent so  
12 much time trying to think about the customers.

13           The only way that customers could be shown to be  
14 infringing in this circumstance because there is substantial  
15 noninfringing use, because the EMB can be installed level  
16 with primary burner, is by induced infringement, clear and  
17 convincing proof of intentional conduct by Peterson inducing  
18 the customers to infringe the elements I just went over. It  
19 isn't here. It isn't here even if you take all of the  
20 inferences in their favor, and you are obliged by the law to  
21 take none of them in their favor.

22           This is a situation in which counsel has done  
23 nothing but present a second closing argument, a second  
24 factual argument. That is not appropriate under 59. It's  
25 not appropriate under Rule 52. Your Honor, has, I believe,

1 no choice but to deny their motion and let them argue this to  
2 the Federal Circuit if they would like.

3 Thank you very much.

4 THE COURT: Thank you.

5 MR. GAINES: I forgot three documents. I  
6 apologize, Your Honor.

7 THE COURT: That's all right.

8 MR. GAINES: First apology for springing Hillgrave  
9 and Chiuminatta on you. That's true. They were not cited in  
10 the original pleadings. Our apologies for that. I guess we  
11 kind of had D-30 sprung on us and so we sprung a couple of  
12 cases on them. Our apologies for that, but the rest of cases  
13 were there.

14 Your Honor, there's one thing that I want to get  
15 clear really right off the bat and that's with regard to the  
16 date that -- that opposing counsel references in his  
17 argument. And on the screen right now, you see -- well, go  
18 back to D-30, please. D-30 has date 2-15-02.

19 Let go back to Mr. Todd Corrin's testimony now.  
20 Mr. Harris, I believe, is questioning him here, Your Honor.  
21 "I notice it's pretty recent product." "No, our computer --  
22 our new computer system we have creates a date on the drawing  
23 every time you print it, whatever date that is, so, for  
24 instance, I had this printed on February 15th of 2002. If I  
25 printed it today that date would come up with today's date."

1 "I hear exactly what you're saying but what is the date of  
2 the drawing?" "You mean the date that it was originally  
3 drawn?" "Yes." "it's not dated at the bottom so I do not  
4 know that. Normally that would be approved by an approval  
5 date so it's -- it's not dated on there."

6 Oposing counsel was trying to make the inference  
7 that because the date on the drawing was February the 15th  
8 that this was, you know, an extremely recent document and --  
9 and that it was the -- the date of that -- the document  
10 created that date. According to Todd Corrin's testimony  
11 that's not the case at all. That date there is only the  
12 date the computer program puts on it so there's nothing  
13 that can really be drawn from that. What can be drawn though  
14 from this, is that Todd Corrin did testify specifically that  
15 this was sent to customers. That is right there in the  
16 record.

17 The other thing I want to address is the -- the  
18 valve control stem. Brad, would you put up page 3 of the  
19 instructions so we can clear this matter up for the court.

20 Your Honor, if you will notice that there's an  
21 extension control knob. It's not a valve. It's a control  
22 knob. It's for getting the user's hand away from the flames  
23 so you won't burn it whenever you want to adjust the valve.  
24 The valve portion is this right here. That's the valve, not  
25 the stem. That's the valve. And again and again the

1 testimony was the valve on the floor flush with the pan,  
2 that's the configuration. And that's exactly what we have  
3 here.

4 Your Honor, with respect our direct infringement  
5 case, the only thing that I can rebut on that is to point out  
6 again that there were advertisements sent out. In the  
7 Moleculon case, I'll draw the court's attention to that  
8 again, the only way that that claim could be infringed was by  
9 the user, by the -- by the person operating the tube. That's  
10 because there's a method claim, but yet the court found that  
11 because it sent out those advertisements and the instructions  
12 with it, that that was sufficient under circumstantial  
13 evidence, Your Honor, to find infringement.

14 And I want to address something and if I have to, I  
15 really don't want to and I know you know don't want me to but  
16 I will if I have to. I will read the entire colloquy between  
17 Mr. Harris and Dean Monco into the record if we need to. But  
18 in the spirit of Dondi Mr. Harris knew that it would be  
19 expensive for both plaintiff and defendant for them to go out  
20 and scavenge the countryside taking deposition from all sorts  
21 of customers. It would be disruptive to defendant's client  
22 base and that is why Mr. Monco very strenuously objected to  
23 producing any customer list. True, we could have. We could  
24 have scoured around and, I suppose, and found them ourselves.  
25 But in the spirit of Dondi Mr. Harris specifically discussed

1 the problems that we faced with contributory infringement and  
2 induced infringement because he knew that that would be an  
3 issue at this trial. And in that light, in that light the  
4 counsel agreed that the device itself could be provided.

5 Now, was Mr. Monco hoodwinking Mr. Harris? Well,  
6 maybe so. But that's what we relied on, Your Honor. We  
7 relied on that good-faith representation by the opposing  
8 counsel that we wouldn't have to go into the customers and  
9 ferret out all of that information if we had the device and  
10 it truly was set up in an infringing configuration that  
11 that's all we would need.

12 But it's just not the device itself, Your Honor.  
13 We've got testimony. We've have got testimony. We've go  
14 testimony of Todd Corrin on D-30. We have testimony from  
15 Bortz about where this valve goes flush with the pan just  
16 like the general instructions say. So we're not just  
17 spinning this out of thin air here as opposing counsel seems  
18 to suggest. We relied on Mr. Monco's good-faith  
19 representation that the device would be sufficient, that  
20 would keep us from having to discover all of the customers of  
21 defendant. And he objected to that -- you know, objected to  
22 us discovering those customers. So i the spirit of Dondi we  
23 entered into an agreement.

24 Now with respect to the direct infringement on the  
25 part of Peterson. First of all, they set up a device in

1 their showroom that they showed to their distributors.  
2 Mr. Bortz testified to this. Now, opposing counsel will say,  
3 oh, there was no testimony about how it was set up. Well, it  
4 can be inferred that they're going to follow their own  
5 instructions, just like I said. They're going to follow  
6 their own instructions in setting up the device.

7           What are the instructions? Well, look at page 3 of  
8 their general instruction that they sent out with every box  
9 and look at D-30 that they submitted at trial. So there's  
10 direct infringement right there. Further direct infringement  
11 is the fact that they sold at least 10 to 12 units. Now,  
12 granted, 10 to 12 units of G-5's, but that is sufficient to  
13 establish direct infringement by someone, and then  
14 contributory inducement follows thereafter, so the G-4 and  
15 G-5 -- I believe opposing counsel made the statement, I could  
16 be incorrect, but I think he said that G-4 and G-5 are not  
17 the same thing.

18           I want to turn again to Todd Corrin's testimony.  
19 Okay. And this is by Dean Monco. "Okay. What is a G-5  
20 burner?" Answer by Todd Corrin, "A G-5 burner is very  
21 small, G-4 only it has all gas connections and valves  
22 preassembled by us at the factory. Has ANSI standard  
23 approval by CSA on that burner." Right there he said it's  
24 virtually the same thing but smaller. So I don't understand  
25 where D-30 wouldn't apply to G-5. It's the same thing but

1 smaller.

2 I want to address the other thing about what the  
3 Federal Circuit said. I'm not reading the opinion exactly  
4 like Mr. Hutchinson is, Your Honor. The Federal Circuit  
5 said, look, we cannot tell from your Findings of Fact and  
6 Conclusions of Law, exactly what the basis of the court's  
7 rulings were, so we remand for you to find more specific  
8 facts and findings of the fact findings, and -- and then set  
9 that forth. And here's the law to guide you in -- with  
10 respect to direct infringement, inducement. They just laid  
11 the law out there.

12 Your Honor, Golden Blount versus R. H. Peterson  
13 Federal Circuit is a 52(a) case. That's what it is. They  
14 were wanting to set precedent for some guidelines for the  
15 court regarding 52(a) and that was the gist of the opinion  
16 in my view. And the fact that they found for Peterson or  
17 they -- the only thing that -- they found absolutely nothing  
18 for Peterson other than it allowed Peterson to submit brand  
19 new Findings of Fact and Conclusions of Law that turned the  
20 case on its ear, but what the Federal Circuit really did was  
21 say, hey, look court, district court, your claim construction  
22 is correct. We believe it should be taken from the top.  
23 Where else would it be taken from? We believe the patent's  
24 valid. We believe you came to a just result there. We  
25 believe that there was -- you know, that the inequitable

JT-APP 3180

1 conduct was never raised and long since waived. That is what  
2 they found and said. And in doing this, in finding more  
3 specific or making more specific Findings of Fact here's  
4 the law that you consider. They didn't hold in Peterson's  
5 favor. They found nothing in Peterson's favor. They just  
6 remanded back for more specific fact -- findings of fact and  
7 conclusions.

8 We presented -- both sides, Your Honor, presented  
9 the Findings of Find and Conclusions of Law pretrial. And,  
10 of course, it was before claim construction was done. It was  
11 a pretrial order by Your Honor and we filed those pursuant to  
12 that request. And it was before -- it was before the trial  
13 had taken place before any sort of claim construction had  
14 been made, and we were just trying to present the court its  
15 case as we thought it would unfold at trial.

16 I think it's interesting to note that defendant can  
17 only point to we should have known for its justification of a  
18 vexatious and unjustified litigation. And, Your Honor, the  
19 case law is clear that should have known is not a good enough  
20 standard. There has to be something very egregious.

21 Mr. Hutchinson makes the argument that we were egregious  
22 because we should have known that we weren't going to be able  
23 to prove our case of infringement and we couldn't establish  
24 inducement or contributory infringement, et cetera. But,  
25 Your Honor, again we're going off on what the counsel agreed

1 to. They agreed in deposition that that device would be  
2 supplied to us and that would alleviate the need for us  
3 engaging in customer discovery, Your Honor, and we relied on  
4 that in good faith.

5 Now, I don't know what Dean Monco had in mind but  
6 we were relying on it in good faith and I think we should  
7 still be able to rely on it in good faith. And if that's the  
8 only thing we had then, yes, their case is a little bit  
9 stronger, but that's not the only thing that we have. And I  
10 just said a little bit stronger. That's not the only thing  
11 that we have, Your Honor. We have testimony by Bortz, we  
12 have testimony by Corrin, we have instructions. Everything  
13 about the device says, look, when you set this up, the tube  
14 has to be below -- the front tube has to be below the bottom  
15 tube because again, Your Honor, this is not -- this doesn't  
16 go in the fireplace like this. You put sand on this, mind  
17 you, and it's all tilted down that way. It's all spread out  
18 to a standing situation. And the reason why it's important  
19 for this thing to be below that is because you want to fan  
20 that out. That's the way these things are set up. And we  
21 established that at through Golden Blount. That's the way  
22 that -- that this stuff is usually set up.

23 The only other thing that I can add, Your Honor, is  
24 that this -- that does not establish vexatious case. You  
25 know, we relied on counsel and that's where we took our case

1 and we had all sorts of evidence that supports our position.  
2 Our claim construction even came out the way that we were  
3 proposing. This does not constitute a vexatious and  
4 unjustified litigation.

5 Thank you very much for you time, Your Honor.

6 MR. HUTCHINSON: Your Honor, might I add one thing  
7 for just 10 seconds?

8 THE COURT: Certainly.

9 MR. HUTCHINSON: I would just note that the Eltec  
10 case that we cited, 903 F.2d at 805, shows should have known  
11 is good enough and Advance Transfer case, 837 F.2d at 1085  
12 says gross negative is sufficient.

13 THE COURT: Okay.

14 MR. GAINES: Your Honor, for the court's  
15 convenience we do have all the material that we presented  
16 here on floppy if you would like to have that.

17 THE COURT: Okay. I don't think I need that.

18 MR. GAINES: Thank you.

19 THE COURT: I made a mistake in adopting the  
20 defendant's Findings of Fact and Conclusions of Law. I'll  
21 correct that now. I'll vacate the order adopting those  
22 findings and I will adopt the plaintiff's findings. If you  
23 would present me with the necessary findings and necessary  
24 final judgment in the case also.

25 MR. GAINES: Thank you very much, Your Honor.

1 THE COURT: And it's good to see all of you.

2 MR. GAINES: Good to see you.

3 THE COURT: We will stand adjourned.

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C E R T I F I C A T I O N

I, Joe Belton, certify that during the proceedings in the foregoing styled and numbered cause, I was the official Court Reporter and took in stenograph notes such proceedings and have transcribed the same by computer as shown by the above and foregoing pages 1 through 64, and that said transcript is true and correct.

I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2004.

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U.S. DISTRICT COURT REPORTER  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

NOR. DIST. TEX.
NOV 15 2004
CLERK, U.S. DISTRICT COURT
BILL OF COSTS
Deputy

ORIGINAL
R

UNITED STATES DISTRICT COURT
Northern District of Texas

Golden Blount, Inc.,

v.

Robert H. Peterson Co.

Case Number: 3-01CV0127-R

Judgment having been entered in the above entitled action on 9/3/04 and cost order on 11/17/04 against Def., Robert H. Peterson Co.,

the Clerk is requested to tax the following as costs:

Table with 2 columns: Description of costs and Amount. Includes items like Fees of the Clerk (\$150.00), Fees for service of summons and subpoena (0.00), Fees of the court reporter (1,312.43), Fees and disbursements for printing (0.00), Fees for witnesses (380.00), Fees for exemplification (1,817.40), Docket fees (20.00), Costs as shown on Mandate of Court of Appeals (0.00), Compensation of court-appointed experts (0.00), Compensation of interpreters (0.00), Other costs (6,351.21), and TOTAL (\$3,679.83).

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories.

DECLARATION

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill was mailed today with postage prepaid to: Jerry Selinger, counsel of record for Defendant

Signature of Attorney: \_\_\_\_\_

Name of Attorney: William D. Harris, Jr.

For: Golden Blount, Inc. Name of Claiming Party Date: September 8, 2004

Costs are taxed in the amount of \$ 3,679.83 and included in the judgment.

Karen Mitchell Clerk of Court

By: [Signature] Deputy Clerk

11/17/04 Date

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**WITNESS FEES (computation, cf. 28 U.S.C. 1821 for statutory fees)**

NAME AND RESIDENCE	ATTENDANCE		SUBSISTENCE		MILEAGE		Total Cost Each Witness
	Days	Total Cost	Days	Total Cost	Miles	Total Cost	
Charlie Hanft, 2316 Main Street, Tucker, Georgia 30084 Airline Parking							348.00 32.00
					<b>TOTAL</b>		380.00

**NOTICE**

**Section 1924, Title 28, U.S. Code (effective September 1, 1948) provides:**

“Sec. 1924. Verification of bill of costs.”

“Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.”

**See also Section 1920 of Title 28, which reads in part as follows:**

“A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.”

**The Federal Rules of Civil Procedure contain the following provisions:**

**Rule 54 (d)**

“Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day’s notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.”

**Rule 6(e)**

“Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.”

**Rule 58 (In Part)**

“Entry of the judgment shall not be delayed for the taxing of costs.”

ADDENDUM TO BILL OF COSTS

ITEM	AMOUNT
Other Costs .....	
postage-Hitt Gaines & Boisbrun (HGB)	\$ 549.80
postage-Locke Liddell & Sapp (LLS)	<u>60.90</u>
facsimile-HGB	<u>263.00</u>
facsimile-LLS	<u>82.00</u>
courier services-HGB	<u>586.10</u>
courier services-LLS	<u>99.00</u>
on-line search expense-HGB	<u>1,627.16</u>
on-line search expense-LLS	<u>24.21</u>
trial supplies	<u>465.84</u>
obtaining patents	<u>864.20</u>
airfare---deposition in Chicago	<u>1,565.00</u>
taxi---deposition in Chicago	<u>80.00</u>
parking for and in preparation for trial	<u>84.00</u>
	<u>84.00</u>
TOTAL	\$ <u>6,351.21</u>

Hitt Gaines & Boisbrun, P.C.

P.O. Box 832570

Richardson, TX 75083

Federal Tax ID No. 75-2576576

September 30, 2001

Mr. Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison TX 75001

Re: Our File: BLNT-0001LT  
GOLDEN BLOUNT, INC. v. ROBERT H. PETERSON COMPANY  
Invoice # 53289

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Expenses

	<u>Amount</u>
Air Travel	1,565.00
Facsimile	19.50
Food/Beverage/Entertainment	8.00
Parking	16.00
Photocopying	878.16
Postage	157.02
Taxi	80.00
Total Expenses	<u>\$2,723.68</u>

JT-APP 3189

Hitt Gaines & Boisbrun, P.C.  
P.O. Box 832570  
Richardson, TX 75083  
Federal Tax ID No. 75-2576576  
October 31, 2001

Mr. Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison TX 75001

Re: Our File: BLNT-0001LT  
GOLDEN BLOUNT, INC. v. ROBERT H. PETERSON COMPANY  
Invoice # 54001

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Legal fees and expenses  
October 1, 2001 through October 31, 2001

Expenses

	<u>Amount</u>
Court Reporter Disbursement	1,085.53
Facsimile	19.50
Obtain patents	864.20
Photocopying	18.30
Postage	151.66
Total Expenses	<u>\$2,139.19</u>

JT-APP 3190

Hitt Gaines & Boisbrun, P.C.

P.O. Box 832570

Richardson, TX 75083

Federal Tax ID No. 75-2576576

December 31, 2001

Mr. Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison TX 75001

Re: Our File: BLNT-0001LT  
GOLDEN BLOUNT, INC. v. ROBERT H. PETERSON COMPANY  
Invoice # 54838

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Expenses

	<u>Amount</u>
Copy of Transcript of Hearing	45.00
Facsimile	2.00
On-line search expense	130.00
Photocopying	7.90
Postage	1.02
<b>Total Expenses</b>	<hr/> \$185.92

JT-APP 3191

Hitt Gaines & Boisbrun, P.C.  
P.O. Box 832570  
Richardson, TX 75083

Federal Tax ID No. 75-2576576

March 12, 2002

Mr. Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison TX 75001

Re: Our File: BLNT-0001LT  
GOLDEN BLOUNT, INC. v. ROBERT H. PETERSON COMPANY

Invoice # 55480

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Expenses

	<u>Amount</u>
Facsimile	34.00
On-line search expense	29.35
Photocopying	74.90
Postage	2.71
Total Expenses	<u>\$140.96</u>

JT-APP 3192

Hitt Gaines & Boisbrun, P.C.  
P.O. Box 832570  
Richardson, TX 75083  
Federal Tax ID No. 75-2576576  
February 28, 2002

Mr. Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison TX 75001

Re: Our File: BLNT-0001LT  
GOLDEN BLOUNT, INC. v. ROBERT H. PETERSON COMPANY  
Invoice # 55547

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Legal Fees and Expenses  
February 1, 2002, through February 28, 2002

<u>Expenses</u>	<u>Amount</u>
Facsimile	73.00
Photocopying	109.20
Postage	36.97
Total Expenses	<u>\$219.17</u>

JT-APP 3193

Hitt Gaines & Boisbrun, P.C.  
P.O. Box 832570  
Richardson, TX 75083  
Federal Tax ID No. 75-2576576  
March 31, 2002

Mr. Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison TX 75001

Re: Our File: BLNT-0001LT  
GOLDEN BLOUNT, INC. v. ROBERT H. PETERSON COMPANY  
Invoice # 56028

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Expenses

	<u>Amount</u>
Courier Runs	192.45
Facsimile	35.50
Photocopying	20.90
Postage	8.14
Total Expenses	<u>\$256.99</u>

JT-APP 3194

Hitt Gaines & Boisbrun, P.C.  
P.O. Box 832570  
Richardson, TX 75083

Federal Tax ID No. 75-2576576

April 30, 2002

Mr. Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison TX 75001

Re: Our File: BLNT-0001LT  
GOLDEN BLOUNT, INC. v. ROBERT H. PETERSON COMPANY  
Invoice # 56377

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Expenses

	<u>Amount</u>
Facsimile	45.50
On-line search expense	14.00
Photocopying	93.40
Postage	132.06
Supplies	237.07
<b>Total Expenses</b>	<hr/> \$522.03

JT-APP 3195

Hitt Gaines & Boisbrun, P.C.

P.O. Box 832570

Richardson, TX 75083

Federal Tax ID No. 75-2576576

June 30, 2002

Mr. Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison TX 75001

Re: Our File: BLNT-0001LT  
GOLDEN BLOUNT, INC. v. ROBERT H. PETERSON COMPANY  
Invoice # 57180

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Expenses

	<u>Amount</u>
Courier Runs	297.75
Facsimile	17.50
On-line search expense	127.39
Parking	7.00
Photocopying	935.20
Postage	59.20
Supplies	217.41
Total Expenses	<u>\$1,661.45</u>

JT-APP 3196

# HITT GAINES & BOISBRUN, P.C.

Intellectual Property Law & Related Matters

Hitt Gaines & Boisbrun, P.C.

P.O. Box 832570

Richardson, TX 75083

Federal Tax ID No. 75-2576576

August 22, 2002

Mr. Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison TX 75001

Re: Our File: BLNT-0001LT  
GOLDEN BLOUNT, INC. v. ROBERT H. PETERSON COMPANY  
Invoice # 57589

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Expenses

	<u>Amount</u>
Courier Runs	95.90
Deposition	136.90
Facsimile	14.50
On-line search expense	532.51
Parking	61.00
Photocopying	413.89
Supplies	11.36
Total Expenses	<u>\$1,266.06</u>

JT-APP 3197

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Mailing Address: P.O. Box 832570, Richardson, Texas 75083  
Street Address: 225 University Plaza, 275 West Campbell Road, Richardson, Texas 75080 U.S.A.  
Tel: (972) 480-8800 Fax: (972) 480-8865 firm@abstractassets.com

8/22/02  
7:44 AM

HITT GAINES & BOISBRUN, P.C.  
Slip Listing

Page 1

Selection Criteria

Client (hand select) Include: BLNT-0001LT  
Activity (hand select) Include: Photocopying  
Slip Classification Open

Rate Info - identifies rate source and level

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
76263	8/8/01	Billed	Photocopying	HGB BLNT-0001LT	4	0.25	1.00
76727	8/17/01	Billed	Photocopying	HGB BLNT-0001LT	10	0.25	2.50
78257	9/6/01	Billed	Photocopying	HGB BLNT-0001LT	9	0.25	2.25
78265	9/7/01	Billed	Photocopying	HGB BLNT-0001LT	32	0.25	8.00
78307	9/5/01	Billed	Photocopying	HGB BLNT-0001LT	66	0.25	16.50
78565	9/7/01	Billed	Photocopying	HGB BLNT-0001LT	135	0.25	33.75
78569	9/7/01	Billed	Photocopying	HGB BLNT-0001LT	500	0.25	125.00
78570	9/8/01	Billed	Photocopying	HGB BLNT-0001LT	3	0.25	0.75
78572	9/8/01	Billed	Photocopying	HGB BLNT-0001LT	1	0.25	0.25

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8/22/02  
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HITT GAINES & BOISBRUN, P.C.  
Slip Listing

Page 2

Slip ID	Dates and Time Posting Status Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
78634	EXP 9/7/01 Billed Photocopying	G:53289 9/30/01 HGB Photocopying BLNT-0001LT	5	0.25	1.25
78753	EXP 9/24/01 Billed Photocopying	G:53289 9/30/01 HGB Photocopying BLNT-0001LT	1	587.41	587.41
78842	EXP 9/19/01 Billed Photocopying	G:53289 9/30/01 HGB Photocopying BLNT-0001LT	36	0.25	9.00
78887	EXP 9/5/01 Billed Photocopying	G:53289 9/30/01 HGB Photocopying BLNT-0001LT	66	0.25	16.50
78899	EXP 9/12/01 Billed Photocopying	G:53289 9/30/01 HGB Photocopying BLNT-0001LT	27	0.25	6.75
78901	EXP 9/13/01 Billed Photocopying	G:53289 9/30/01 HGB Photocopying BLNT-0001LT	122	0.25	30.50
79158	EXP 9/24/01 Billed Photocopying	G:53289 9/30/01 HGB Photocopying BLNT-0001LT	86	0.25	21.50
79168	EXP 9/25/01 Billed Photocopying	G:53289 9/30/01 HGB Photocopying BLNT-0001LT	18	0.25	4.50
79271	EXP 9/27/01 Billed Photocopying	G:53289 9/30/01 HGB Photocopying BLNT-0001LT	9	0.25	2.25
79344	EXP 9/28/01 Billed Photocopying	G:53289 9/30/01 HGB Photocopying BLNT-0001LT	22	0.25	5.50
79360	EXP 9/28/01 Billed Photocopying	G:53289 9/30/01 HGB Photocopying BLNT-0001LT	12	0.25	3.00

JT-APP 3199

8/22/02  
7:44 AM

HITT GAINES & BOISBRUN, P.C.  
Slip Listing

Page 3

Slip ID	Dates and Time Posting Status Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
79932	EXP 10/2/01 Billed Photocopying	G:54001 10/31/01 HGB Photocopying BLNT-0001LT	16	0.15	2.40
80313	EXP 10/4/01 Billed Photocopying	G:54001 10/31/01 HGB Photocopying BLNT-0001LT	16	0.15	2.40
80751	EXP 10/16/01 Billed Photocopying	G:54001 10/31/01 HGB Photocopying BLNT-0001LT	39	0.15	5.85
80808	EXP 10/11/01 Billed Photocopying	G:54001 10/31/01 HGB Photocopying BLNT-0001LT	5	0.15	0.75
80824	EXP 10/12/01 Billed Photocopying	G:54001 10/31/01 HGB Photocopying BLNT-0001LT	30	0.15	4.50
81039	EXP 10/8/01 Billed Photocopying	G:54001 10/31/01 HGB Photocopying BLNT-0001LT	11	0.15	1.65
81040	EXP 10/8/01 Billed Photocopying	G:54001 10/31/01 HGB Photocopying BLNT-0001LT	2	0.15	0.30
81114	EXP 10/22/01 Billed Photocopying	G:54001 10/31/01 HGB Photocopying BLNT-0001LT	3	0.15	0.45
82191	EXP 11/2/01 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	27	0.10	2.70
82522	EXP 11/5/01 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	22	0.10	2.20
82535	EXP 11/6/01 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	5	0.10	0.50

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8/22/02  
7:44 AM

HITT GAINES & BOISBRUN, P.C.  
Slip Listing

Page 4

Slip ID	Dates and Time Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
82797	EXP		HGB	42	0.10	4.20
11/13/01	Billed	G:56377 4/30/02	Photocopying BLNT-0001LT			
83158	EXP		HGB	23	0.10	2.30
11/21/01	Billed	G:56377 4/30/02	Photocopying BLNT-0001LT			
83270	EXP		HGB	6	0.10	0.60
11/27/01	Billed	G:56377 4/30/02	Photocopying BLNT-0001LT			
84906	EXP		HGB	79	0.10	7.90
12/18/01	Billed	G:54802 12/31/01	Photocopying BLNT-0001LT			
86511	EXP		HGB	4	0.10	0.40
1/7/02	Billed	G:55480 3/12/02	Photocopying BLNT-0001LT			
86606	EXP		HGB	75	0.10	7.50
1/14/02	Billed	G:55480 3/12/02	Photocopying BLNT-0001LT			
86611	EXP		HGB	6	0.10	0.60
1/14/02	Billed	G:55480 3/12/02	Photocopying BLNT-0001LT			
86613	EXP		HGB	297	0.10	29.70
1/15/02	Billed	G:55480 3/12/02	Photocopying BLNT-0001LT			
86849	EXP		HGB	7	0.10	0.70
1/17/02	Billed	G:55480 3/12/02	Photocopying BLNT-0001LT			
86865	EXP		HGB	20	0.10	2.00
1/22/02	Billed	G:55480 3/12/02	Photocopying BLNT-0001LT			
87221	EXP		HGB	34	0.10	3.40
1/25/02	Billed	G:55480 3/12/02	Photocopying BLNT-0001LT			

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
87242	1/28/02	EXP	Billed Photocopying	HGB BLNT-0001LT	60	0.10	6.00
87247	1/29/02	EXP	Billed Photocopying	HGB BLNT-0001LT	16	0.10	1.60
87531	1/31/02	EXP	Billed Photocopying	HGB BLNT-0001LT	204	0.10	20.40
87537	1/30/02	EXP	Billed Photocopying	HGB BLNT-0001LT	20	0.10	2.00
87550	1/31/02	EXP	Billed Photocopying	HGB BLNT-0001LT	6	0.10	0.60
88221	2/1/02	EXP	Billed Photocopying	HGB BLNT-0001LT	105	0.10	10.50
88222	2/1/02	EXP	Billed Photocopying	HGB BLNT-0001LT	99	0.10	9.90
88226	2/1/02	EXP	Billed Photocopying	HGB BLNT-0001LT	15	0.10	1.50
88430	12/31/01	EXP	Billed Photocopying	HGB BLNT-0001LT	1	7.90	7.90
88443	2/11/02	EXP	Billed Photocopying	HGB BLNT-0001LT	20	0.10	2.00
88460	2/12/02	EXP	Billed Photocopying	HGB BLNT-0001LT	24	0.10	2.40

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Slip Listing

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Slip ID	Dates and Time Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
88510	EXP	2/13/02 Billed Photocopying	HGB BLNT-0001LT	18	0.10	1.80
88602	EXP	2/7/02 Billed Photocopying	HGB BLNT-0001LT	14	0.10	1.40
88613	EXP	2/11/02 Billed Photocopying	HGB BLNT-0001LT	6	0.10	0.60
88706	EXP	2/5/02 Billed Photocopying	HGB BLNT-0001LT	9	0.10	0.90
88711	EXP	2/6/02 Billed Photocopying	HGB BLNT-0001LT	11	0.10	1.10
88713	EXP	2/6/02 Billed Photocopying	HGB BLNT-0001LT	22	0.10	2.20
88815	EXP	2/14/02 Billed Photocopying	HGB BLNT-0001LT	9	0.10	0.90
88953	EXP	2/22/02 Billed Photocopying	HGB BLNT-0001LT	25	0.10	2.50
88999	EXP	2/19/02 Billed Photocopying	HGB BLNT-0001LT	21	0.10	2.10
89004	EXP	2/19/02 Billed Photocopying	HGB BLNT-0001LT	6	0.10	0.60
89006	EXP	2/20/02 Billed Photocopying	HGB BLNT-0001LT	38	0.10	3.80

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
89010	2/20/02	EXP	Billed Photocopying	HGB BLNT-0001LT	140	0.10	14.00
89072	2/15/02	EXP	Billed Photocopying	HGB BLNT-0001LT	6	0.10	0.60
89209	2/21/02	EXP	Billed Photocopying	HGB BLNT-0001LT	158	0.10	15.80
89344	2/26/02	EXP	Billed Photocopying	HGB BLNT-0001LT	15	0.10	1.50
89349	2/26/02	EXP	Billed Photocopying	HGB BLNT-0001LT	36	0.10	3.60
89353	2/27/02	EXP	Billed Photocopying	HGB BLNT-0001LT	18	0.10	1.80
89355	2/27/02	EXP	Billed Photocopying	HGB BLNT-0001LT	28	0.10	2.80
90163	2/27/02	EXP	Billed Photocopying	HGB BLNT-0001LT	228	0.10	22.80
90164	2/27/02	EXP	Billed Photocopying	HGB BLNT-0001LT	6	0.10	0.60
90166	2/28/02	EXP	Billed Photocopying	HGB BLNT-0001LT	15	0.10	1.50
90492	3/6/02	EXP	Billed Photocopying	HGB BLNT-0001LT	8	0.10	0.80

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Slip ID	Dates and Time Posting Status Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
90532	EXP 3/5/02 Billed Photocopying	G:56028 3/31/02 HGB Photocopying BLNT-0001LT	8	0.10	0.80
90805	EXP 3/12/02 Billed Photocopying	G:56028 3/31/02 HGB Photocopying BLNT-0001LT	67	0.10	6.70
91006	EXP 3/15/02 Billed Photocopying	G:56028 3/31/02 HGB Photocopying BLNT-0001LT	34	0.10	3.40
91011	EXP 3/18/02 Billed Photocopying	G:56028 3/31/02 HGB Photocopying BLNT-0001LT	11	0.10	1.10
91038	EXP 3/7/02 Billed Photocopying	G:56028 3/31/02 HGB Photocopying BLNT-0001LT	67	0.10	6.70
91040	EXP 3/11/02 Billed Photocopying	G:56028 3/31/02 HGB Photocopying BLNT-0001LT	8	0.10	0.80
91815	EXP 3/27/02 Billed Photocopying	G:56028 3/31/02 HGB Photocopying BLNT-0001LT	6	0.10	0.60
92687	EXP 4/2/02 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	5	0.10	0.50
92695	EXP 4/3/02 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	4	0.10	0.40
93273	EXP 4/16/02 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	6	0.10	0.60
93417	EXP 4/17/02 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	8	0.10	0.80

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Slip ID	Dates and Time Posting Status Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
93421	EXP 4/18/02 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	7	0.10	0.70
93589	EXP 4/19/02 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	5	0.10	0.50
93595	EXP 4/19/02 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	65	0.10	6.50
93596	EXP 4/19/02 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	131	0.10	13.10
93706	EXP 4/23/02 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	61	0.10	6.10
93711	EXP 4/24/02 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	132	0.10	13.20
93718	EXP 4/25/02 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	18	0.10	1.80
93867	EXP 4/25/02 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	41	0.10	4.10
93883	EXP 4/30/02 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	16	0.10	1.60
93901	EXP 4/30/02 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	116	0.10	11.60
93905	EXP 4/25/02 Billed Photocopying	G:56377 4/30/02 HGB Photocopying BLNT-0001LT	194	0.10	19.40

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity	Client File	Units DNB Time	Est. Time Variance	Rate Rate Info	Bill Status	Slip Value
94685	5/6/02	EXP	Billed Photocopying	G:57180	6/30/02	HGB	1	625.27		625.27
94711	5/2/02	EXP	Billed Photocopying	G:57180	6/30/02	HGB	88	0.10		8.80
94713	5/3/02	EXP	Billed Photocopying	G:57180	6/30/02	HGB	16	0.10		1.60
94736	5/3/02	EXP	Billed Photocopying	G:57180	6/30/02	HGB	8	0.10		0.80
94742	5/3/02	EXP	Billed Photocopying	G:57180	6/30/02	HGB	10	0.10		1.00
94823	5/10/02	EXP	Billed Photocopying	G:57180	6/30/02	HGB	38	0.10		3.80
94828	5/10/02	EXP	Billed Photocopying	G:57180	6/30/02	HGB	83	0.10		8.30
95344	5/17/02	EXP	Billed Photocopying	G:57180	6/30/02	HGB	1	247.33		247.33
95355	5/20/02	EXP	Billed Photocopying	G:57180	6/30/02	HGB	6	0.10		0.60
95619	5/24/02	EXP	Billed Photocopying	G:57180	6/30/02	HGB	6	0.10		0.60
95809	5/29/02	EXP	Billed Photocopying	G:57180	6/30/02	HGB	174	0.10		17.40

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Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
95908	5/30/02	EXP	Billed Photocopying	HGB Photocopying BLNT-0001LT	30	0.10	3.00
95958	5/31/02	EXP	Billed Photocopying	HGB Photocopying BLNT-0001LT	90	0.10	9.00
96513	6/3/02	EXP	Billed Photocopying	HGB Photocopying BLNT-0001LT	8	0.10	0.80
96516	6/3/02	EXP	Billed Photocopying	HGB Photocopying BLNT-0001LT	60	0.10	6.00
98281	6/28/02	EXP	Billed Photocopying	HGB Photocopying BLNT-0001LT	9	0.10	0.90
99198	7/16/02	EXP	WIP Photocopying	HGB Photocopying BLNT-0001LT	14	0.10	1.40
99199	7/16/02	EXP	WIP Photocopying	HGB Photocopying BLNT-0001LT	7	0.10	0.70
99201	7/17/02	EXP	WIP Photocopying	HGB Photocopying BLNT-0001LT	9	0.10	0.90
99519	7/23/02	EXP	WIP Photocopying	HGB Photocopying BLNT-0001LT	304	0.10	30.40
99531	7/25/02	EXP	WIP Photocopying	HGB Photocopying BLNT-0001LT	12	0.10	1.20
99616	7/26/02	EXP	WIP Photocopying	HGB Photocopying BLNT-0001LT	36	0.10	3.60

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Slip Listing

Slip ID	Dates and Time Posting Status Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
99618	EXP 7/26/02 WIP Photocopying	HGB Photocopying BLNT-0001LT	18	0.10	1.80
99620	EXP 7/27/02 WIP Photocopying	HGB Photocopying BLNT-0001LT	77	0.10	7.70
99621	EXP 7/28/02 WIP Photocopying	HGB Photocopying BLNT-0001LT	87	0.10	8.70
99622	EXP 7/28/02 WIP Photocopying	HGB Photocopying BLNT-0001LT	1380	0.10	138.00
99623	EXP 7/28/02 WIP Photocopying	HGB Photocopying BLNT-0001LT	200	0.10	20.00
99663	EXP 7/27/02 WIP Photocopying	HGB Photocopying BLNT-0001LT	1	182.31	182.31
99795	EXP 7/28/02 WIP Photocopying	HGB Photocopying BLNT-0001LT	38	0.10	3.80
100655	EXP 7/25/02 WIP Photocopying	HGB Photocopying BLNT-0001LT	1	2.48	2.48
100872	EXP 8/12/02 WIP Photocopying	HGB Photocopying BLNT-0001LT	27	0.10	2.70
100881	EXP 8/13/02 WIP Photocopying	HGB Photocopying BLNT-0001LT	45	0.10	4.50
101020	EXP 8/15/02 WIP Photocopying	HGB Photocopying BLNT-0001LT	10	0.10	1.00

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Slip Listing

Slip ID Dates and Time Posting Status Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
Grand Total	Billable Unbillable Total	0.00 0.00 0.00		2557.05 0.00 2557.05

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Slip Listing

Page 1

Selection Criteria

Client (hand select) Include: BLNT-0001LT  
Activity (hand select) Include: Postage  
Slip Classification Open

Rate Info - identifies rate source and level

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
76140	8/8/01	EXP	Billed Postage	HGB Postage BLNT-0001LT	1	0.34	0.34
76823	8/23/01	EXP	Billed Postage	HGB Postage BLNT-0001LT	1	31.30	31.30
76824	8/23/01	EXP	Billed Postage	HGB Postage BLNT-0001LT	1	23.80	23.80
76825	8/23/01	EXP	Billed Postage	HGB Postage BLNT-0001LT	1	29.75	29.75
79114	9/11/01	EXP	Billed Postage	HGB Postage BLNT-0001LT	1	35.75	35.75
79115	9/11/01	EXP	Billed Postage	HGB Postage BLNT-0001LT	1	33.80	33.80
79136	9/24/01	EXP	Billed Postage	HGB Postage BLNT-0001LT	1	0.34	0.34
79152	9/25/01	EXP	Billed Postage	HGB Postage BLNT-0001LT	2	0.80	1.60
79281	9/27/01	EXP	Billed Postage	HGB Postage BLNT-0001LT	1	0.34	0.34

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Slip Listing

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Slip ID	Dates and Time Posting Status Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
80252	EXP 10/8/01 Billed Postage	G:54001 10/31/01 HGB Postage BLNT-0001LT	1	43.99	43.99
80257	EXP 10/2/01 Billed Postage	G:54001 10/31/01 HGB Postage BLNT-0001LT	2	0.57	1.14
80620	EXP 10/12/01 Billed Postage	G:54001 10/31/01 HGB Postage BLNT-0001LT	1	33.80	33.80
80621	EXP 10/12/01 Billed Postage	G:54001 10/31/01 HGB Postage BLNT-0001LT	1	23.80	23.80
80622	EXP 10/12/01 Billed Postage	G:54001 10/31/01 HGB Postage BLNT-0001LT	1	33.80	33.80
80839	EXP 10/12/01 Billed Postage	G:54001 10/31/01 HGB Postage BLNT-0001LT	1	1.03	1.03
80903	EXP 10/29/01 Billed Postage	G:54001 10/31/01 HGB Postage BLNT-0001LT	1	13.76	13.76
81095	EXP 10/22/01 Billed Postage	G:54001 10/31/01 HGB Postage BLNT-0001LT	1	0.34	0.34
82138	EXP 11/2/01 Billed Postage	G:56377 4/30/02 HGB Postage BLNT-0001LT	1	0.80	0.80
82820	EXP 11/13/01 Billed Postage	G:56377 4/30/02 HGB Postage BLNT-0001LT	1	7.00	7.00
84098	EXP 11/13/01 Billed Postage	G:56377 4/30/02 HGB Postage BLNT-0001LT	1	23.80	23.80

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Slip Listing

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Slip ID	Dates and Time Posting Status Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
84099	EXP 11/13/01 Billed Postage	G:56377 4/30/02 HGB Postage BLNT-0001LT	1	29.75	29.75
84100	EXP 11/13/01 Billed Postage	G:56377 4/30/02 HGB Postage BLNT-0001LT	1	35.75	35.75
84101	EXP 11/13/01 Billed Postage	G:56377 4/30/02 HGB Postage BLNT-0001LT	1	7.50	7.50
84102	EXP 11/14/01 Billed Postage	G:56377 4/30/02 HGB Postage BLNT-0001LT	1	23.80	23.80
85073	EXP 12/28/01 Billed Postage	G:54802 12/31/01 HGB Postage BLNT-0001LT	1	1.02	1.02
86844	EXP 1/22/02 Billed Postage	G:55480 3/12/02 HGB Postage BLNT-0001LT	2	0.57	1.14
87295	EXP 1/29/02 Billed Postage	G:55480 3/12/02 HGB Postage BLNT-0001LT	1	1.57	1.57
88316	EXP 2/5/02 Billed Postage	G:55547 2/28/02 HGB Postage BLNT-0001LT	2	0.57	1.14
88431	EXP 12/31/01 Billed Postage	G:54838 12/31/01 HGB Postage BLNT-0001LT	1	1.02	1.02
88631	EXP 2/8/02 Billed Postage	G:55547 2/28/02 HGB Postage BLNT-0001LT	1	0.34	0.34
89450	EXP 2/20/02 Billed Postage	G:55547 2/28/02 HGB Postage BLNT-0001LT	1	16.25	16.25

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Slip Listing

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Slip ID	Dates and Time Posting Status Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
89451	EXP 2/20/02 Billed Postage	G:55547 2/28/02 HGB Postage BLNT-0001LT	1	16.25	16.25
89505	EXP 2/27/02 Billed Postage	G:55547 2/28/02 HGB Postage BLNT-0001LT	1	1.97	1.97
89511	EXP 2/27/02 Billed Postage	G:55547 2/28/02 HGB Postage BLNT-0001LT	3	0.34	1.02
90604	EXP 3/6/02 Billed Postage	G:56028 3/31/02 HGB Postage BLNT-0001LT	1	7.00	7.00
91025	EXP 3/15/02 Billed Postage	G:56028 3/31/02 HGB Postage BLNT-0001LT	2	0.57	1.14
93456	EXP 4/19/02 Billed Postage	G:56377 4/30/02 HGB Postage BLNT-0001LT	1	3.66	3.66
95061	EXP 5/17/02 Billed Postage	G:57180 6/30/02 HGB Postage BLNT-0001LT	1	16.25	16.25
95062	EXP 5/17/02 Billed Postage	G:57180 6/30/02 HGB Postage BLNT-0001LT	1	16.25	16.25
95302	EXP 5/20/02 Billed Postage	G:57180 6/30/02 HGB Postage BLNT-0001LT	1	12.45	12.45
95303	EXP 5/20/02 Billed Postage	G:57180 6/30/02 HGB Postage BLNT-0001LT	1	12.45	12.45
96558	EXP 6/3/02 Billed Postage	G:57180 6/30/02 HGB Postage BLNT-0001LT	1	1.80	1.80

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Slip ID Dates and Time Posting Status Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
Grand Total	Billable Unbillable Total	0.00 0.00 0.00		549.80 0.00 549.80

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Slip Listing

Page 1

Selection Criteria

Client (hand select) Include: BLNT-0001LT  
Activity (hand select) Include: Facsimile  
Slip Classification Open

Rate Info - identifies rate source and level

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
76680	8/20/01	EXP	Billed Facsimile/Telephone	HGB Facsimile BLNT-0001LT	3	0.50	1.50
78547 *	9/7/01	EXP	Billed Facsimile/Telephone	HGB Facsimile BLNT-0001LT	5	0.50	2.50
79199	9/24/01	EXP	Billed Facsimile/Telephone	HGB Facsimile BLNT-0001LT	5	0.50	2.50
79292	9/27/01	EXP	Billed Facsimile/Telephone	HGB Facsimile BLNT-0001LT	8	0.50	4.00
79300	9/28/01	EXP	Billed Facsimile/Telephone	HGB Facsimile BLNT-0001LT	18	0.50	9.00
79950	10/2/01	EXP	Billed Facsimile/Telephone	HGB Facsimile BLNT-0001LT	16	0.50	8.00
80328	10/4/01	EXP	Billed Facsimile/Telephone	HGB Facsimile BLNT-0001LT	8	0.50	4.00
80331	10/4/01	EXP	Billed Facsimile/Telephone	HGB Facsimile BLNT-0001LT	2	0.50	1.00
80807	10/12/01	EXP	Billed Facsimile/Telephone	HGB Facsimile BLNT-0001LT	13	0.50	6.50

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Slip Listing

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Slip ID	Dates and Time Posting Status Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
82540	EXP 11/1/01 Billed G:56377 4/30/02 Facsimile/Telephone	HGB Facsimile BLNT-0001LT	11	0.50	5.50
82541	EXP 11/1/01 Billed G:56377 4/30/02 Facsimile/Telephone	HGB Facsimile BLNT-0001LT	6	0.50	3.00
84655	EXP 12/17/01 Billed G:54802 12/31/01 Facsimile/Telephone	HGB Facsimile BLNT-0001LT	4	0.50	2.00
86760	EXP 1/17/02 Billed G:55480 3/12/02 Facsimile/Telephone	HGB Facsimile BLNT-0001LT	2	0.50	1.00
86874	EXP 1/22/02 Billed G:55480 3/12/02 Facsimile/Telephone	HGB Facsimile BLNT-0001LT	14	0.50	7.00
87263	EXP 1/28/02 Billed G:55480 3/12/02 Facsimile/Telephone	HGB Facsimile BLNT-0001LT	32	0.50	16.00
87267	EXP 1/29/02 Billed G:55480 3/12/02 Facsimile/Telephone	HGB Facsimile BLNT-0001LT	14	0.50	7.00
87433	EXP 1/31/02 Billed G:55480 3/12/02 Facsimile/Telephone	HGB Facsimile BLNT-0001LT	6	0.50	3.00
88428	EXP 12/31/01 Billed G:54838 12/31/01 Facsimile/Telephone	HGB Facsimile BLNT-0001LT	1	2.00	2.00
88595	EXP 2/11/02 Billed G:55547 2/28/02 Facsimile/Telephone	HGB Facsimile BLNT-0001LT	4	0.50	2.00
88697	EXP 2/6/02 Billed G:55547 2/28/02 Facsimile/Telephone	HGB Facsimile BLNT-0001LT	34	0.50	17.00

JT-APP 3217

8/22/02  
7:50 AM

HITT GAINES & BOISBRUN, P.C.  
Slip Listing

Page 3

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
88753	2/15/02	EXP	Billed	HGB Facsimile BLNT-0001LT	4	0.50	2.00
		G:55547	2/28/02				
88839	2/14/02	EXP	Billed	HGB Facsimile BLNT-0001LT	5	0.50	2.50
		G:55547	2/28/02				
89038	2/1/02	EXP	Billed	HGB Facsimile BLNT-0001LT	12	0.50	6.00
		G:55547	2/28/02				
89044	2/4/02	EXP	Billed	HGB Facsimile BLNT-0001LT	20	0.50	10.00
		G:55547	2/28/02				
89045	2/5/02	EXP	Billed	HGB Facsimile BLNT-0001LT	10	0.50	5.00
		G:55547	2/28/02				
89049	2/18/02	EXP	Billed	HGB Facsimile BLNT-0001LT	3	0.50	1.50
		G:55547	2/28/02				
89051	2/19/02	EXP	Billed	HGB Facsimile BLNT-0001LT	20	0.50	10.00
		G:55547	2/28/02				
89190	2/20/02	EXP	Billed	HGB Facsimile BLNT-0001LT	17	0.50	8.50
		G:55547	2/28/02				
89200	2/22/02	EXP	Billed	HGB Facsimile BLNT-0001LT	3	0.50	1.50
		G:55547	2/28/02				
89284	2/26/02	EXP	Billed	HGB Facsimile BLNT-0001LT	4	0.50	2.00
		G:55547	2/28/02				
89288	2/26/02	EXP	Billed	HGB Facsimile BLNT-0001LT	6	0.50	3.00
		G:55547	2/28/02				

JT-APP 3218

8/22/02  
7:50 AM

HITT GAINES & BOISBRUN, P.C.  
Slip Listing

Page 4

Slip ID	Dates and Time Posting Status Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
90154	EXP 2/28/02 Billed G:55547 Facsimile/Telephone	2/28/02 HGB Facsimile BLNT-0001LT	4	0.50	2.00
90697	EXP 3/6/02 Billed G:56028 Facsimile/Telephone	3/31/02 HGB Facsimile BLNT-0001LT	71	0.50	35.50
93333	EXP 4/17/02 Billed G:56377 Facsimile/Telephone	4/30/02 HGB Facsimile BLNT-0001LT	3	0.50	1.50
93612	EXP 4/18/02 Billed G:56377 Facsimile/Telephone	4/30/02 HGB Facsimile BLNT-0001LT	7	0.50	3.50
93615	EXP 4/19/02 Billed G:56377 Facsimile/Telephone	4/30/02 HGB Facsimile BLNT-0001LT	8	0.50	4.00
93620	EXP 4/19/02 Billed G:56377 Facsimile/Telephone	4/30/02 HGB Facsimile BLNT-0001LT	54	0.50	27.00
93917	EXP 4/30/02 Billed G:56377 Facsimile/Telephone	4/30/02 HGB Facsimile BLNT-0001LT	2	0.50	1.00
95438	EXP 5/20/02 Billed G:57180 Facsimile/Telephone	6/30/02 HGB Facsimile BLNT-0001LT	6	0.50	3.00
95694	EXP 5/23/02 Billed G:57180 Facsimile/Telephone	6/30/02 HGB Facsimile BLNT-0001LT	4	0.50	2.00
95701	EXP 5/24/02 Billed G:57180 Facsimile/Telephone	6/30/02 HGB Facsimile BLNT-0001LT	6	0.50	3.00
96536	EXP 6/3/02 Billed G:57180 Facsimile/Telephone	6/30/02 HGB Facsimile BLNT-0001LT	19	0.50	9.50

JT-APP 3219

8/22/02  
7:50 AM

HITT GAINES & BOISBRUN, P.C.  
Slip Listing

Page 5

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
99603	7/25/02	EXP	WIP Facsimile/Telephone	HGB Facsimile BLNT-0001LT	4	0.50	2.00
99608	7/26/02	EXP	WIP Facsimile/Telephone	HGB Facsimile BLNT-0001LT	13	0.50	6.50
100979	8/14/02	EXP	WIP Facsimile/Telephone	HGB Facsimile BLNT-0001LT	12	0.50	6.00
Grand Total				Billable	0.00		263.00
				Unbillable	0.00		0.00
				Total	0.00		263.00

JT-APP 3220

8/22/02  
7:53 AM

HITT GAINES & BOISBRUN, P.C.  
Slip Listing

Page 1

Selection Criteria

Client (hand select) Include: BLNT-0001LT  
Activity (hand select) Include: Courier  
Slip Classification Open

Rate Info - identifies rate source and level

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
90657	3/12/02	EXP	Billed Courier	HGB Courier BLNT-0001LT	1	192.45	192.45
	G:56028	3/31/02					
94691	5/6/02	EXP	Billed Courier Runs	HGB Courier BLNT-0001LT	1	23.80	23.80
	G:57180	6/30/02					
94696	5/8/02	EXP	Billed Courier Runs	HGB Courier BLNT-0001LT	1	94.55	94.55
	G:57180	6/30/02					
95567	5/23/02	EXP	Billed Courier Runs	HGB Courier BLNT-0001LT	1	41.00	41.00
	G:57180	6/30/02					
96445	5/20/02	EXP	Billed Courier Runs	HGB Courier BLNT-0001LT	1	47.60	47.60
	G:57180	6/30/02					
97274	6/21/02	EXP	Billed Courier Runs	HGB Courier BLNT-0001LT	1	90.80	90.80
	G:57180	6/30/02					
99670	7/27/02	EXP	WIP Courier Runs	HGB Courier BLNT-0001LT	1	52.60	52.60
99672	7/27/02	EXP	WIP Courier Runs	HGB Courier BLNT-0001LT	1	43.30	43.30
Grand Total				Billable	0.00		586.10

JT-APP 3221

8/22/02  
7:53 AM

HITT GAINES & BOISBRUN, P.C.  
Slip Listing

Page 2

Slip ID Dates and Time Posting Status Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
	Unbillable	0.00		0.00
	Total	0.00		586.10

JT-APP 3222

Selection Criteria

Client (hand select) Include: BLNT-0001LT  
 Activity (hand select) Include: Search  
 Slip Classification Open

Rate Info - identifies rate source and level

Slip ID	Dates and Time	Posting Status	Description	Attorney Activlty Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
83057	11/30/01	EXP	Billed On-line search expense	HGB Search BLNT-0001LT	1	14.00	14.00
			G:56377 4/30/02				
85793	12/31/01	EXP	Billed On-line search expense	HGB Search BLNT-0001LT	1	884.01	884.01
			G:54802 12/31/01				
85799	12/31/01	EXP	Billed On-line search expense	HGB Search BLNT-0001LT	1	69.68	69.68
			G:54802 12/31/01				
85800	12/31/01	EXP	Billed On-line search expense	HGB Search BLNT-0001LT	1	40.97	40.97
			G:54802 12/31/01				
86690	1/17/02	EXP	Billed On-line search expense	HGB Search BLNT-0001LT	1	29.35	29.35
			G:55480 3/12/02				
88429	12/31/01	EXP	Billed On-line search expense	HGB Search BLNT-0001LT	1	130.00	130.00
			G:54838 12/31/01				
95574	5/23/02	EXP	Billed On-line search expense	HGB Search BLNT-0001LT	1	33.33	33.33
			G:57180 6/30/02				
95575	5/23/02	EXP	Billed On-line search expense	HGB Search BLNT-0001LT	1	69.47	69.47
			G:57180 6/30/02				
95576	5/23/02	EXP	Billed On-line search expense	HGB Search BLNT-0001LT	1	24.59	24.59
			G:57180 6/30/02				

8/22/02  
7:53 AM

HITT GAINES & BOISBRUN, P.C.  
Slip Listing

Page 2

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
100676	8/8/02	EXP	WIP On-line search expense	HGB Search BLNT-0001LT	1	122.18	122.18
100683	8/8/02	EXP	WIP On-line search expense	HGB Search BLNT-0001LT	1	117.23	117.23
100684	8/8/02	EXP	WIP On-line search expense	HGB Search BLNT-0001LT	1	41.92	41.92
100692	8/8/02	EXP	WIP On-line search expense	HGB Search BLNT-0001LT	1	24.12	24.12
100693	8/8/02	EXP	WIP On-line search expense	HGB Search BLNT-0001LT	1	26.31	26.31
Grand Total				Billable	0.00		1627.16
				Unbillable	0.00		0.00
				Total	0.00		1627.16

JT-APP 3224

8/22/02  
7:52 AM

HITT GAINES & BOISBRUN, P.C.  
Slip Listing

Page 1

Selection Criteria

Client (hand select) Include: BLNT-0001LT  
Activity (hand select) Include: Obtain patents  
Slip Classification Open

Rate Info - identifies rate source and level

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
79921	10/3/01	EXP	Billed Obtain patents	HGB Obtain patents BLNT-0001LT	1	289.80	289.80
		G:54001		10/31/01			
80626	10/19/01	EXP	Billed Obtain patents	HGB Obtain patents BLNT-0001LT	1	283.00	283.00
		G:54001		10/31/01			
80627	10/19/01	EXP	Billed Obtain patents	HGB Obtain patents BLNT-0001LT	1	291.40	291.40
		G:54001		10/31/01			
Grand Total				Billable	0.00		864.20
				Unbillable	0.00		0.00
				Total	0.00		864.20

JT-APP 3225

8/22/02  
7:54 AM

HITT GAINES & BOISBRUN, P.C.  
Slip Listing

Page 1

Selection Criteria

Client (hand select) Include: BLNT-0001LT  
Activity (hand select) Include: Deposition  
Slip Classification Open

Rate Info - identifies rate source and level

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity	Client File	Units DNB Time	Est. Time Variance	Rate Rate Info	Bill Status	Slip Value
100696	8/8/02	EXP	WIP Deposition	HGB	Deposition BLNT-0001LT	1		136.90		136.90
Grand Total				Billable		0.00				136.90
				Unbillable		0.00				0.00
				Total		0.00				136.90

JT-APP 3226

8/22/02  
7:52 AM

HITT GAINES & BOISBRUN, P.C.  
Slip Listing

Page 1

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Selection Criteria

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Client (hand select) Include: BLNT-0001LT  
Activity (hand select) Include: Court Reporter  
Slip Classification Open

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Rate Info - identifies rate source and level

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity	Client File	Units DNB Time	Est. Time	Variance	Rate Rate Info	Bill Status	Slip Value
81345	10/15/01	EXP	Court Reporter Disbursement	HGB	BLNT-0001LT	1			1085.53		1085.53
	Billed	G:54001	10/31/01								
Grand Total											
				Billable				0.00			1085.53
				Unbillable				0.00			0.00
				Total				0.00			1085.53

JT-APP 3227

8/22/02  
7:53 AM

HITT GAINES & BOISBRUN, P.C.  
Slip Listing

Page 1

Selection Criteria

Client (hand select) Include: BLNT-0001LT  
Activity (hand select) Include: Transcript  
Slip Classification Open

Rate Info - identifies rate source and level

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
84616	12/18/01	EXP	Billed Copy of Transcript of Hearing	HGB Transcript BLNT-0001LT	1	45.00	45.00
88427	12/31/01	EXP	Billed Copy of Transcript of Hearing	HGB Transcript BLNT-0001LT	1	45.00	45.00
Grand Total				Billable Unbillable Total	0.00 0.00 0.00		90.00 0.00 90.00

JT-APP 3228

8/22/02  
7:52 AM

HITT GAINES & BOISBRUN, P.C.  
Slip Listing

Page 1

Selection Criteria

Client (hand select) Include: BLNT-0001LT  
Activity (hand select) Include: Taxi  
Slip Classification Open

Rate Info - identifies rate source and level

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
80604	9/30/01	EXP		HGB Taxi BLNT-0001LT	1	80.00	80.00
	Billed	G:53289	9/30/01				
	Taxi						
Grand Total				Billable	0.00		80.00
				Unbillable	0.00		0.00
				Total	0.00		80.00

JT-APP 3229

8/22/02  
7:51 AM

HITT GAINES & BOISBRUN, P.C.  
Slip Listing

Page 1

Selection Criteria

Client (hand select) Include: BLNT-0001LT  
Activity (hand select) Include: Parking  
Slip Classification Open

Rate Info - identifies rate source and level

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
80605	9/30/01	EXP	Billed Parking	HGB Parking BLNT-0001LT	1	16.00	16.00
	G:53289		9/30/01				
95305	5/3/02	EXP	Billed Parking	HGB Parking BLNT-0001LT	1	7.00	7.00
	G:57180		6/30/02				
100656	7/17/02	EXP	WIP Parking	HGB Parking BLNT-0001LT	1	2.00	2.00
101142	8/21/02	EXP	WIP Parking	HGB Parking BLNT-0001LT	1	59.00	59.00
Grand Total				Billable	0.00		84.00
				Unbillable	0.00		0.00
				Total	0.00		84.00

JT-APP 3230

8/22/02  
7:54 AM

HITT GAINES & BOISBRUN, P.C.  
Slip Listing

Page 1

Selection Criteria

Client (hand select) Include: BLNT-0001LT  
Activity (hand select) Include: Supplies  
Slip Classification Open

Rate Info - identifies rate source and level

Slip ID Dates and Time Posting Status Description			Attorney Activity Client File	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
93895 4/30/02 Billed Supplies	EXP G:56377	4/30/02	HGB Supplies BLNT-0001LT	1	237.07	237.07
94567 5/2/02 Billed Supplies	EXP G:57180	6/30/02	HGB Supplies BLNT-0001LT	1	107.11	107.11
94568 5/2/02 Billed Supplies	EXP G:57180	6/30/02	HGB Supplies BLNT-0001LT	1	23.54	23.54
94569 5/2/02 Billed Supplies	EXP G:57180	6/30/02	HGB Supplies BLNT-0001LT	1	86.76	86.76
99660 7/27/02 WIP Supplies	EXP		HGB Supplies BLNT-0001LT	1	11.36	11.36
Grand Total			Billable Unbillable Total	0.00 0.00 0.00		465.84 0.00 465.84

JT-APP 3231

LOCKE LIDDELL & SAPP LLP  
ATTORNEYS & COUNSELORS

P. O. Box 911541  
DALLAS, TEXAS 75391-1541  
TAX ID 74-1164324

February 18, 2000

Golden Blount  
4200 West Grove  
Dallas, TX 75248

As of January 31, 2000

File No.: 09842/60434

Re: Gas-Fired Artifl Logs & Coals-Burner Assembly

DATE	SERVICES	ATTY	HOURS	VALUE
12/10/99	Preparation of cease and desist letters.	LDT	1.00	325.00
			TOTAL HOURS	1.00

TOTAL SERVICES . . . . . \$325.00

DATE	CHARGES	VALUE
	Facsimiles @ 1.00 per page	2.00
		TOTAL CHARGES . . . . . \$2.00
		TOTAL SERVICES AND CHARGES . . . . . \$327.00
		TOTAL DUE THIS STATEMENT . . . . . \$327.00

Please remit payment to:  
Locke Liddell & Sapp LLP  
P. O. Box 911541  
Dallas, Texas 75391-1541

JT-APP 3232

February 18, 2000

Golden Blount  
Page 2

As of January 31, 2000

File No.: 09842/60434

Re: Gas-Fired Artifl Logs & Coals-Burner Assembly

This statement is due upon receipt. Please call Roy W. Hardin (214) 740-8000 of this firm if you have questions concerning legal services covered by it or if you dispute the amount of the statement. Ms. Emily Teague in our Accounting Department (214) 740-8347 can answer questions concerning payments on your account.

Any payment for less than the full amount of this statement tendered in full satisfaction of this statement (or any portion of it) should be sent to: Locke Liddell & Sapp LLP, Attention: Accounts Receivable, 2200 Ross Avenue, Suite 2200, Dallas, Texas 75201-6776

PRIVACY NOTICE

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JT-APP 3233

LOCKE LIDDELL & SAPP LLP  
ATTORNEYS & COUNSELORS

P. O. Box 911541  
DALLAS, TEXAS 75391-1541  
TAX ID 74-1164324

May 12, 2000

Golden Blount  
4200 West Grove  
Dallas, TX 75248

As of April 30, 2000

File No.: 09842/60434

Re: Gas-Fired Artifi Logs & Coals-Burner Assembly

DATE	SERVICES	ATTY	HOURS	VALUE
03/21/00	Conference with Mr. Blount regarding [REDACTED]	LDT	.50	175.00
04/26/00	Telephone conference with Mr. Blount and preparation of demand letter to Robert H. Peterson Co.	LDT	.40	140.00
	TOTAL HOURS		.90	
	TOTAL SERVICES . . . . .			\$315.00
	TOTAL DUE THIS STATEMENT . . . . .			\$315.00

Please remit payment to:  
Locke Liddell & Sapp LLP  
P. O. Box 911541  
Dallas, Texas 75391-1541

JT-APP 3234

May 12, 2000

Golden Blount  
Page 2

As of April 30, 2000

File No.: 09842/60434

Re: Gas-Fired Artifl Logs & Coals-Burner Assembly

This statement is due upon receipt. Please call Roy W. Hardin (214) 740-8000 of this firm if you have questions concerning legal services covered by it or if you dispute the amount of the statement. Ms. Emily Teague in our Accounting Department (214) 740-8347 can answer questions concerning payments on your account.

Any payment for less than the full amount of this statement tendered in full satisfaction of this statement (or any portion of it) should be sent to: Locke Liddell & Sapp LLP, Attention: Accounts Receivable, 2200 Ross Avenue, Suite 2200, Dallas, Texas 75201-6776

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JT-APP 3235

LOCKE LIDDELL & SAPP LLP  
ATTORNEYS & COUNSELORS

P. O. BOX 911541  
DALLAS, TEXAS 75391-1541  
TAX ID 74-1164324

Golden Blount  
4200 West Grove  
Dallas, TX 75248

October 23, 2000

As of October 18, 2000

File No.: 09842/60434

Re: Gas-Fired Artifl Logs & Coals-Burner Assembly

DATE	SERVICES	ATTY	HOURS	VALUE
07/14/00	Sketch views of patent drawings; consultation with patent draftsman.	MLR	1.50	502.50
10/11/00	Review of file and [REDACTED]	RWH	1.00	350.00
10/11/00	Begin research for case law to [REDACTED]	MD	4.00	540.00
10/12/00	Continue research on [REDACTED]	MD	8.25	1,113.75
10/18/00	Prepare Complaint for Patent Infringement--Golden Blount, Inc. v. Robert H. Peterson Company	MD	3.25	438.75
	TOTAL HOURS		18.00	
	TOTAL SERVICES			\$2,945.00

JT-APP 3236

October 23, 2000

Golden Blount  
Page 2

As of October 18, 2000

File No.: 09842/60434

Re: Gas-Fired Artifl Logs & Coals-Burner Assembly

DATE	CHARGES	VALUE
	Photocopies @:20 per page	8.40
	TOTAL CHARGES . . . . .	\$8.40
	TOTAL SERVICES AND CHARGES . . . . .	\$2,953.40
	TOTAL DUE THIS STATEMENT . . . . .	\$2,953.40

Please remit payment to:  
Locke Liddell & Sapp LLP  
P. O. Box 911541  
Dallas, Texas 75391-1541

This statement is due upon receipt. Please call Roy W. Hardin (214) 740-8000 of this firm if you have questions concerning legal services covered by it or if you dispute the amount of the statement. Ms. Emily Teague in our Accounting Department (214) 740-8347 can answer questions concerning payments on your account.

Any payment for less than the full amount of this statement tendered in full satisfaction of this statement (or any portion of it) should be sent to: Locke Liddell & Sapp LLP, Attention: Accounts Receivable, 2200 Ross Avenue, Suite 2200, Dallas, Texas 75201-6776

PRIVACY NOTICE

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JT-APP 3237

October 23, 2000

Golden Blount  
Page 3

As of October 18, 2000

File No.: 09842/60434

Re: Gas-Fired Artifl Logs & Coals-Burner Assembly

with, the services provided.

Locke Liddell & Sapp does not disclose, nor does Locke Liddell & Sapp reserve the right to disclose, any nonpublic personal information about clients or former clients, except as permitted by law.

Locke Liddell & Sapp restricts access to nonpublic personal information to those employees who need to know that information to provide the applicable services. Locke Liddell & Sapp maintains physical, electronic and procedural safeguards that comply with federal regulations to guard the nonpublic personal information of clients and former clients.

JT-APP 3238

LOCKE LIDDELL & SAPP LLP  
ATTORNEYS & COUNSELORS

P. O. Box 911541  
DALLAS, TEXAS 75391-1541  
TAX ID 74-1164324

February 21, 2001

Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison, TX 75001

As of January 31, 2001

File No.: 09842/60434

Re: Gas-Fired Artifi Logs & Coals-Burner Assembly

DATE	SERVICES	ATTY	HOURS	VALUE
10/17/00	Telecon with Mr. Blount and review of information necessary for [REDACTED]	RWH	.50	175.00
11/06/00	Telecon with Golden [REDACTED]	RWH	.75	262.50
11/06/00	Prepare patent assignment form for assignment of '159 Patent to Golden Blount, Inc.; draft letter to Mr. Blount [REDACTED]	MD	2.00	270.00
11/07/00	Complete assignment of patent application and draft of letter to Mr. Blount concerning [REDACTED]	MD	2.50	337.50
01/08/01	Prepare letter and complaint and send to client for approval.	RWH	3.50	1,312.50
01/09/01	Review of file histories and considering [REDACTED]	RWH	3.50	1,312.50
			TOTAL HOURS	12.75
			TOTAL SERVICES	\$3,670.00

JT-APP 3239

February 21, 2001

Golden Blount  
Page 2

As of January 31, 2001

File No.: 09842/60434

Re: Gas-Fired Artifl Logs & Coals-Burner.Assembly

LESS DISCOUNT (\$1,170.00)

TOTAL SERVICES BILLED . . . . . \$2,500.00

DATE	CHARGES	VALUE
	Air Freight Shipments	19.66
	Messenger Services	13.00
	Photocopies @.20 per page	9.80
12/22/00	Comm. of Patents & Trademarks - Recordal of Assignment	40.00
01/18/01	Clerk, U.S. District Court - Filing fee for Complaint	150.00
	TOTAL CHARGES . . . . .	\$232.46
	TOTAL SERVICES AND CHARGES . . . . .	\$2,732.46
	TOTAL DUE THIS STATEMENT . . . . .	\$2,732.46

Please remit payment to:  
Locke Liddell & Sapp LLP  
P. O. Box 911541  
Dallas, Texas 75391-1541

This statement is due upon receipt. Please call Roy W. Hardin (214) 740-8000 of this firm if you have questions concerning legal services covered by it or if you dispute the amount of the statement. Ms. Emily Teague in our Accounting Department (214) 740-8347 can answer questions concerning payments on your account.

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JT-APP 3240

Golden Blount  
Page 3

February 21, 2001

As of January 31, 2001

File No.: 09842/60434

Re: Gas-Fired Artifi Logs & Coals-Burner Assembly

PRIVACY NOTICE

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JT-APP 3241

LOCKE LIDDELL & SAPP LLP  
ATTORNEYS & COUNSELORS

P. O. Box 911541  
DALLAS, TEXAS 75391-1541  
TAX ID 74-1164324

March 13, 2001

Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison, TX 75001

As of February 28, 2001

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

DATE	CHARGES	VALUE
	Messenger Services	26.00
	TOTAL CHARGES . . . . .	\$26.00
	TOTAL DUE THIS STATEMENT . . . . .	\$26.00

Please remit payment to:  
Locke Liddell & Sapp LLP  
P. O. Box 911541  
Dallas, Texas 75391-1541

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JT-APP 3242

March 13, 2001

Golden Blount  
Page 2

As of February 28, 2001

File No.: .09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

PRIVACY NOTICE

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JT-APP 3243

LOCKE LIDDELL & SAPP LLP  
ATTORNEYS & COUNSELORS

P. O. Box 911541  
DALLAS, TEXAS 75391-1541  
TAX ID 74-1164324

May 15, 2001

Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison, TX 75001

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

DATE	SERVICES	ATTY	HOURS	VALUE
03/28/01	Review of Judge's Scheduling Order and conference regarding [REDACTED] non-infringement claim by Defendants.	RWH	2.00	750.00
04/09/01	Review files and correspondence concerning the present action; discuss [REDACTED] with Roy Hardin; draft discovery requests.	CEP	2.00	460.00
04/10/01	Review pleadings and correspondence concerning the present action; review United State patent 5,988,159; draft discovery requests including document requests and interrogatories.	CEP	5.00	1,150.00
04/11/01	Review of proposed discovery requests	RWH	1.00	375.00
04/11/01	Revise drafts of Golden Blount's document requests and interrogatories to Robert Peterson Co.	CEP	1.00	230.00
04/12/01	Revise Golden Blount's document requests and interrogatories to Robert Peterson Co. in view of [REDACTED]	CEP	1.00	230.00
04/17/01	Letter to client and service of first wave of discovery.	RWH	.50	187.50
	TOTAL HOURS		12.50	

JT-APP 3244

May 15, 2001

Golden Blount  
Page 2

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

TOTAL SERVICES . . . . . \$3,382.50

DATE	CHARGES	VALUE
	Photocopies @.20 per page	9.60
	Facsimiles @ 1.00 per page	24.00
	TOTAL CHARGES . . . . .	\$33.60
	TOTAL SERVICES AND CHARGES . . . . .	\$3,416.10
	TOTAL DUE THIS STATEMENT . . . . .	\$3,416.10

Please remit payment to:  
Locke Liddell & Sapp LLP  
P. O. Box 911541  
Dallas, Texas 75391-1541

This statement is due upon receipt. Please call Roy W. Hardin (214) 740-8000 of this firm if you have questions concerning legal services covered by it or if you dispute the amount of the statement. Ms. Emily Teague in our Accounting Department (214) 740-8347 can answer questions concerning payments on your account.

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JT-APP 3245

May 15, 2001

Golden Blount  
Page 3

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

with, the services provided.

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JT-APP 3246

LOCKE LIDDELL & SAPP LLP  
ATTORNEYS & COUNSELORS

P. O. Box 911541  
DALLAS, TEXAS 75391-1541  
TAXID 74-1164324

June 19, 2001

Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison, TX 75001

As of May 31, 2001

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

DATE	SERVICES	ATTY	HOURS	VALUE
05/17/01	Attention to Scheduling Order and considering [REDACTED] preparing and transmitting proposed form of Joint Status Conference paper to opposing counsel.	RWH	2.00	750.00
05/18/01	Attention to corrected joint report; telecon with opposing counsel.	RWH	.75	281.25
05/22/01	[REDACTED]	CEP	.50	115.00
05/23/01	Review discovery responses of Defendant Robert H. Peterson Co.; draft correspondence concerning same.	CEP	1.00	230.00
05/29/01	Review discovery requests of Defendant Robert Peterson to Plaintiff Golden Blount; draft written discovery responses of Plaintiff Golden Blount; [REDACTED]	CEP	4.00	920.00
05/30/01	Revise written discovery responses of Plaintiff Golden Blount.	CEP	2.00	460.00
TOTAL HOURS			10.25	
TOTAL SERVICES . . . . .				\$2,756.25

JT-APP 3247

Golden Blount  
Page 2

June 19, 2001

As of May 31, 2001

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

DATE	CHARGES	VALUE
	Messenger Services	40.00
	Postage	5.63
	Photocopies @.20 per page	10.00
	Facsimiles @ 1.00 per page	10.00
	TOTAL CHARGES . . . . .	\$65.63
	TOTAL SERVICES AND CHARGES . . . . .	\$2,821.88
	TOTAL DUE THIS STATEMENT . . . . .	\$2,821.88

Please remit payment to:  
Locke Liddell & Sapp LLP  
P. O. Box 911541  
Dallas, Texas 75391-1541

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JT-APP 3248

June 19, 2001

Golden Blount  
Page 3

As of May 31, 2001

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

with, the services provided.

Locke Liddell & Sapp does not disclose, nor does Locke Liddell & Sapp reserve the right to disclose, any nonpublic personal information about clients or former clients, except as permitted by law.

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JT-APP 3249

LOCKE LIDDELL & SAPP LLP  
ATTORNEYS & COUNSELORS

P. O. Box 911541  
DALLAS, TEXAS 75391-1541  
TAX ID 74-1164324

July 17, 2001

Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison, TX 75001

As of June 30, 2002

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

DATE	SERVICES	ATTY	HOURS	VALUE
06/01/01	[REDACTED]; draft proposed protective order; revise draft of Golden Blount's response to RHP's discovery requests.	CEP	3.00	690.00
06/04/01	Attention to proposed Protective Order; [REDACTED]	RWH	.50	187.50
06/04/01	Draft Protective Order; [REDACTED] draft joint motion for discovery of the agreed protective order; draft correspondence concerning the present action; revise draft of Golden Blount's response to RHP's document requests; revise draft of Golden Blount's response to RHP's Interrogatories; [REDACTED]	CEP	6.00	1,380.00
06/06/01	Prepare for meeting with client regarding [REDACTED]	RWH	.50	187.50
06/13/01	Review prosecution history of patent in suit; [REDACTED]	CEP	5.00	1,150.00

JT-APP 3250

July 17, 2001

As of June 30, 2002

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

DATE	SERVICES	ATTY	HOURS	VALUE
06/14/01	Review files [REDACTED] [REDACTED] review correspondence concerning [REDACTED]	CEP	2.00	460.00
06/18/01	[REDACTED] review prior art in view of [REDACTED]; draft correspondence to client concerning same; review prosecution history of the patent in suit in view of [REDACTED]	EP	1.50	345.00
06/19/01	Review of prior art submitted by defendant; adding responses to interrogatory answers; [REDACTED] [REDACTED]	RWH	2.50	937.50
06/22/01	Attention to service of discovery responses and correction of document responses.	RWH	.50	187.50
06/29/01	Preparing for and conferring with opposing counsel to deliver offer to drop past infringement damage charge if attorney fees are paid and product removed from market [REDACTED] [REDACTED]	RWH	.50	187.50
	TOTAL HOURS		22.00	
	TOTAL SERVICES			\$5,712.50

DATE	CHARGES	VALUE
	Air Freight Shipments	11.14
	Messenger Services	20.00
	Postage	24.50

JT-APP 3251

July 17, 2001

Golden Blount  
Page 3

As of June 30, 2002

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

DATE	CHARGES	VALUE
	Photocopies @.20 per page	158.80
	Facsimiles @ 1.00 per page	46.00
06/27/01	Computerized Research - Dialog (05/01)	24.21
	TOTAL CHARGES . . . . .	\$284.65
	TOTAL SERVICES AND CHARGES . . . . .	\$5,997.15
	TOTAL DUE THIS STATEMENT . . . . .	\$5,997.15

Please remit payment to:  
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P. O. Box 911541  
Dallas, Texas 75391-1541

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JT-APP 3252

Golden Blount  
Page 4

July 17, 2001

As of June 30, 2002

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

with, the services provided.

Locke Liddell & Sapp does not disclose, nor does Locke Liddell & Sapp reserve the right to disclose, any nonpublic personal information about clients or former clients, except as permitted by law.

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JT-APP 3253

LOCKE LIDDELL & SAPP LLP  
ATTORNEYS & COUNSELORS

P. O. BOX 911541  
DALLAS, TEXAS 75391-1541  
TAX ID 74-1164324

August 14, 2001

Golden Blount  
Golden Blount, Inc.  
4301 Westgrove  
Addison, TX 75001

As of July 31, 2001

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

DATE	SERVICES	ATTY	HOURS	VALUE
07/19/01	[REDACTED], call to opposing counsel regarding discovery matters.	RWH	.25	93.75
07/24/01	Review of Peterson claims regarding [REDACTED]	RWH	1.50	562.50
07/24/01	Telecon with opposing counsel to inquire whether Peterson to take product off market; [REDACTED]	RWH	.50	187.50
07/31/01	Telecon with opposing counsel regarding position of defendants on invalidity.	RWH	.50	187.50
	TOTAL HOURS		2.75	
	TOTAL SERVICES . . . . .			\$1,031.25
	TOTAL DUE THIS STATEMENT . . . . .			\$1,031.25

JT-APP 3254

August 14, 2001

Golden Blount  
Page 2

As of July 31, 2001

File No.: 09842/79075

Re: Golden Blount, Inc. v. Robert H. Peterson Co.

Please remit payment to:  
Locke Liddell & Sapp LLP  
P. O. Box 911541  
Dallas, Texas 75391-1541

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JT-APP 3255

JT-APP 3256

AirTran  
Customer Receipt

Itinerary Number: HQFYBH  
Passenger: HANFT/CHARLES  
Payment Type: Visa

Flight Itinerary

27JUL02 Flight No(s): 72  
ATLANTA, GA Depart:0820  
DALLAS/FT. WORTH, TX Arrive:0835

Class of Service: L-COACH  
One Way Fare: 82.78  
Taxes: 9.21  
9-11 Security Fee(s): 2.50  
Passenger Facility Charge(s): 4.50

30JUL02 Flight No(s): 112  
DALLAS/FT. WORTH, TX Depart:1403  
ATLANTA, GA Arrive:1703

Class of Service: Y-COACH  
One Way Fare: 222.33  
Taxes: 18.87  
9-11 Security Fee(s): 2.50  
Passenger Facility Charge(s): 4.50

Total Fare: 305.12  
Total Taxes: 28.88  
Total 9-11 Security Fee(s): 5.00  
Total Passenger Facility Charge(s): 9.00  
Other Charges: 0.00

Total Cost: 348.00

HARTSFIELD ATLANTA  
INT'L AIRPORT

\*\*\* thank you \*\*\*

Entrance: 06:01 07:27 02 Lane 02

Exit: 17:19 07:31 02 Lane 31

CASHIER 154 5000 2004

AMOUNT PAID: 348.00

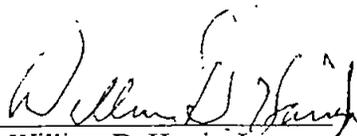
348.00

*Perkins*

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of Golden Blount, Inc.'s Bill of Cost was served upon the following counsel of record, via first class mail on September 8, 2004.

Jerry R. Selinger  
Jenkins & Gilchrist  
1445 Ross Avenue, Suite 3200  
Dallas, Texas 75202  
(214) 855-4500  
(214) 855-4300 (Facsimile)

  
\_\_\_\_\_  
William D. Harris, Jr.

JT-APP 3257

*R*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
**FILED**  
DEC - 8 2004  
CLERK, U.S. DISTRICT COURT  
By *[Signature]*

**GOLDEN BLOUNT, INC.,**

**Plaintiff,**

v.

**ROBERT H. PETERSON CO.,**

**Defendant.**

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**Civil Action No.**

**3-01-CV-0127-R**

**PLAINTIFF, GOLDEN BLOUNT, INC.'S SUBMISSION OF  
FINAL JUDGMENT AND ORDER DISMISSING REMAINING PENDING MOTIONS**

At the request of the United States District Court for the Northern District of Texas, Plaintiff, Golden Blount, Inc. (Plaintiff) hereby submits the enclosed Final Judgment. At the conclusion of the Oral Hearing that occurred on August 18, 2004, Senior District Judge Jerry Buchmeyer instructed Plaintiff to present him "with the necessary findings and necessary final judgment in the case also." (Oral Hearing transcript, page 63, lines 22 thru 24.) The requested Findings of Fact and Conclusions of Law were submitted on August 31, 2004, and adopted on September 2, 2004. However, the Adopted Findings of Fact and Conclusions of Law left the issues of attorney's fees and costs, as well as the Motion for New Trial filed by Plaintiff on July 6, 2004, remaining for this Court to address.

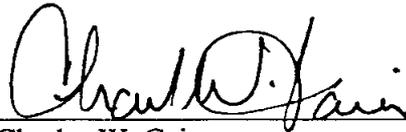
After a substantial amount of briefing, Magistrate Judge Stickney, on November 15, 2004, awarded Plaintiff \$622,015.00 in attorney's fees and \$3,679.83 in costs. Robert H. Peterson Co. (Defendant) has failed to contest Magistrate Judge Stickney's ruling, and the time for doing so has passed. Thus, the only remaining issue before the District Court is Plaintiff's Motion for New Trial. However, in view of this Court's ruling in Plaintiff's favor at the Oral Hearing on August 18, 2004,

and its adoption of Plaintiff's Findings of Fact and Conclusions of Law on September 2, 2004, Plaintiff's Motion for New Trial is now moot, and thus should be dismissed. Accordingly, Plaintiff requests this Court to adopt and sign the enclosed Order Dismissing Remaining Pending Motions, which includes a dismissal of Plaintiff's Motion for New Trial.

After the dismissal of Plaintiff's Motion for New Trial, no other issues remain before this Court. Accordingly, this Court should execute the enclosed Final Judgment to satisfy Rule 58 of the Federal Rules of Civil Procedure, which was submitted in accordance with Judge Buchmeyer's request.

Respectfully submitted,

For Plaintiff Golden Blount, Inc.



Charles W. Gaines  
State Bar No. 07570580  
Greg H. Parker  
State Bar No. 24011301  
HITT GAINES, P.C.  
2435 North Central Plaza  
Suite 1300  
Richardson, Texas 75080  
972/480-8800 (Telephone)  
972/480-8865 (Facsimile)

William D. Harris, Jr.  
State Bar No. 09109000  
SCHULTZ & ASSOCIATES, P.C.  
5400 LBJ Freeway  
One Lincoln Center, Suite 525  
Dallas, Texas 75240  
214/210-5940 (Telephone)  
214/210-5941 (Facsimile)

JT-APP 3259

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

GOLDEN BLOUNT, INC.,

Plaintiff,

v.

ROBERT H. PETERSON CO.,

Defendant.

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Civil Action No.

3-01-CV-0127-R

DISMISSAL OF REMAINING PENDING MOTIONS

Consistent with the Order dated November 15, 2004, it is hereby **ORDERED** that any remaining pending motions, which includes Golden Blount, Inc.'s Motion for New Trial filed July 6, 2004, are Dismissed.

IT IS SO ORDERED.

ENTERED: this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

\_\_\_\_\_  
JERRY BUCHMEYER  
SENIOR UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF TEXAS

JT-APP 3260

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

**GOLDEN BLOUNT, INC.,**

**Plaintiff,**

v.

**ROBERT H. PETERSON CO.,**

**Defendant.**

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**Civil Action No.**

**3-01-CV-0127-R**

**FINAL JUDGMENT**

Pursuant to Rule 58 of the Federal Rules of Civil Procedure and the Court's Findings of Fact and Conclusions of Law entered September 2, 2004, it is hereby **ORDERED** that judgment is entered for Plaintiff. It is further **ORDERED** that Plaintiff recover damages, as set forth in the Court's Findings of Fact and Conclusions of Law of September 2, 2004, and reasonable attorneys fees and costs, as set forth in the Court's Order Granting Attorney's Fees and Costs of November 15, 2004. Moreover, it is **ORDERED** that interest shall run on the damages, attorney's fees and costs, as set forth in the Court's Findings of Fact and Conclusions of Law of September 2, 2004. Based upon the fact that infringement causes irreparable harm, it is additionally **ORDERED** that Defendant be permanently enjoined from making, using, offering to sell, selling or importing into the United States the device found to infringe the adjudicated claims of United States Patent No. 5,988,159, or colorable variations thereof.

**IT IS SO ORDERED.**

**ENTERED:** this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

\_\_\_\_\_  
**JERRY BUCHMEYER  
SENIOR UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF TEXAS**

**JT-APP 3261**

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Plaintiff, Golden Blount, Inc.'s Submission of Final Judgment and Order Dismissing Remaining Pending Motions was served on the following counsel of record on December 8, 2004, by first class mail:

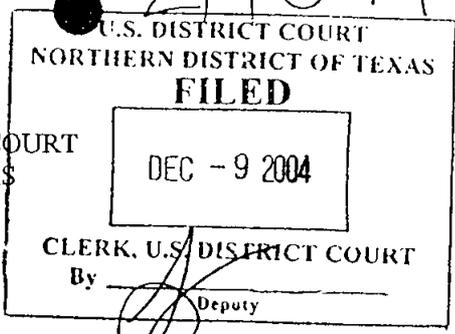
Jerry R. Selinger  
Jenkins & Gilchrist  
1445 Ross Avenue, Suite 3200  
Dallas, Texas 75202  
214/855-4500 (Telephone)  
214/855-4300 (Facsimile)



Charles W. Gaines

*R. Feld*  
*10/20/04*

214044



IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

GOLDEN BLOUNT, INC.

Plaintiff,

v.

ROBERT H. PETERSON CO.

Defendant.

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Civil Action No. 3-01CV0127-R

(JURY TRIAL DEMANDED)

NOTICE OF APPEAL

Notice is hereby given that the Robert H. Peterson Co., Defendant in the above-identified action, hereby appeals to the United States Court of Appeals for the Federal Circuit from this Court's November 12, 2004 Order Granting In Part and Denying In Part Plaintiff's September 8, 2004 Application for Attorneys Fees and September 9, 2004 Application for Costs (attached hereto as Exhibit 1).

Additionally, Defendant Robert H. Peterson Co. appeals from the following Orders which were timely appealed on September 17, 2004 (see September 17, 2004 Notice of Appeal attached hereto as Exhibit 2):

- 1) Order entered August 18, 2004, vacating Defendants findings of fact and conclusions of law and adopting Plaintiff's findings of fact and conclusions of law (attached to Exhibit 2 as Ex. A).
- 2) Order entered September 2, 2004, vacating Defendant Robert H. Peterson's Application for Attorneys' Fees previously adopted on August 11, 2004 (attached to Exhibit 2 as Ex. B);

- 3) Order entered September 2, 2004, vacating Defendant's Findings of Fact and Conclusions of Law previously adopted on June 22, 2004 and adopting Plaintiff's Findings of Fact and Conclusions of Law submitted on August 31, 2004 (attached to Exhibit 2 as Ex. C); and
- 4) Findings of Fact and Conclusions of Law dated September 2, 2004 (attached to Exhibit 2 as Ex. D).

Dated: December 9, 2004

Respectfully submitted,



Leland W. Hutchinson, Jr.  
Jennifer L. Fitzgerald  
David S. Becker  
FREEBORN & PETERS, LLP  
311 S. Wacker Dr., Suite 3000  
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312/360-6000 (Telephone)  
312/360-6572 (Facsimile)

OF COUNSEL:  
Jerry R. Selinger  
State Bar No. 18008250  
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Dallas, Texas 75202  
214/855-4776 (Telephone)  
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CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing document was served by first-class mail, postage prepaid, to counsel for Plaintiff, William D. Harris, Jr., Schultz & Associates, P.C., 5400 LBJ Freeway, One Lincoln Center, Suite 525, Dallas, Texas 75240, and Charles Gaines, Hitt Gaines, P.C., 2435 North Central Plaza, Suite 1300, Richardson, Texas 75080, this 9<sup>th</sup> day of December, 2004.

  
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BY  
ORIGINAL

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
**FILED**  
NOV 15 2004  
CLERK, U.S. DISTRICT COURT  
By BJ Deputy

GOLDEN BLOUNT, INC.,

Plaintiff,

v.

ROBERT H. PETERSON CO.,

Defendant.

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Civil Action No. 3:01-CV-0127-R

ORDER

Pursuant to the District Court's Order of Reference, entered September 16, 2004, Plaintiff Golden Blount, Inc.'s ("Plaintiff") Application for Attorney Fees, filed September 8, 2004, and Plaintiff's Application for Costs, filed September 9, 2004, (collectively "Applications") have been referred to the United States Magistrate Judge for hearing if necessary and determination. Having considered Plaintiff's Applications, Defendant Robert H. Peterson's ("Defendant") Opposition to Plaintiff's Applications for Attorneys' Fees and Costs ("Opposition"), Plaintiff's Reply to Defendant's Opposition to Plaintiff's Applications for Attorney's Fees and Costs and Objection to Defendant's Untimely Filing of Notice of Appeal ("Reply"), and the applicable law, Plaintiff's Applications are **GRANTED in part and DENIED in part.**

Specifically, this Court grants Plaintiff's request for attorney fees in the amount of \$622,015.00 and Plaintiff's request for costs in the amount of \$3,679.83. Plaintiff's request for costs in the amount of \$6,351.21 is denied. On September 2, 2004, the District Court adopted Plaintiff's Findings of Fact and Conclusions of Law ("Findings and Conclusions"), filed August 31, 2004, which awards Plaintiff post judgment interest on attorney fees from August 9, 2002 to April 19, 2004, and resuming from the date the final judgment is signed. Therefore, Plaintiff's

request for post judgment interest on attorney fees from September 2, 2004 is denied, because the District Court has already determined that the post judgment interest should resume from the date the final judgment is signed.

**I. Background<sup>1</sup>**

The District Court issued a judgment favorable to Plaintiff on August 9, 2002. On April 19, 2004, the United States Court of Appeals for the Federal Circuit remanded the case to the District Court to issue more specific findings regarding the patent infringement, willfulness, the exceptional nature of the case, and the damages amount. On May 11, 2004, the District Court ordered the parties to submit proposed findings of fact and conclusions of law. The District Court adopted Defendant's Findings and Conclusions on June 22, 2004 ("June 22, 2004 Order"). Plaintiff filed its Request for Reconsideration of Adoption of Defendant's Findings of Fact and Conclusions of Law, Alternative Motion for New Trial ("Motions for Reconsideration and New Trial") on July 6, 2004. At a hearing on August 18, 2004, the District Court decided to vacate its previous adoption of Defendant's Findings and Conclusions and to adopt Plaintiff's Findings and Conclusions, and ordered Plaintiff to provide the necessary findings and final judgment ("August 18, 2004 Minute Order"). On September 2, 2004, the District Court entered an Order vacating Defendant's Findings and Conclusions and adopting Plaintiff's August 31, 2004 Findings and Conclusions ("September 2, 2004 Order").

In the Findings and Conclusions adopted by the District Court on September 2, 2004, Plaintiff was awarded reasonable attorney fees under 35 U.S.C. § 285, and post judgment

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<sup>1</sup> The background information comes from Defendant Robert H. Peterson Co.'s Opposition to Plaintiff's Applications for Attorney Fees and Costs, filed September 17, 2004, and Plaintiff's Memorandum in Support of Golden Blount, Inc.'s Application for Attorneys' Fees, filed September 8, 2004.

interest, calculated pursuant to 28 U.S.C. § 1961, on attorney fees at the highest rate allowed by the law from August 9, 2004, to April 19, 2004, and resuming again on the date the final judgment is signed. Plaintiff subsequently filed its Applications on September 8, 2004 and on September 9, 2004. Defendant disputes the District Court's jurisdiction to entertain Plaintiff's Applications on the basis that the August 18, 2004 Minute Order constituted the final judgment, and therefore, Plaintiff's Applications, filed September 8, 2004, and September 9, 2004, were untimely under the Federal Rules of Civil Procedures 52(b) and 54(d).

## II. Analysis

### A. Timeliness of Plaintiff's Applications

#### 1. Plaintiff's Motion for New Trial

The District Court has jurisdiction to entertain Plaintiff's Applications, because they were timely filed under the Federal Rules. Defendant asserts that since the District Court's August 18, 2004 Minute Order disposed of Plaintiff's Motions for Reconsideration and a New Trial, under Federal Rule of Civil Procedure ("FRCP") 58(a)(1)(D), a separate document is not required for the entry of judgment. However, a "judgment" [is] defined as 'a decree or any order from which an appeal lies.'" *Freudensprung v. Offshore Tech. Servs.*, 379 F.3d 327, 336 (5th Cir. 2004) (quoting *Theriot v. ASW Well Serv.*, 951 F.2d 84, 88 (5th Cir. 1992)). Further, under Federal Rule of Appellate Procedure ("FRAP") 4(a)(4)(A), "If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the *last such remaining motion*."<sup>2</sup>

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<sup>2</sup> See also FRAP 4(a)(4)(B)(i) ("If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in FRAP 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.")

(emphasis added). The provisions of FRAP 4(a)(4)(A)(iv) and FRAP 4(a)(4)(A)(v) list the identical motions set out in FRCP 58(a)(1)(D).<sup>3</sup> Since an appeal does not lie until the District Court enters an order disposing of both Plaintiff's Request for Reconsideration and Plaintiff's Motion for New Trial, and since there is nothing on the docket disposing of Plaintiff's Motion for a New Trial, there is no judgment. *See* FED. R. CIV. P. 58(b)(1) (If a separate document is not required under FRCP 58(a)(1), a judgment is deemed entered when it is entered in the civil docket in accordance with FRCP 79(a).).

Even if this Court were to accept Defendant's argument that the District Court adopted Plaintiff's June 10, 2004 Findings and Conclusions at its August 18, 2004 hearing and that the adoption disposed of Plaintiff's Request for Reconsideration of Adoption of Defendant's Findings of Fact and Conclusions of Law when the minute entry of that hearing was entered on the docket, Plaintiff's Alternative Motion for New Trial is still pending. Therefore, Plaintiff's Applications were timely filed, because the time to file motions under FRCP 52(b) and FRCP 54(b) do not start running until a judgment is entered, and the judgment is not entered for Plaintiff's Motions for Reconsideration and New Trial until the District Court enters an order disposing of Plaintiff's Motion for New Trial.

Also, even if the District Court's August 18, 2004 Minute Order could be considered a judgment, Plaintiff's applications would still be timely filed "because the ... order lacked a

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<sup>3</sup> The motions enumerated in FRAP 4(a)(4)(A)(i) through FRAP4(a)(4)(A)(vi) track the motions listed in FRCP 58(a)(1)(A) through FRCP 58(a)(1)(E) as exceptions to the separate document requirement. In fact, the Advisory Committee Notes for 2002 after FRCP 58 specifically state that the amendments to FRCP 58(a)(1) were made in order to address the problems that arise under FRAP 4. *See also Freudensprung*, 379 F.3d at 334 ("Certain Amendments, effective December 1, 2002, were made to resolve uncertainties concerning how Rule 4(a)(7)'s 'definition of when a judgment or order is deemed entered interacts with the requirement in [Rule] 58 that, to be effective, a judgment must be set forth on a separate document.'" (internal quotations omitted) (quoting Notes of Advisory Committee on Rules 2002 Amendments, following Rule 4)).

required separate document, under amended Rules 4 and 58(b), the order was not deemed 'entered' – and the time to file notice of appeal did not begin to run ...." *Freudensprung*, 379 F.3d at 337. Under FRCP 58(b)(2)(B), a judgment is also considered entered, even where it is lacking a required separate document, when 150 days have run from its entry on the docket pursuant to FRCP 79(a). However, this does not apply here because 150 days from August 18, 2004 is January 15, 2005.

**2. Plaintiff's Request for Reconsideration**

Plaintiff's Applications were also timely filed because the District Court's August 18, 2004 Minute Order did not dispose of Plaintiff's Request for Reconsideration under FRCP 58(a)(1)(D) as a "motion to alter or amend the judgment." The District Court's June 22, 2004 adoption of Defendant's Findings of Fact and Conclusions of Law is not an entered judgment until it is set forth on a separate document, and no such separate document exists. *See* FED. R. Civ. P. 58(b)(2)(A); *see also* *Freudensprung*, 379 F.3d at 334 ("[A] judgment or order is deemed 'entered' within the meaning of Rule 4(a) when it is set forth on a separate document in compliance with Federal Rules of Civil Procedure 58(a)(1) and entered on the district court's civil docket as required by Federal Rules of Civil Procedure 79(a)."). The Provisions of FRCP 58(b)(2)(B) also do not apply here because 150 days from June 22, 2004 is November 19, 2004.

Further, the District Court's June 22, 2004 Order cannot be considered "an order disposing of a motion" and hence cannot fit under the exception to the separate document requirement in FRCP 58(A)(1). Defendant's Findings and Conclusions, adopted in the District

Court's June 22, 2004 Order, do not constitute a motion.<sup>4</sup> "[The document] was not styled as a motion. The writing did not 'state with particularity the grounds' ..."of the motion.<sup>5</sup> Defendant's Opposition ("Def.'s Opp.") at 4 (quoting FED. R. CIV. P. 7(b)(1)). However, even if Defendant's Findings and Conclusions could be considered a motion, they do not fall under the enumerated motions listed in FRCP 58(a)(1)(A) through FRCP 58(a)(1)(E).<sup>6</sup>

### 3. The District Court's Instructions and Adoption

Contrary to Defendant's assertion, the District Court's order at the August 18, 2004 hearing for the Plaintiff "to present [the Court] with the necessary findings and necessary final judgment ..." clearly shows that the District Court did not make a final decision regarding which version of the findings it was going to adopt. (Pl.'s Rep. at 3). Therefore, the District Court's August 18, 2004 Minute Order did not dispose of Plaintiff's motions under FRCP 58(a)(1)(D), making Plaintiff's Applications timely under FRCP 52(b) and FRCP 54(d). The District Court's instruction to Plaintiff was not "language calculated to conclude all claims before the court." (Def.'s Opp. at 5 (citing *Moreau v. Harris County*, 158 F.3d 241, 244 (5th Cir. 1998))). At the August 18, 2004 hearing, the District Court only made the decision to vacate Defendant's

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<sup>4</sup> A motion is defined as a "written or oral application requesting a court to make a specified ruling or order." BLACK'S LAW DICTIONARY 458 (2d pocket ed. 2001). Defendant's proposed findings and conclusions was not an "application requesting" the Court to make a certain ruling or an order.

<sup>5</sup> This was the reasoning put forth by Defendant as to why Plaintiff's August 31, 2004 Findings and Conclusions do not constitute a proper FRCP 52(b) motion. (Def.'s Opp. at 4).

<sup>6</sup> Defendant's Findings and Conclusions do not fit (1) under FRCP 58(a)(1)(A) as a motion for judgment under FRCP 50(b), which discusses renewing a motion for judgment after trial or an alternative motion for a new trial; (2) under FRCP 58(a)(1)(B) as a motion to amend or make additional findings of fact under FRCP 52(b); (3) under FRCP 58(a)(1)(C) as a motion for attorney fees under FRCP 54, which states that claims for attorneys' fees and related non-taxable expenses shall be made by a motion; (4) under FRCP 58(a)(1)(D) as a motion for a new trial or to alter or amend the judgment under FRCP 59; (5) under FRCP 58(a)(1)(E) as a motion for relief under FRCP 60, which states that relief may be granted for mistakes, inadvertence, excusable neglect, newly discovered evidence, etc..

findings and to adopt Plaintiff's instead, and it did not adopt Plaintiff's June 10, 2004 findings as the Defendant asserts. If that was the District Court's intent, it would not have instructed Plaintiff to submit the necessary findings since the June 10, 2004 version had previously been submitted to the District Court. It is apparent from the facts that the District Court's decision regarding which version of the findings and conclusions it wished to adopt was not finalized until September 2, 2004.

Defendant states that the "August 31 [v]ersion [of Plaintiff's findings and conclusions] contains significant additional findings and conclusions which alter and amend those set forth in the June 10 [f]indings." (Def.'s Opp. at 3). The District Court's September 2, 2004 adoption of those findings without any indication that it is vacating the adoption of the June 10, 2004 findings, also makes it clear that the District Court never adopted Plaintiff's June 10, 2004 Findings and Conclusions at its August 18, 2004 hearing. The District Court's September 2, 2004 Order states, "[C]onsistent with its ruling at the conclusion of the Oral Hearing on August 18, 2004, [the District Court] is of the opinion that the Plaintiff's Findings of Fact and Conclusions of law submitted on August 31, 2004, are correct, and they are hereby adopted as the Findings and Conclusions of this Court." (emphasis omitted). This Order clearly shows that the District Court only adopted the August 31, 2004 version of Plaintiff's findings and conclusions. The District Court waited for the version of the findings that Plaintiff submitted pursuant to its request, and after reviewing it and finding it to be satisfactory, the District Court adopted it on September 2, 2004.

**B. Reasonableness of the Plaintiff's Requested Attorney Fees and Costs**

**1. Attorney Fees**

The District Court has already determined that under 35 U.S.C. § 285, this is an exceptional case entitling Plaintiff to attorney fees. Therefore, the issue left before this Court is whether the amount of attorney fees requested by Plaintiff is reasonable. The Federal Circuit's precedent governs the substantive interpretation of 35 U.S.C. § 285. *Pharmacia & Upjohn Co. v. Mylan Pharms., Inc.*, 182 F.3d 1356, 1359 (Fed. Cir. 1999). However, "[t]he methodology of assessing a reasonable award under 35 U.S.C. § 285 is within the discretion of the district court." *Mathis v. Spears*, 857 F.2d 749, 754 (Fed. Cir. 1988) (citing *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1068 (Fed. Cir. 1983)). This Court applies the lodestar analysis. The lodestar amount is determined by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate. *Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 661 (5th Cir. 2002) (quoting *Rutherford v. Harris County, Tex.*, 197 F.3d 173, 192 (5th Cir. 1999)). The factors set out in *Johnson v. Georgia Highway Express, Inc.* are considered in analyzing the reasonableness of the hours expended and the hourly rates requested. 488 F.2d 714, 717-19 (5th Cir. 1974).<sup>7</sup> Further, the work performed by paralegals should be legal work, not clerical tasks, for their fees to be recoverable as attorney fees. *Vela v. City of Houston*, 276 F.3d 659, 681 (5th Cir. 2001) (citing *Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. 1982)).

"Otherwise, paralegal expenses are separately unrecoverable overhead expenses." *Allen*, 665

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<sup>7</sup> The factors set out in *Johnson* are: (1) the time and labor required; (2) the novelty and difficulty of the issues involved; (3) the skill required to litigate the case; (4) the ability of the attorney to accept other work; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances of the case; (8) the amount involved and results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the attorney-client relationship; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19.

F.2d at 697 (citing *Jones v. Armstrong Cork Co.*, 630 F.2d 324, 325 & n.1 (5th Cir. 1980)).

Plaintiff seeks attorney fees for the three law firms that represented it throughout the course of this case. Plaintiff seeks compensation for: 80.15 hours for the services of the Locke, Liddle & Sapp, L.L.P. ("Locke") attorneys who served as counsel before the case was turned over to Hitt Gaines, P.C. ("Hitt"), and Schultz, & Associates, P.C. ("Schultz"); 66.5 hours for the services of the Hitt's paralegals and 2,185.1 hours for the services of the Hitt attorneys; and 171.7 hours for the services of the Schultz attorneys. Plaintiff seeks compensation for its counsel at hourly rates ranging from \$135.00 to \$375.00, and for Hitt's paralegals at hourly rates ranging from \$65.00 to \$90.00.<sup>8</sup>

This Court has considered the *Johnson* factors, as well as Plaintiff's Application for Attorney Fees, Memorandum in Support of Plaintiff's Application for Attorney Fees, and Appendix in Support of Plaintiff's Application for Attorney Fees. The number of hours that Plaintiff seeks compensation for are reasonable for this case, and Plaintiff's requested hourly rates are reasonable for this case in this community. Plaintiff has also sufficiently shown that the work done by Hitt's paralegals is "work traditionally done by an attorney," and thus the paralegals' hours are recoverable as the prevailing party's attorney fees. *Allen*, 665 F.2d 689 at 697. Defendant has not contested the reasonableness of the number of hours or the hourly rates Plaintiff is requesting for its counsel and paralegals. Taking into consideration Plaintiff's requested hourly rates and the number of hours for which Plaintiff seeks compensation, Plaintiff

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<sup>8</sup> On page 6 of Plaintiff's Application for Attorney fees, and on page A-112 of the Appendix in Support of Plaintiff's Application for Attorney Fees ("Attorney Fees Appendix"), attorney Charles Phipps' billing rate is listed as \$130.00. However, in the Appendix at page A-87, his billing rate is listed as \$230.00. It appears from Locke's statements itemizing its services that Charles Phipps' billing rate is \$230.00. Therefore, this Court assessed the reasonableness of Plaintiff's request for attorney fees for the services rendered by Charles Phipps at the hourly rate of \$230.00.

is awarded attorney fees at the following rates for the following number of hours: \$249.39 per hour for 2,180.04 hours for the services rendered by Hitt; \$71.57 per hour for 66.34 hours for the services rendered by Hitt's paralegals; \$318.11 per hour for 171.7 hours for the services rendered by Schultz; and \$236.65 per hour for 80.15 hours for the service rendered by Locke. In sum, Plaintiff is awarded a lodestar amount of \$622,015.00.<sup>9</sup>

Once the lodestar has been determined, it may be adjusted upward or downward, if the *Johnson* factors, not "already considered in calculating the lodestar," warrant such an adjustment. *Shipes v. Trinity Indus.*, 987 F.2d 311, 320 (5th Cir. 1993) (citing *Von Clark v. Butler*, 916 F.2d 255, 258 (5th Cir. 1980)). However, the lodestar is presumptively reasonable and should be modified only in exceptional cases. *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993), *on remand*, 852 F. Supp. 542 (S.D. Miss. 1994), *aff'd*, 49 F.3d 728 (5th Cir. 1995) (citing *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992), *on remand*, 976 F.2d 801 (2d Cir. 1991)). Plaintiff does not seek a fee enhancement and Defendant does not dispute the reasonableness of the amount of fees requested by Plaintiff. Therefore, this Court determines that the lodestar amount should not be adjusted.

## 2. Costs

Plaintiff seeks \$10,031.04 in costs. Costs other than attorney fees may be awarded to the prevailing party under FRCP 54(d)(1). *Gaddis v. United States*, 381 F.3d 444, 452 (5th Cir. 2004) (quoting *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 891 (5th Cir. 1993)). "28 U.S.C. § 1920 defines recoverable costs, and a district court may decline to award the costs listed in the

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<sup>9</sup> See Plaintiff's Attorney Fees Appendix for the specific hourly rates and the number of hours requested.

statute but may not award costs omitted from the list.”<sup>10</sup> *Id.* Although Defendant has not disputed the reasonableness of Plaintiff’s requested costs, upon reviewed of Plaintiff’s Bill of Costs, this Court determines that Plaintiff should only be awarded \$3,679.83 in costs. It is not apparent that the other costs requested, in the amount of \$6,351.21 for postage, facsimile, courier services, on-line search expenses, trial supplies, obtaining patents, taxi and airfare for a deposition, parking for and in preparation of trial fit within 28 U.S.C. § 1920 as recoverable costs. *See Coats*, 5 F.3d at 891 (Travel expenses, costs incurred for “blow ups” used at trial, and video technician fees for a deposition are not recoverable as costs, because they are not expenses included in 28 U.S.C. § 1920.).

### III. Conclusion

Based on the above, Plaintiff’s Application for Attorneys’ Fees and Plaintiff’s Application for Costs are **GRANTED in part and DENIED in part**. Defendant is ordered to pay Plaintiff the above mentioned amounts within 30 days from the District Court’s entry of the final judgment.

SO ORDERED. November 12, 2004.

  
PAUL D. STICKNEY  
UNITED STATES MAGISTRATE JUDGE

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<sup>10</sup> The costs listed in 28 U.S.C. § 1920 are: (1) fees of the clerk and marshal; (2) fees of the court reporter for stenographic transcript necessarily obtained for use in the case; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and copies of papers necessarily obtained for use in the case; (5) docket fees under 28 U.S.C. § 1923; (6) compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under 28 U.S.C. § 1828.

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

GOLDEN BLOUNT, INC.

Plaintiff,

v.

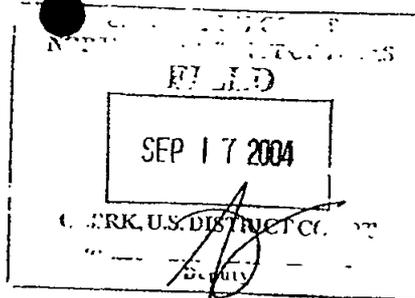
ROBERT H. PETERSON CO.

Defendant.

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Civil Action No. 3-01CV0127-R

(JURY TRIAL DEMANDED)



NOTICE OF APPEAL

Notice is hereby given that the Robert H. Peterson Co., Defendant in the above-identified action, hereby appeals to the United States Court of Appeals for the Federal Circuit from this Court's August 18, 2004 Order, vacating Defendants findings of fact and conclusions of law and adopting Plaintiff's findings of fact and conclusions of law (attached hereto as Exhibit A).

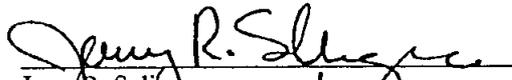
In the alternative, Defendant Robert H. Peterson Co. appeals from the following:

- 1) Order entered September 2, 2004, vacating Defendant Robert H. Peterson's Application for Attorneys' Fees previously adopted on August 11, 2004 (attached hereto as Exhibit B);
- 2) Order entered September 2, 2004, vacating Defendant's Findings of Fact and Conclusions of Law previously adopted on June 22, 2004 and adopting Plaintiff's Findings of Fact and Conclusions of Law submitted on August 31, 2004 (attached hereto as Exhibit C); and

- 3) Findings of Fact and Conclusions of Law dated September 2, 2004 (attached hereto as Exhibit D).

Dated: September 17, 2004

Respectfully submitted,

  
Jerry R. Selinger  
State Bar No. 18008250  
JENKINS & GILCHRIST, A.P.C. *by permission P. Harty*  
1445 Ross Avenue, Suite 3200  
Dallas, Texas 75202  
214/855-4776 (Telephone)  
214/855-4300 (Facsimile)

OF COUNSEL:  
Leland W. Hutchinson, Jr.  
Jennifer L. Fitzgerald  
David S. Becker  
FREEBORN & PETERS, LLP  
311 S. Wacker Dr., Suite 3000  
Chicago, Illinois 60606  
312/360-6000 (Telephone)  
312/360-6572 (Facsimile)

#631561

CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing document was served by first-class mail, postage prepaid, to counsel for Plaintiff, William D. Harris, Jr., Schultz & Associates, P.C., 5400 LBJ Freeway, One Lincoln Center, Suite 525, Dallas, Texas 75240. and Charles Gaines, Hitt Gaines, P.C., 2435 North Central Plaza, Suite 1300, Richardson, Texas 75080, this 17th day of September, 2004.

Steven Parker

MINUTE ORDER

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS

PLACE: Dallas JUDGE: Jerry Buchmeyer DATE: August 18, 2004

REPORTER: Joe Belton COURTROOM DEPUTY : Tannica Stewart

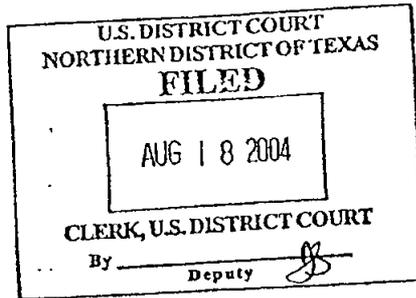
INTERPRETER: CSO : Present COURT TIME: 2.0

CIVIL ACTION

<u>TIME</u>	<u>CASE NUMBER &amp; STYLE</u>	<u>TYPE OF HEARING</u>	<u>ATTYS PRESENT</u>
10:00 a.m.	3:01-CV-127-R Golden Blount, v. Peterson	Motion Hearing	P - Charles Gaines D - Leland Hutchinson

Dft's findings of fact and conclusions of law  
VACATED....Plaintiff's findings of fact and  
conclusions of law adopted.

11:40 a.m. Court adjourned



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
SEP - 2 2004  
CLERK, U.S. DISTRICT COURT  
By Deputy *[Signature]*

GOLDEN BLOUNT, INC.,  
Plaintiff,

v.

ROBERT H. PETERSON CO.,  
Defendant.

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Civil Action No.  
3-01CV0127-R

ORDER

This Court, consistent with its ruling at the conclusion of the Oral Hearing on August 18, 2004, hereby VACATES Defendant Robert H. Peterson's Application for Attorneys' Fees previously adopted on August 11, 2004.

IT IS SO ORDERED.

ENTERED: this 2 day of Sept., 2004.

*[Signature]*  
JERRY BUCHMEYER  
SENIOR UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
SEP - 2 2004  
CLERK, U.S. DISTRICT COURT  
By \_\_\_\_\_ Deputy

GOLDEN BLOUNT, INC.,  
Plaintiff,

v.

ROBERT H. PETERSON CO.,  
Defendant.

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Civil Action No.

3-01CV0127-R

ORDER

This Court, consistent with its ruling at the conclusion of the Oral Hearing on August 18, 2004, hereby VACATES Defendant's Findings of Fact and Conclusions of Law previously adopted on June 22, 2004. The Court, also consistent with its ruling at the conclusion of the Oral Hearing on August 18, 2004, is of the opinion that the Plaintiff's Findings of Fact and Conclusions of Law submitted on August 31, 2004, are correct, and they are hereby ADOPTED as the Findings and Conclusions of this Court.

IT IS SO ORDERED.

ENTERED: this 2 day of Sept., 2004.

  
\_\_\_\_\_  
JERRY BUCHMEYER  
SENIOR UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

US DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FILED  
SEP - 2 2004  
CLERK, U.S. DISTRICT COURT  
By \_\_\_\_\_ Deputy

GOLDEN BLOUNT, INC.,  
Plaintiff,

v.

ROBERT H. PETERSON CO.,  
Defendant.

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Civil Action No.

3-01CV0127-R

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has conducted a bench trial on plaintiff Golden Blount Inc.'s claims against defendant Robert H. Peterson for a finding of infringement of U.S. Patent No. 5,988,159 and permanent injunction, and on Peterson's counterclaims of invalidity and non-infringement. In accordance with FED. R. CIV. P. 52(a) and consistent with the Court of Appeals for the Federal Circuit's Opinion<sup>1</sup> decided April 19, 2004, the Court enters the following findings of fact and conclusions of law.<sup>2</sup>

**FINDINGS OF FACT**

1. This is an action for patent infringement. The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1338(a). The Court has personal jurisdiction over the parties. Venue in this judicial district is proper under 28 U.S.C. § 1391.

<sup>1</sup> While the Appellate Court held that the patent was not invalid, and that the defense of unenforceability was waived, this Court includes general reference to these elements for completeness. *Golden Blount, Inc. v. Robert H. Peterson Co.*, 365 F.3d 1054 (Fed. Cir. 2004).

<sup>2</sup> This order contains both findings of fact ("Findings") and conclusions of law ("Conclusions"). To the extent that any Findings may be deemed conclusions of law, they shall also be considered Conclusions. To the extent that any Conclusions may be deemed findings of fact, they shall also be considered Findings. See *Miller v. Fenton*, 474 U.S. 104, 113-14, 88 L. Ed. 2d 405, 106 S. Ct. 445 (1985).

2. Plaintiff Golden Blount, Inc. ("Blount") is a United States corporation having a principal place of business in Addison, Texas.

3. Defendant Robert H. Peterson Co. ("Peterson") is a United States corporation having a principal place of business in City of Industry, California.

4. Blount is the owner by assignment of U.S. Patent No. 5,988,159 ("the '159 patent"), entitled "Gas-Fired Artificial Logs and Coals-Burner Assembly," which issued on November 23, 1999. The '159 patent expires on November 23, 2016.

5. Blount filed this suit for infringement of the '159 patent under 35 U.S.C. §§ 271(a) thru 271(c) on January 18, 2001.

6. On March 19, 2001, Peterson filed its Answer and Counterclaim. Peterson denied infringement and asserted counterclaims for noninfringement and invalidity of the '159 patent.

7. A bench trial, by agreement of the parties, commenced on July 29, 2002, and ended on July 31, 2002.

8. Claims 1, 2, 5, 7-9, 11-13 and 15-17 are at issue in this case. Claims 1 and 17 are independent claims. All the other claims at issue are dependent on claim 1.

9. Claim 1 of the '159 patent reads as follows:

A gas-fired artificial logs and coals-burner assembly for fireplace comprising:  
an elongated primary burner tube including a plurality of gas discharge ports;  
a secondary coals burner elongated tube positioned forwardly of the primary burner tube;

a support means for holding the elongated primary burner tube in a raised level relative to the forwardly position secondary coals burner elongated tube;

the secondary coals burner elongated tube including a plurality of gas discharge ports;

the elongated primary burner tube and the secondary coals burner elongated tube communicating through tubular connection means wherein the gas flow to the secondary elongated coals burner tube is fed through the primary burner tube and the tubular connection means;

a valve for adjusting gas flow to the secondary coals burner elongated tube positioned in the tubular gas connection means; and

the primary burner tube being in communication with a gas source with a gas flow control means therein for controlling gas flow into said primary burner tube.

10. Claim 2 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the support means for the primary burner tube is comprised of an open frame pan for supporting the primary burner tube in an elevated position relative to the fireplace floor.

11. Claim 5 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the secondary coals burner elongated tube is substantially parallel to the primary burner tube and has a smaller inside diameter than the primary burner tube with the valve adjusting gas flow for coals burn and forwarding heat radiation from the fireplace.

12. Claim 7 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the elongated primary burner tube and the secondary coals burner elongated tube are spaced apart on different planes at from about four to about eight inches.

13. Claim 8 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the secondary coals burner elongated tube is of a smaller diameter than the primary burner tube which allows for a lower profile of coals and sand coverage.

14. Claim 9 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the secondary coals burner elongated tube is adjustable in height relative to the floor of the fireplace and the elevated primary burner tube.

15. Claim 11 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the primary and secondary burner tubes have apertures of from about  $1/32$  inch to about  $1/8$  inch.

16. Claim 12 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the gas flow adjustment valve has a removable handle, the gas flow adjustment allowing a variety of settings from full closed to full open.

17. Claim 13 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the connection means is comprised of a connector attached to the terminal end of the primary burner tube at a first end of a connector and attached to the secondary coals burner elongated tube to a connector second end with the valve interposed between the primary burner tube and the secondary burner tube.

18. Claim 15 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the open frame pan and primary elongated burner tube is positioned under an artificial logs and grate support means.

19. Claim 16 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the primary elongated burner tube is covered with sand and the secondary

elongated burner tube is covered with sand, mica, and fibrous materials which simulate coals and ember burn.

20. Claim 17 of the '159 patent reads as follows:

A gas-fired artificial coals- and embers-burner apparatus suitable for attaching to a gas-fired primary artificial log burner tube said primary artificial log burner tube having a terminal end comprising:

a secondary coals burning elongated tube;

a connector means for connecting said terminal end in communication with the secondary burner tube, the secondary burner tube positioned substantially parallel, forward and below the primary burner tube, the connector means having interposed between the primary and secondary burner tubes a gas flow adjustment valve, the primary and secondary burner tubes having a plurality of gas discharge ports, the secondary burner tube being in gas flow communication with the primary burner tube being the connection means, a gas distribution ports of the secondary burner tube directed away from the fireplace opening.

21. At the time the patent issued, Blount's commercial structure covered by the '159 patent had been marketed for approximately six years. (Trial Transcript, hereafter referred to as "Tr.", vol. 1, pg. 158). The invention covered by the '159 patent is a simple yet very useful device that is to be used in artificial gas fireplaces. The general idea is that the device has two tubes, with the main or primary burner tube being higher than the ember burner tube to allow for artificial embers and sand to be fanned out over the tubes with a decreasing depth of materials to simulate a natural angle of repose of coals in a real fireplace. A secondary valve controls the flow of gas from the primary burner tube to the ember burner to allow for an adjustment of flame from the ember burner. Thus, with the presence of the ember burner forward the primary burner tube, more flame can be provided out front of the gas logs to better simulate a real fireplace and thereby make the artificial fireplace more aesthetically pleasing. Evidence presented at trial establishes that Peterson's accused device fulfills exactly the same purpose. (Tr. vol. 2, pg 175; Defendant's Ex. No. D-33).

22. Blount's sales of its commercial structure grew significantly during the time spanning the filing of the application that resulted in the '159 patent and the issuance of the '159 patent. (Tr., vol. 1, pg. 36-37).

23. In late 1996 or early 1997, Peterson began manufacturing, advertising and selling a device that was strikingly similar to, if not a virtual copy of, Blount's commercial structure. (Tr., vol. 2, pg. 76 and pg. 172).

24. Blount's '159 patent issued on November 23, 1999. (Plaintiff's Ex. No. 1).

25. Blount notified Peterson of the existence of the '159 patent and Peterson's infringing activities on December 16, 1999, using a certified letter postmarked December 10, 1999, from Mr. Dan Tucker (attorney for Blount) to Peterson's president, Mr. Leslie Bortz. (Plaintiff's Ex. No. 10).

26. This first certified letter included a copy of the '159 patent, and informed Peterson that Blount was prepared to take whatever steps were reasonable and necessary to prevent infringement. Blount requested a response regarding this matter from Peterson by January 14, 2000. (Plaintiff's Ex. No. 10).

27. On December 17, 1999, Mr. Tod Corrin (Peterson's Vice President) forwarded the December 10, 1999, certified letter onto Peterson's patent counsel, Mr. William McLaughlin. Mr. Corrin wrote, in a cover letter included with the copy of the first certified letter, "[e]nclosed is a *patent infringement* letter we received from Golden Blount's Attorney." (Plaintiff's Ex. No. 17, emphasis added). Given the letter from Blount's attorney and this acknowledgment by Mr. Corrin, this Court finds that Peterson had knowledge of its infringement of the '159 patent as of December 16, 1999.

28. On December 30, 1999, Peterson responded to Blount's letter of December 10, 1999, explaining that Peterson had forwarded the December 10, 1999, letter to its attorneys and that Peterson would get back with Blount as soon as possible. Given the December Holidays, as well as the New Year, Peterson informed Blount that Blount's January 14, 2000, response date was unreasonable. (Plaintiff's Ex. No. 11).

29. After receiving no response from Peterson for more than four months, Blount sent a second certified letter to Peterson on May 3, 2000, again informing Peterson of its patent infringement. The May 3, 2000, letter advised Peterson that Blount "will take [the] necessary steps to stop any such *infringement*." (Plaintiff's Ex. No. 12, emphasis added).

30. Peterson responded to the May 3, 2000, letter on May 16, 2000, that it disagreed with Blount's assertion that Peterson was marketing a device that was substantially similar to the burner assembly claimed in the '159 patent. Peterson further asked that Blount explain to it, in detail, the basis upon which Blount believed that Peterson was infringing the patent. (Plaintiff's Ex. No. 13).

This Court finds that Peterson's disagreement lacks any serious credibility, since a simple comparison of the device as illustrated in the '159 patent with Peterson's product would have revealed to any reasonable person that infringement was highly likely. Moreover, the record before this Court reveals that Peterson did not have any documents before it or its attorney at this time that provides a reasonable basis for this statement. Even though Blount did not give any explanation to Peterson, this did not relieve Peterson of its obligation to investigate in good faith whether it was in fact infringing the '159 patent. This Court further finds that the May 3, 2000, letter was written simply for the purpose of delay, or even with the hope that the infringement matter would go away. This Court, therefore, concludes that the request was not genuine.

31. On January 18, 2001, over a year after Peterson received its first notice of infringement letter, Blount filed suit. (Plaintiff's Ex. No. 14). Blount's initial notice letter of December 10, 1999, met the notice requirements under 35 U.S.C. § 287(a), and therefore, Peterson's additional information request did not relieve Peterson of its obligation to determine if it was infringing the '159 patent.

32. Blount sent a final letter on January 19, 2001, to Peterson advising Peterson that suit was brought in view of its failure to respond or indicate in any manner its intentions with respect to its infringing product. (Plaintiff's Ex. No. 14).

33. Peterson made no efforts to cease its infringing activities either in the time period spanning the December 10, 1999, letter and the January 19, 2001, letter, or for that matter, up and until the commencement of this trial. (Plaintiff's Ex. No. 17 & Updated Sales Figures provided by Peterson in response to this Court's request).

34. During the period between December 16, 1999, and September 19, 2002, Peterson sold 3,723 ember flame burner units ("ember burners"). (Tr., vol. 2, pg. 181 and Peterson Company's Objection to Golden Blount's Motion for Updated Damages filed on September 18, 2002).

35. Peterson's ember burner is intended to be attached to its G-4 series burner system or G-5 series burner system. (Joint Pretrial Order--Stipulations, pg. 6). In addition to selling the ember

burner, Peterson also sells log sets that can be used with the ember burner and often uses the ember burner to entice their customers to come back in and buy new log sets. (Tr. vol. 2, pg 178).

36. The G-4 and G-5 series burner systems are substantially identical except that Peterson pre-assembles the G-5 burner system according to certain Canadian Gas Association specifications. (Tr., vol. 2, pg. 179).

37. At least 10 of the 3,723 Ember burners sold by Peterson were included on the pre-assembled G-5 series burner systems. (Oct. 5, 2001, deposition of Mr. Leslie Bortz, pg. 154-55).

38. At trial, Blount introduced Plaintiff's Exhibit No. 4A, which is one of Peterson's manufactured products including a Peterson G-4 burner pan with Peterson's ember burner attached to it. Blount properly laid foundation for this Plaintiff's Exhibit No. 4A through the testimony of one of Peterson's own witnesses, Mr. Jankowski, who stated that he recognized Plaintiff's Exhibit No. 4A as Peterson's products. (Tr. vol. 2, pg. 145). Also, Mr. Blount, whose business competes with Peterson's, identified Plaintiff's Exhibit No. 4A as being Peterson's competing product. (Tr. vol. 1, pg. 144). This Court also finds that foundation for this device is further established because the Court finds it to be virtually identical to the picture on page 3 of Peterson's own general installation instructions (introduced at trial by Peterson as Defendant's Ex. No. D-34), except for the valve knob, which is not at issue.

#### LITERAL INFRINGEMENT-DIRECT

39. The construction of the claims appears under paragraphs 120 thru 123 of the Conclusions of Law section. The determination of infringement based on the construed claims is factual and is therefore organized here under the Findings of Fact.

40. The analysis with respect to the literal infringement of claim 1 is as follows:

The first element of claim 1 reads: "an elongated primary burner tube including a plurality of gas discharge ports." Based upon the totality of the evidence, including unrebutted testimony of Mr. Golden Blount and this Court's own observations of the accused device, it is this Court's finding that the primary burner tube is the fundamental burner tube used in a majority of all gas operated fireplaces. Similarly, the plurality of gas discharge ports allow the flammable gas to escape from the primary burner tube and be ignited to provide a flame. Blount presented the unrebutted oral testimony of Mr. Blount, who using an infringement chart (Plaintiff's Ex. No. 9) as a guide, testified

that Peterson's manufactured products include a primary burner tube having gas discharge ports therein. (Tr., vol. 1, pg. 45-50). In addition to this unrebutted testimony, this Court had the opportunity to closely observe an assembled version of Peterson's manufactured product<sup>3</sup>, wherein this Court observed Peterson's manufactured product having the primary burner tube including two or more gas discharge ports. (Tr., vol. 2, pg. 28). Peterson even admitted and stipulated to the presence of this element in its device. (Tr., vol. 2, pg. 173; Joint Pretrial Order--Stipulations, pg. 6). Further, Peterson never presented any evidence that its manufactured products did not contain the aforementioned claimed element. Thus, Peterson's manufactured products meet the first limitation of claim 1, which reads: "an elongated primary burner tube including a plurality of gas discharge ports."

41. The second element of claim 1 reads: "a secondary coals burner elongated tube positioned forwardly of the primary burner tube." Given the claim interpretation as set forth by the Court of Appeals for the Federal Circuit and based upon the totality of the evidence, the secondary coals burner elongated tube is positioned toward the opening of the fireplace, at least as compared to the primary burner tube, and is designed to provide a realistic flame, likened to a flame that might emanate from burning coals. Blount again presented evidence in the form of oral testimony of Mr. Blount, that Peterson's manufactured products include a secondary coals burner elongated tube, and that it is positioned forwardly of the primary burner tube. (Tr., vol. 1, pg. 45-50). Based on this Court's close observation of Peterson's manufactured product<sup>4</sup>, this Court finds that Peterson's manufactured products contain the claimed secondary coals burner elongated tube, which in Plaintiff's Exhibit No. 4A is Peterson's Ember Flame Booster (ember burner), and that it was positioned forwardly the primary burner tube. (Tr., vol. 2, pg. 28). Peterson even admitted and stipulated to the presence of this element in its device. (Tr., vol. 2, pg. 173; Joint Pretrial Order--Stipulations, pg. 6). Further, Peterson never presented evidence that conclusively established that its manufactured products did not contain the aforementioned claimed element. Thus, Peterson's manufactured products meet the second limitation of claim 1, which reads: "a secondary coals burner elongated tube positioned forwardly of the primary burner tube."

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<sup>3</sup> See Finding of Fact No. 38, discussed above.

<sup>4</sup> See Finding of Fact No. 38, discussed above.

42. The third element of claim 1 reads: "a support means for holding the elongated primary burner tube in a raised level relative to the forwardly position[ed] secondary coals burner elongated tube." The previous two paragraphs already demonstrate that Peterson's manufactured products include both the elongated primary burner tube and the forwardly positioned secondary coals burner elongated tube. The only additional limitation added by this element is that a support means holds the elongated primary burner tube in a raised level relative to the secondary coals burner elongated tube. Peterson's manufactured products include a support means that holds the primary burner tube. Actually, Peterson's support means, which is an industry standard pan, is substantially identical if not completely identical, in shape and function to the support means illustrated in the '159 patent. (Tr., vol. 1, pg. 47). The question for this Court to rule on is whether Peterson's support means holds Peterson's elongated primary burner tube in a raised level relative to its secondary coals burner elongated tube. As affirmed by the Court of Appeal for the Federal Circuit, this Court construes the term "raised level" to mean that the top of the primary burner tube is at a raised level with respect to the top of the secondary burner tube. Blount offered evidence at trial that the top of Peterson's primary burner tube was higher than the top of Peterson's ember burner tube, by demonstrating before this Court, using a carpenter's level laid across the tops of the tubes of Plaintiff's Exhibit No. 4A, that Peterson's primary burner tube was raised with respect to its secondary burner. (Tr., vol. 2, pg. 28). Even Peterson's own patent attorney, Mr. McLaughlin, admitted during the demonstration that "assuming the table is level, the top of the front burner is below the top of the rear burner." (Tr., vol. 2, pg. 29). Also, Peterson's executive Mr. Bortz admitted that the top of the ember burner was lower than the top of the primary burner. (Tr., vol. 2, pg. 42). Similarly, Mr. Corrin testified that the tube is below the top of the main burner tube. (Tr., vol. 2, pg. 173 and Defendant's Ex. No. 8). The above evidence was, for the most part, unrebutted because Peterson based the majority of its case in chief on the argument that the relative height of the primary burner tube with respect to the secondary coals burner elongated tube should be measured from the bottoms of the respective tubes, or the ports. This Court further observed a general set of instructions included within the box of each ember burner, (Defendant's Ex. No. D-34 at pg. 3), which instructs the person assembling the device to tighten the Ember Flame Booster (ember burner) so that the valve faces forward and flush with the burner pan. According to the testimony of Mr. Bortz, the normal configuration is to have the valve resting on the fireplace floor because it serves as a support

for the ember burner. (Leslie Bortz Deposition, vol. 1, pg. 70-71). At trial, and as observed by this Court, when the valve was resting on the table flush with the pan, the top of the primary burner was above the top of the ember burner. Additionally, Peterson actually offered to this Court, (Defendant's Ex. No. D-30), which it stated was provided to customers and installers to illustrate how to properly install the assembly. (Tr. vol. 2, pg. 183). While Defendant's Exhibit No. D-30 was offered in an attempt to establish non-infringement based upon Peterson's asserted bottoms test that it was proposing, the instructions clearly illustrate that Peterson's preferred installation has the tops of the primary burner tube being in a raised level with respect to the tops of the secondary coals burner elongated tube. Thus, given the above discussed interpretation, and in view of the evidence presented, Peterson's manufactured products meet the third limitation of claim 1, which reads: "a support means for holding the elongated primary burner tube in a raised level relative to the forwardly position[ed] secondary coals burner elongated tube."

43. The fourth element of claim 1 reads: "the secondary coals burner elongated tube including a plurality of gas discharge ports." Blount again presented oral testimony of Mr. Blount that the secondary coals burner elongated tube of Peterson's manufactured products include a plurality of gas discharge ports. (Tr., vol. 1, pg. 45-50). Further, this Court's close observation of Peterson's manufactured product<sup>5</sup> established that Peterson's secondary coals burner elongated tube includes a plurality of gas discharge ports. (Tr., vol. 2, pg. 28). Peterson also admitted to the presence of a plurality of gas discharge ports or jets, (Tr., vol. 2, pg. 174), and mentions this claimed element in its installation instructions. (Defendant's Ex. No. D-34). Further, Peterson never presented any evidence that its manufactured products did not contain the aforementioned claimed element that successfully rebuts Blount's evidence on this point. Thus, Peterson's manufactured products meet the fourth limitation of claim 1, which reads: "the secondary coals burner elongated tube including a plurality of gas discharge ports."

44. The fifth element of claim 1 reads: "the elongated primary burner tube and the secondary coals burner elongated tube communicating through tubular connection means wherein the gas flow to the secondary elongated coals burner tube is fed through the primary burner tube and the tubular connection means." Blount presented the oral testimony of Mr. Blount that Peterson's manufactured

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<sup>5</sup> See Finding of Fact No. 38, discussed above.

products include the tubular connection means and that the gas flow to the secondary elongated coals burner tube is fed through the primary burner tube and tubular connection means. (Tr., vol. 1, pg. 45-50). Additionally, this Court physically observed this claimed element in Peterson's manufactured product<sup>6</sup>, (Tr., vol. 2, pg. 28), and again notes that the illustration in Defendant's Exhibit No. D-34 shows this tubular connection means. Moreover, Peterson never presented any evidence that its manufactured products did not contain the aforementioned claimed element. Thus, Peterson's manufactured products meet the fifth limitation of claim 1, which reads: "the elongated primary burner tube and the secondary coals burner elongated tube communicating through tubular connection means wherein the gas flow to the secondary elongated coals burner tube is fed through the primary burner tube and the tubular connection means."

45. The sixth element of claim 1 reads: "a valve for adjusting gas flow to the secondary coals burner elongated tube positioned in the tubular gas connection means." The evidence as established by Mr. Blount's testimony, Peterson's general instructions (Defendant's Ex. No. D-34), and this Court's own inspection of Plaintiff's Exhibit No. 4A, confirms the presence of the valve. (Tr., vol. 1, pg. 45-50 and vol. 2, pg. 28). Peterson even admitted and stipulated to the presence of this element in its device. (Tr., vol. 2, pg. 173; Joint Pretrial Order--Stipulations, pg. 6). Further, Peterson never presented any evidence that its manufactured products did not contain the aforementioned claimed element. Thus, Peterson's manufactured products meet the sixth limitation of claim 1, which reads: "a valve for adjusting gas flow to the secondary coals burner elongated tube positioned in the tubular gas connection means."

46. The seventh element of claim 1 reads: "the primary burner tube being in communication with a gas source with a gas flow control means therein for controlling gas flow into said primary burner tube." Blount again presented the oral testimony of Mr. Blount that the primary burner tube of Peterson's manufactured products would ultimately be coupled to a gas source with a gas flow control means therein for controlling gas flow into the primary burner tube. (Tr., vol. 1, pg. 45-50). Furthermore, the parties stipulated prior to the commencement of the trial that "Robert H. Peterson Co.'s ember burner is intended to be attached to its G-4 series burner system or G-5 series burner system and the combined unit comprises a primary burner pipe, an ember pan that supports the

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<sup>6</sup> See Finding of Fact No. 38, discussed above.

primary burner pipe, a secondary burner tube and a valve that controls a flow of gas between the primary burner pipe and the secondary burner tube, and that an end user *would* connect the primary burner pipe to a gas source having a valve associated therewith." (Joint Pretrial Order--Stipulations, pg. 6). Thus, Peterson's manufactured products would ultimately meet the seventh limitation of claim 1, which reads: "the primary burner tube being in communication with a gas source with a gas flow control means therein for controlling gas flow into said primary burner tube."

47. This Court finds that the above evidence is substantial and it clearly establishes that Peterson's accused device contains each and every element of claim 1 of the '159 patent.

48. The evidence presented at trial establishes that Peterson provided its customers with two sets of installation instructions. One set was a general set of instructions, (Defendant's Ex. No. D-34 at pg. 3), which instructs the person assembling the device to tighten the Ember Flame Booster (ember burner) so that the valve faces forward and flush with the burner pan. According to the testimony of Mr. Bortz, the normal configuration is to have the valve resting on the fireplace floor because it serves as a support for the ember burner. (Leslie Bortz Deposition, vol. 1, pg. 70-71). At trial, and as observed by this Court, when the valve is resting on the table flush with the pan, the top of the primary burner is above the top of the ember burner. The other set of instructions, (Defendant's Ex. No. D-30), was very specific in the way in which the ember burner was to be oriented with respect to the primary burner. When the device is installed pursuant to these instructions, Defendant's Exhibit No. D-30 clearly shows that the top of the primary burner is above the top of the ember burner. Thus, both of these instructions consistently show that when the G-4 or the G-5 and the ember burner of Peterson's accused device are installed pursuant to these instructions, it would result in an infringing configuration.

49. Although Peterson did not make this argument at any time during trial, Peterson asserts on remand that Blount has not established direct infringement by it or its customers because Blount never directly proved how the devices were actually assembled. Peterson, instead relied on its case-in-chief that it did not infringe because of its urged claim construction and that the '159 patent was invalid, both of which this Court and the Federal Circuit rejected. Moreover, Peterson's position is against the weight of the evidence, both direct and circumstantial, in this case. This Court finds that the evidence clearly supports a case of direct infringement, not only by Peterson, but by its customers as well. Case law holds that when instructions are provided with an infringing device, it can be

circumstantially inferred that the customer follows those instructions with respect to the accused device. Thus, it is reasonable for this Court to conclude that both Peterson and its customers would have assembled the devices in the way set forth in both sets of Peterson's assembly instructions. Peterson's direct infringement of claim 1 is established by the testimony of Messrs. Bortz and Corrin, both corporate officers of Peterson, who testified that Peterson assembled and operated the infringing device for distributors so they had the opportunity to see how the item worked. (Tr., vol. 2, pg. 65-66 and 199). In addition, Peterson itself assembled and sold at least 10 G-5 devices with a preassembled ember burner, which are the same as the G-4 except for being preassembled to comply with ANSI regulations. Mr. Bortz testified that he was sure that the ember burner was used with the G-5 because Peterson preassembled it and put it together, presumably in accordance with its own instructions. (Leslie Bortz Deposition, vol. 1, pg. 36). There has been no reasons given to this Court why Peterson didn't assemble these devices in accordance with its own instructions. Thus, the record establishes direct infringement on the part of Peterson itself.

50. Direct infringement by the ultimate purchasers of claim 1 is established by the evidence that proves that Peterson supplied all the required elements of claims 1, 15 and 17 of the '159 patent, as well as installation instructions, (Defendant's Ex. Nos. D-34 & D-30; Tr. vol. 2, pg. 177, 183), to its ultimate purchasers. It is reasonable to conclude that these instructions were used by Peterson's ultimate customers to assemble the ember burner, its associated components, and connect it to a gas source as stipulated by the parties. (Tr., vol. 1, pg. 45-50). These facts provide this Court with both direct and circumstantial evidence to find that direct infringement of claim 1 did indeed occur by Peterson's ultimate consumers.

51. Therefore, Blount has clearly established direct infringement on the part of Peterson and the ultimate purchaser of claim 1 of the '159 patent.

52. Dependent claim 15 includes all of the elements of independent claim 1 plus the element that "the open frame pan and primary elongated burner tube is positioned under an artificial logs and grate support means." Literal infringement of dependent claim 15 is particularly important because claim 15 includes the artificial logs and the grate support means. As set forth above, Peterson also manufactures and sells logs and other accessory items that can be sold with its G-4 or G-5 and the ember burner, and in fact uses the ember burner to entice customers to come back and buy new logs. (Tr., vol. 2, pg 178).

53. Sufficient evidence exists in the record to establish that Peterson's burner will ultimately be positioned under an artificial logs and grate support means. Therefore, Blount has clearly established direct infringement on the part of Peterson and the ultimate purchaser of claim 15 of the '159 patent.

54. This Court further concludes that in addition to directly infringing independent claims 1 & 15 of the '159 patent, Peterson and the ultimate purchasers directly infringe independent claim 17 of the '159 patent.

55. With the exception of a few additional elements included in independent claim 17 not included in independent claim 1, and a few elements included within independent claim 1 that are not included within independent claim 17, claims 1 and 17 are substantially similar.

56. Independent claim 17 does not include the claim limitation of independent claim 1 that the primary burner is in communication with a gas flow control means. Thus, this element need not be found in Peterson's manufactured products to find direct infringement by Peterson of independent claim 17.

57. The first element of independent claim 17 recites: "a secondary coals burning elongated tube," and is similar to the fourth element of independent claim 1. Accordingly, the discussion above with respect to the fourth element of independent claim 1 may be applied to the first element of independent claim 17. Thus, Peterson's manufactured products will ultimately meet the first limitation of claim 17, which reads: "a secondary coals burning elongated tube."

58. The second element of independent claim 17 recites: "a connector means for connecting said terminal end in communication with the secondary burner tube, the secondary burner tube positioned substantially parallel, forward and below the primary burner tube, the connector means having interposed between the primary and secondary burner tubes a gas flow adjustment valve, the primary and secondary burner tubes having a plurality of gas discharge ports, the secondary burner tube being in gas flow communication with the primary burner tube being the connection means, gas distribution ports of the secondary burner tube directed away from the fireplace opening."

59. Thus, independent claim 17 requires that the gas distribution ports of the secondary burner tube be directed away from the fireplace opening. As specifically construed and affirmed by the Court of Appeals for the Federal Circuit, this Court previously construed the term "directed away from" to mean that the gas ports of the secondary burner tube may be positioned in any direction that does not include a horizontal component pointed toward the vertical plane of the fireplace opening.

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*Golden Blount, Inc. v. Robert H. Peterson Co.*, 365 F.3d 1054, 1059-60 (Fed. Cir. 2004). Blount presented oral testimony of Mr. Blount that the gas ports of Peterson's manufactured products are positioned directly down, which according to the above-referenced interpretation, are away from the fireplace opening. (Tr., vol. 1, pg. 45-50). In addition to this testimony, this Court closely observed an assembled version of Peterson's manufactured product<sup>7</sup>, wherein it observed the manufactured product having the gas ports directed away from the fireplace opening. (Tr., vol. 2, pg. 28). Because Peterson believed the term "directed away from" would ultimately be construed to mean that the ports must be directed at least partially toward the back of the fireplace, Peterson went so far as to require the ports of its secondary burner tube to be positioned directly downward. Given the claim construction as construed and affirmed by the Federal Circuit, this required configuration results in a device that meets the "directed away from" limitation of claim 17.

60. As the other claimed elements of the second limitation of independent claim 17 have been found in Peterson's manufactured products, as established above with respect to paragraphs 40 thru 46, this Court finds that the evidence establishes direct infringement by Peterson and by the ultimate purchasers of Peterson's products of claim 17. Moreover, the evidence establishes that Peterson itself directly infringed claim 17 when Peterson assembled the G-5 series burner systems and then sold them to customers.

61. Therefore, this Court finds that Peterson and the ultimate purchaser directly infringed at least claims 1, 15 and 17, as construed under paragraphs 120 thru 123 below, of the '159 patent.

#### LITERAL INFRINGEMENT-CONTRIBUTORY

62. Blount established at trial, through stipulation, that Robert H. Peterson Co.'s ember burner is intended to be attached to its G-4 series burner system or G-5 series burner system and the combined unit comprises a primary burner pipe, an ember pan that supports the primary burner pipe, a secondary burner tube and a valve that controls a flow of gas between the primary burner pipe and the secondary burner tube, and that an end user would connect the primary burner pipe to a gas source having a valve associated therewith. (Joint Pretrial Order--Stipulations, pg. 6).

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<sup>7</sup> See Finding of Fact No. 38, discussed above.

63. Peterson was made aware of the '159 patent as early as December 16, 1999, by the letter from Mr. Tucker, which is referenced above. (Plaintiff's Ex. No. 10). Given these facts, it is clear that Peterson was aware that the combination for which its components were especially made was patented and infringing, as required by 35 U.S.C. § 271(c).

64. Blount further established through the testimony of Mr. Bortz that Peterson's ember burner is especially adapted for use in an infringement of the '159 patent, had no substantial non-infringing uses, and that it was intended to be used with both the G-4 and G-5 burner pans. (Tr., vol. 2, pg. 67; Leslie Bortz Deposition, vol. 1, pg. 36). Thus, the Court also finds that the testimony of Mr. Bortz and Mr. Corrin, as well as Mr. Blount, supports the fact that the ember burner was not a staple article of commerce.

65. As discussed above, this Court finds that direct infringement existed. For those units covered by stipulation for hookup, they were normally hooked up by professional installers or persons from the dealer. With their experience and relation to Peterson and with all of Peterson's literature (including Defendant's Ex. Nos. D-34 & D-30) one can count on proper installations pursuant to Peterson's installation instructions as discussed above. Thus, each installation ultimately results in a direct infringement. (Tr., vol. 2, pg. 189). Blount has clearly proven contributory infringement on the part of Peterson of claims 1, 15 and 17 for those units.

#### LITERAL INFRINGEMENT-INDUCEMENT

66. The record establishes that Peterson sold the ember burner. In addition, the record also establishes that Peterson sold the G-4, which includes the primary burner and support pan, and sold the G-5, ten at least of which, had the ember burner attached. Further, given the stipulation that the ultimate assembly would be connected to a gas source, there is sufficient basis to conclude that Peterson knew or should have known that this ultimate configuration would infringe independent claims 1 and 17. (Joint Pretrial Order--Stipulations, pg. 6).

67. Peterson was made aware of the '159 patent as early as December 16, 1999, by the letter of December 10, 1999, from Mr. Tucker, which is referenced above. (Plaintiff's Ex. No. 10). Given these facts, it is clear that Peterson was aware that the combination for which its components were especially made was patented and infringing.

68. The record is also clear that Peterson provided literature and assembly instructions to consumers, as discussed above, detailing how to install the components in a preferred configuration, which induced its customers to install the components in an infringing manner. (Tr., vol. 2, pg. 173-174, 177, 183; Defendant's Ex. Nos. D-34 & D-30). Also, Peterson fully assembled and hooked up in a fireplace an accused structure and demonstrated it and its use to independent distributors, which this Court finds to be a substantial inducement.

69. Because Peterson provided the consumers with detailed instructions, (Defendant's Ex. Nos. D-34 & D-30), how to assemble the parts in an infringing manner, and given the fact that Peterson had knowledge of the '159 patent by way of the notice letter of December 16, 1999, Peterson knew or should have known that such actions would induce direct infringement. Thus, there is little doubt and almost a certainty that the installation was in fact done in accordance with Peterson's published installation instructions. The demonstrations of a properly connected device to distributors further shows inducement because this information was passed on to dealers and ultimately to assemblers and customers. Invariably, infringement occurred. (Tr., vol. 2, pg. 189).

70. As found by this Court in paragraphs 40 thru 61 above, there was direct infringement by Peterson or its ultimate purchasers of claims 1, 15 and 17 of the '159 patent.

71. Accordingly, this Court finds that in those instances where direct infringement by Peterson was not conclusively established on a unit by unit basis, Blount has clearly proven induced infringement on the part of Peterson of claims 1, 15 and 17 for those units.

72. Because Peterson's manufactured products literally infringe claims 1, 15 and 17 of the '159 patent, they infringe the patent. Thus, comparison of Peterson's product to the remaining claims depending from independent claim 1, whether it be in determining direct infringement, contributory infringement or induced infringement, is generally unnecessary and is therefore not addressed herein.

#### INFRINGEMENT-DOCTRINE OF EQUIVALENTS

73. Blount offered unrebutted testimony at trial that every element of Peterson's manufactured products perform substantially the same function in substantially the same way to obtain the same result as the claimed elements of the '159 patent. (Tr., vol. 1, pg. 59-60).

74. Blount further offered unrebutted testimony by Mr. Blount at trial that any difference between Peterson's manufactured products and the claim elements were insubstantial at best. Mr. Blount

actually testified that they were an exact copy. (Tr., vol. 1, pg. 30, 37, 46, 48, 56 and 60). In addition, through this Court's own observance of the accused product 4A, this Court finds that there was a substantial equivalent of each and every element of at least claims 1, 15 and 17 in Peterson's accused products.

75. Based on the evidence presented to it, this Court finds that there is no prosecution history estoppel that limits the range of equivalents regarding the claimed elements.

76. Thus, this Court finds that in those instances where literal infringement might not exist, there is infringement of the claims of the '159 patent under the doctrine of equivalence.

77. In summation, this Court concludes that Blount established literal infringement (e.g., directly, by inducement, or contributorily) or infringement under the doctrine of equivalents, each of claims 1, 15 and 17 of the '159 patent, by Peterson by at least a preponderance of the evidence.

#### DAMAGES

78. Damages have been determined using the *Panduit* factors. Mr. Blount testified for Blount at trial as to the demand that existed for the product during the period in question. (Tr., vol. 1, pg. 61). Thus, Blount has conclusively established the first required element of *Panduit*.<sup>8</sup>

79. In addition to establishing a demand for the patented product during the period in question, Blount established an absence, during the period of infringement, of acceptable non-infringing substitutes. (Tr., vol. 1, pg. 63-65).

80. Peterson argued that other acceptable non-infringing substitutes exist.

81. Here the patented product offers quite unique and novel results. (Tr., vol. 1, pg. 28-30). The so called "acceptable non-infringing substitutes" Peterson has introduced are either not acceptable, or they too infringe, although no third party infringing device was offered by either side.

82. Blount established at trial that Peterson's front flame director was not an acceptable substitute. (Tr., vol. 2, pgs. 184, 195). Peterson's own Vice President, Mr. Corrin, testified that the front flame director lacked the valve for adjusting the height of the front flame. Even more telling, Mr. Corrin testified that the front flame director was not as good as their ember burner. (Tr., vol. 2, pgs. 184, 195).

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<sup>8</sup> See the Conclusions of Law section, paragraph 151, where the *Panduit* factors are set forth.

83. As the valve to adjust the height of the front flame is one of the particular features available only from the patented product, under the law set forth in *Standard Havens*, the front flame director, lacking that valve or any adjustment means, is not an acceptable non-infringing substitute.

84. Peterson further argues that Blount admitted at trial that at least five products on the market perform roughly the same function as Blount's patented device. (Tr., vol. 1, pg. 63). The record is clear that those five products were infringing substitutes and not acceptable non-infringing substitutes. (Tr., vol. 1, pg. 63). In fact, the record indicates that Blount sent the manufactures of those five products the identical notice of infringement letter at the same time it sent Peterson its letter. (Tr., vol. 1, pg. 63). No evidence exists in the record that the aforementioned five instances of infringement continued after the notice of infringement letters were received. In fact, Mr. Blount's testimony indicates that while the other companies were moving in and were interested in the outcome of this trial, none were still infringing after receipt of their notice of infringement letter. (Tr., vol. 1, pg. 62-64).

85. Therefore, this Court finds that Blount provided sufficient evidence to support the finding that there were no acceptable non-infringing substitutes that could have decreased the market share Blount and Peterson together held. Thus, Blount has conclusively established the second required element of *Panduit*.

86. Blount also offered sufficient evidence through Mr. Blount's testimony that Blount had more than enough manufacturing and marketing capability to promote the device, thus entitling Blount to actual damages. (Tr., vol. 1, pgs. 62, 66). Thus, Blount has conclusively established the third required element of *Panduit*.

87. Because the *Panduit* factors have been established, it is reasonable for this Court to infer that the lost profits claimed were in fact caused by Peterson's infringing sales. This Court now only needs to determine a detailed computation of the amount of profit Blount would have made, to meet the final required element of *Panduit*.

88. In addition, however, the Court also finds that the facts of the present case establish a two-supplier market. Blount offered evidence through the testimony of Mr. Blount that Blount and Peterson together held approximately 95 percent or more of the market associated with ember burners similar to that covered by the '159 patent. (Tr., vol. 1, pg. 64). While Peterson attempted to impeach Mr. Blount's testimony on this point, this Court finds that Peterson failed to do so.

Therefore, this Court finds that Mr. Blount's testimony is sufficient to establish a two supplier market. The supposed 5 percent of the market that Blount and Peterson might not have held is de minimus, and therefore, for damage calculations a two-supplier market has been found to exist in this case. Therefore, causation may be inferred, that is, "but for" Peterson's infringing activities, Blount would have made the sales it normally would have made.

89. To determine the actual damage amount in a lost profit case, the Court can multiply Blount's per unit profit times the number of infringing devices that Peterson sold.

90. To do this, however, the Court must determine the device upon which lost profits are to be calculated.

91. Using two different approaches, Blount has established that the device for calculating lost profits includes the entire burner assembly (including the secondary burner and valve), the grate, and a full set of artificial logs. This Court finds that Blount ultimately lost the sale of the entire burner assembly (including the secondary burner and valve), the grate, and a full set of artificial logs.

92. Dependent claim 15, which was established as literally infringed above, recites that the gas-fired artificial logs and coals-burner of claim 1 are positioned under artificial logs and a grate support means. Because the artificial logs and the grate support means are positively claimed in dependent claim 15, the artificial logs and the grate support means should be included in the device upon which damages for direct infringement as well as lost profits are to be calculated.

93. Accordingly, the device for calculating lost profits includes the entire burner assembly (including the secondary burner and valve), the grate and a full set of artificial logs, which must be the case here, because apart from the artificial logs and grate, the coals burner unit has no purpose or function.

94. Given the circumstances, the entire market value rule is appropriate here as an alternative, second approach. Evidence was offered at trial by Peterson's own officer, Mr. Corrin, that Peterson used the ember burner to entice customers to come back to the store to purchase newer log sets, and at the same time, purchase Peterson's ember burner, which improved the overall appearance of the fireplace. (Tr., vol. 2, pg. 177-79). These facts are sufficient to establish that the ember burner is the basis for the customer's demand, as set forth by *TWM*, see *infra*.

95. Blount also offered evidence that the glowing embers from the ember burner are what draws a customer's attention to a particular log and burner set, and what ultimately makes the sale. (Tr., vol. 1, pg. 157-63).

96. Blount also offered testimony at trial that the elements of independent claims 1 and 17 constitute a functional unit with the artificial logs and the grate support.

97. Blount presented a third-party witness retailer, Mr. Charlie Hanft of Atlanta, with extensive sales experience with gas fireplaces and ember burner and gas log sets. He testified that 97 ½ percent of the time that he sells an ember burner, he also sells an entire burner assembly and log set with it. (Tr., vol. 1, pg. 160). Peterson did not successfully rebut Blount's evidence on this point because Peterson presented no testimony to quantify even in a general way when the two would not ultimately be sold together.

98. Peterson failed to rebut Blount's evidence because it did not offer any numerical evidence regarding how often it sells one of its Ember burners with the entire burner and log set.

99. In summation of this point, Blount introduced testimony as to the standard practice in the industry for selling the ember burner, and Peterson failed to introduce its own testimony to rebut Blount's testimony.

100. Because the evidence establishes that 97 ½ percent of the sales of the ember burner would also encompass the sale of the entire burner assembly and log set, the record supports a proration of the damage amount based upon this percentage.

101. Based on the record, of the 3,723 EMB's sold by Peterson, 2 ½ percent (i.e., 94 EMB's) were sold without an associated burner assembly and log set, and the remaining 97 ½ percent (i.e., 3,629) were sold with an associated burner assembly and log set.

102. Blount established at trial that its profit on the ember burner alone is \$14.09 per unit and its profit on the ember burner, entire burner assembly and full set of logs is \$117.92 per unit. (Plaintiff's Ex. No. 18).

103. This Court finds, based on the percentages and profits established in the paragraphs above, that the total actual damages amount to \$429,256.

WILLFULNESS / EXCEPTIONAL CASE

104. Having carefully reviewed the record herein, the Court concludes that Peterson's minimal attempt to attain a competent opinion is permeated by a lack of due care and was willful, which leads this Court to find that the case is exceptional. Blount has established by clear and convincing evidence that Peterson's supposed oral opinion was an incompetent, conclusory opinion to be used only as an illusory shield against a later charge of willful infringement, rather than in a good faith attempt to avoid infringing another's patent.

105. Throughout the 2½ years from the time the first notice letter was sent, Peterson simply never obtained a single written opinion suggesting that their commercial embodiment avoided infringement. Also, the denial that the first letter related to notice of infringement is shown unlikely by Mr. Corrin's own characterization of it as an "*infringement letter*" in his correspondence with his patent counsel. (Tr., vol. 2, pg. 192). Also, this Court finds it disingenuous for Peterson to argue at trial that the interrogatories answered well after suit was filed and during discovery, form the written opinion upon which they relied.

106. The first time Peterson spoke to Mr. McLaughlin was on or about December 30, 1999, however, Mr. McLaughlin did not have the accused infringing device at this time. (Tr., vol. 1, pg. 181). The record establishes that Mr. McLaughlin, at this time, only had a picture of the accused infringing device. (Tr., vol. 1, pg. 181). Neither did Mr. McLaughlin have the prosecution history of the '159 patent at this time, which is an important element of any competent opinion. (Tr., vol. 1, pgs. 183, 202-03).

107. This non-substantive conversation cannot be construed to be an opinion upon which Peterson could reasonably rely because it was based solely on a supposition. This supposition amounted to a representation on the part of Mr. Bortz that the invention had been around 20 to 30 years. (Tr., vol. 2, pg. 55-56). Mr. McLaughlin, with only the evidence listed above, said that "if we *could* prove that the invention had been around for 20 to 30 years then it *would* be a strong argument of invalidity." (Tr., vol. 2, pg. 55-56, emphasis added). This "if this, then that" statement plainly does not amount to an opinion upon which a prudent person could reasonably rely.

108. Importantly, this Court has found that Peterson made no further efforts to determine whether it was truly infringing or not, until after suit was filed, almost a year and two months after receiving the first notice letter. (Tr., vol. 1, pg. 202-03).

109. Peterson argues that it did nothing further because it was awaiting "additional information or further explanation from Blount's attorney." This Court finds this argument lacking merit. Blount did not, after sending multiple notice of infringement letters to Peterson under the law, owe Peterson any obligation with regard to advising Peterson how they actually were infringing.

110. Nevertheless, Blount's failure to respond to Peterson's additional information request did not relieve Peterson of its obligation to determine if it was willfully infringing the '159 patent.<sup>9</sup> To the contrary, Peterson continued its infringing activities even after May 16, 2000, and actually even through the trial proceedings. (Tr., vol. 2, pg. 181 and Peterson Company's Objection to Golden Blount's Motion for Updated Damages filed on September 18, 2002). This reflects an egregious and willful disregard for the '159 patent.

111. It was not until after the lawsuit was filed in January 2001 that Peterson finally became concerned, not with the damages associated with the infringing activity, but apparently with the attorney's fees that Peterson might be required to pay as a willful infringer. (Tr., vol. 2, pg. 60-62). By Mr. Bortz' own admission, he told Mr. McLaughlin that this was not a very meaningful case "dollar wise" but that he heard a person might have to pay attorneys' fees if he loses a patent lawsuit, and he asked Mr. McLaughlin what he should do. (Tr., vol. 2, pg. 60-62 & Dec. 19, 2001, deposition of Mr. Leslie Bortz, pg. 60). Mr. McLaughlin told him that one way that attorney's fees could be avoided was by obtaining an opinion. (Id). This set of facts underscores Peterson's true intentions with respect to its willful disregard of the '159 patent, that it was concerned more with having to pay attorneys' fees than it was with its own infringement. The Court finds that this constitutes an intentional disregard for the '159 patent on the part of Peterson.

112. At no time when Mr. McLaughlin gave Mr. Bortz advice did Mr. McLaughlin ever see the actual accused structure. (Tr., vol. 1, pg. 181). While some advertisements of Peterson's structure were shown, detailed drawings were never provided at this time to Mr. McLaughlin, including the installation instructions that were apparently sold with the device. Thus, Mr. McLaughlin never had a full understanding of the accused structure, (Tr., vol. 1, pg. 200), and Mr. McLaughlin should have known that his opinion would not be reasonable without such an understanding.

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<sup>9</sup> See also, Finding of Fact No. 30.

113. While Peterson argues that three oral consultations occurred, this Court finds that only one oral opinion of counsel, if it can even be called that, was rendered. This oral opinion was rendered by Mr. McLaughlin on or about May 1, 2001, about 4 months after suit had been filed and 2½ years after Peterson was first noticed of its infringing activity. (Tr., vol. 1, pg. 179-83).

114. This Court believes that Peterson did get what it asked for, a statement that there was no infringement. Peterson's primary desire, however, was to avoid paying attorneys' fees or increased damages, and this appears to have been the sole reason for consultation with counsel, and these actions show a willful and egregious disregard for the '159 patent.

115. In summary, this Court finds that Peterson had three consultations with its Attorney. All were oral. Only the last oral consultation approached what was needed to determine infringement and validity issues, and even it was made with a search limited to the company's own records and with there having been no accused structure shown the patent attorney. This third consultation occurred a number of months after suit had been filed and was motivated by the apprehension of Peterson having to pay attorneys' fees, and not for a concern of infringement of the '159 patent.

116. Peterson's cavalier attempt to obtain an opinion and the non-persuasive trial testimony of Peterson's witnesses are classic examples of conduct that clearly and convincingly demonstrates an exceptional case, an indication of which is gross willfulness.

117. This Court therefore finds that the infringement of Peterson was willful, thus the actual damages are trebled, totaling \$1,287,766.

118. Given Peterson's conduct and its overall willful disregard for the '159 patent, such an award is appropriate here. The Court finds that as a result of Peterson's continued infringement, without a reasonable basis for believing that it had a right to make, use or sell its product prior to the expiration of the '159 patent, Blount has been compelled to prosecute an infringement claim at great expense. Under these circumstances, an award of attorneys' fees is proper in addition to the enhanced damage award.

119. This Court therefore finds this to be an exceptional case under 35 U.S.C. § 285, thus reasonable attorneys' fees are awarded to Blount.

## CONCLUSIONS OF LAW

### CLAIM CONSTRUCTION

120. The parties dispute the meaning of two terms in the claims of the patent in suit, namely the phrase "raised level," as recited in claim 1, and the term "below" and the phrase "away from the fire place opening," as recited in claim 17.

121. As affirmed by the Court of Appeals for the Federal Circuit in its opinion dated April 19, 2004, this Court construes that the term "at a raised level" in claim 1 refers to the top of the two burner tubes, and that the tops of the tubes should be used to determine whether the primary burner tube is held at a raised level with respect to the secondary burner tube as recited in claim 1. This Court also construes that the term "below" in claim 17 refers to the tops of the two burner tubes, and that the tops of the tubes should be used to determine whether the secondary burner tube is positioned below the primary burner tube as recited in claim 17. *Golden Blount, Inc. v. Robert H. Peterson Co.*, 365 F.3d 1054, 1059-60 (Fed. Cir. 2004).

122. As affirmed by the Court of Appeals for the Federal Circuit in its opinion dated April 19, 2004, this Court construes the term "away from the fireplace opening" to mean that the gas ports may be positioned in any direction that does not include a horizontal component pointed toward the vertical plane of the fireplace opening. *Id.*

123. All the other terms in the claims at issue are construed to have a plain and ordinary meaning, which appear not to have been contested at trial.

### VALIDITY

124. A validity analysis begins with the presumption of validity. An issued patent is presumed valid. 35 U.S.C. § 282.

125. An "accused infringer who raises patent invalidity as a defense bears the burden of showing invalidity by facts supported by clear and convincing evidence." *Robotic Vision Systems, Inc. v. View Engineering, Inc.*, 189 F.3d 1370, 1377 (Fed. Cir. 1999); *Weatherchem Corp. v. J.L. Clark, Inc.*, 163 F.3d 1326, 1334-35 (Fed. Cir. 1998).

126. As affirmed and determined by the Court of Appeals for the Federal Circuit on April 19, 2004, this Court concludes that Peterson has failed to prove by clear and convincing evidence that

the '159 patent is invalid. This Court therefore finds the '159 patent not to be invalid. *Golden Blount, Inc.* at 1061-62.

#### LITERAL INFRINGEMENT-DIRECT

127. The claims define the metes and bounds of the invention, and only they may be infringed. *SmithKline Diagnostics, Inc. v. Helena Labs. Corp.*, 859 F.2d 878, 882 (Fed. Cir. 1988); *Corning Glass Works v. Sumitomo Elec. USA, Inc.*, 868 F.2d 1251 (Fed. Cir. 1989).

128. The patentee's burden is to show literal infringement by a preponderance of the evidence. *Braun v. Dynamics Corp.*, 975 F.2d 815 (Fed. Cir. 1992).

129. A patent claim is literally infringed if the accused product or process contains each element of the claim. *Tate Access Floors v. Maxcess Techs.*, 222 F.3d 958, 964 (Fed. Cir. 2000); *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1054 (Fed. Cir. 1988). If each element is present, literal infringement exists and "that is the end of it." *Graver Tank v. Linde Co.*, 339 U.S. 605, 607, 94 L. Ed. 1097, 70 S. Ct. 854, 1950 Dec. Comm'r Pat. 597 (1950).

130. In determining infringement, the accused product is compared to the patent claims, not the patentee's product. *Zenith Laboratories, Inc. v. Bristol-Myers Squibb Co.*, 19 F.3d 1418, 1423 (Fed. Cir. 1994); *Glaxo Inc. v. TorPharm Inc.*, 153 F.3d 1366, 1373 (Fed. Cir. 1998).

131. Infringement of a single claim is infringement, *Panduit Corp. v. Dennison Mfg. Co. Inc.*, 836 F.2d 1329, 1330 n.1 (Fed. Cir. 1987); *Intervet America v. Kee-Vet Laboratories*, 887 F.2d 1050, 1055 (Fed. Cir. 1989), and entitles the patentee to the full panoply of statutory remedies. *Intervet*, 887 F.2d at 1055.

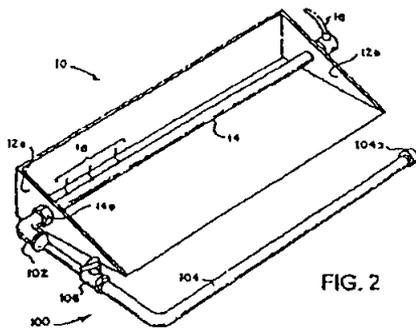
132. If one is arguing that proof of inducing infringement or direct infringement requires *direct*, as opposed to *circumstantial evidence*, the Federal Circuit disagrees. It is hornbook law that direct evidence of a fact is not necessary. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Metabolite Laboratories, Inc. v. Laboratory Corp. of America*, 370 F.3d 1354, 1365 (Fed. Cir. 2004) (citing *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 1272 (Fed. Cir. 1986)).

133. In determining whether a product claim is infringed, the Federal Circuit has held that an accused device may be found to infringe if it is reasonably capable of satisfying the claim limitations,

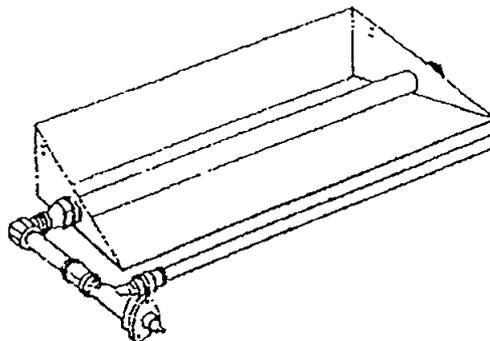
even though it may also be capable of non-infringing modes of operation. See, *Intel Corp. v. United States Int'l Trade Comm'n*, 946 F.2d 821, 832, 20 USPQ2d 1161, 1171 (Fed.Cir.1991); *Key Pharms., Inc. v. Hercon Labs. Corp.*, 981 F.Supp. 299, 310 (D.DeL1997), *aff'd*, 161 F.3d 709, 48 USPQ2d 1911 (Fed.Cir.1998); *Huck Mfg. Co. v. Textron, Inc.*, 187 USPQ 388, 408 (E.D.Mich.1975) ("The fact that a device may be used in a manner so as not to infringe the patent is not a defense to a claim of infringement against a manufacturer of the device if it is also reasonably capable of a use that infringes the patent."); cf. *High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551, 1556, 33 USPQ2d 2005, 2009 (Fed.Cir.1995).

134. Circumstantial evidence of product sales and instructions indicating how to use the product is sufficient to prove third party direct infringement. *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 1272 (Fed. Cir. 1986).

135. This Court understands that in determining infringement, the accused product is compared to the patent claims, not the patentee's product. However, FIG. 2 of the '159 patent is representative of the claims of the '159 patent and the claims may be read on the FIG. 2 structure. For this reason a comparison of one of Blount's devices and Peterson's manufactured product is highly instructive for purposes of this Court's analysis, and is, therefore, provided.



**Blount's Patented Device**  
FIG. 2 of the '159 Patent



**Peterson's Manufactured Product**  
Figure 2 of Peterson's Installation Instructions  
without the control knob shown

136. The findings in the sections above make out a clear case of direct infringement on all of the devices sold.

#### LITERAL INFRINGEMENT-CONTRIBUTORY

137. Contributory infringement liability arises when one "sells within the United States . . . a component of a patented machine . . . constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantially noninfringing use." 35 U.S.C. § 271(c) (2002).

138. Thus, Blount must show that Peterson "knew that the combination for which its components were especially made was both patented and infringing." *Preemption Devices, Inc. v. Minn. Mining & Mfg. Co.*, 803 F.2d 1170, 1174 (Fed. Cir. 1986).

139. An appropriate infringement notice letter from the patentee to the accused infringer provides the requisite knowledge required by 35 U.S.C. § 271(c). *Aro Manufacturing Co., Inc. v. Convertible Top Replacement Co.*, 377 U.S. 476, 490 (1964).

140. Further, Blount must show that Peterson's components have no substantially noninfringing uses, while meeting the other elements of the statute. *Alloc, Inc. v. ITC*, 342 F.3d 1361, 1374 (Fed. Cir. 2003).

141. It is not necessary for a plaintiff to make the direct infringer a party defendant in order to recover on a claim of contributory infringement. It is enough for the plaintiff to prove, by either circumstantial or direct evidence, that a direct infringement has occurred. *Amersham International PLC v. Corning Glass Works*, 618 F. Supp. 507 (D. Mich., 1985).

142. The findings in the sections above make out a clear case of Contributory infringement on all of the devices sold.

#### LITERAL INFRINGEMENT-INDUCEMENT

143. In order to find Peterson liable for inducing infringement under 35 U.S.C. § 271 (b), Blount must show that Peterson took actions that actually induced infringement. *Met-Coil Sys. Corp. v. Korners Unlimited, Inc.*, 803 F.2d 684, 687 (Fed. Cir. 1986) ("There can be no inducement of infringement without direct infringement by some party.")

144. Further, Blount must show that Peterson knew or should have known that such actions would induce direct infringement. *Micro Chem. Inc. v. Great Plains Chem. Co.*, 194 F.3d 1250 (Fed. Cir. 1999).

145. Dissemination of instructions along with sale of the product to an ultimate consumer is sufficient to prove infringement by an inducement. *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 1272 (Fed. Cir. 1986). Thus, Blount has met its burden of showing infringement under section 35 U.S.C. 271(b).

146. The findings in the sections above make out a clear case of induced infringement on all of the devices sold.

#### INFRINGEMENT-DOCTRINE OF EQUIVALENTS

147. Infringement under the doctrine of equivalents occurs when a claimed limitation and the accused product perform substantially the same function in substantially the same way to obtain the same result. See *Warner-Jenkinson Co. v. Hilton-Davis Chem. Co.*, 520 U.S. 17, 39-40, 137 L. Ed. 2d 146, 117 S. Ct. 1040 (1997).

148. Infringement under the doctrine of equivalents also requires that any difference between the claim elements at issue and the corresponding elements of the accused product be insubstantial. *Id.*

149. This Court finds alternatively (or cumulatively) that there was infringement under the doctrine of equivalents.

#### DAMAGES

150. To recover lost profit damages, the patentee need only show causation and the factual basis for causation between the infringement and the lost profits. *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1065, 219 U.S.P.Q. 670 (Fed. Cir. 1983).

151. To do this, *Panduit* established that the patent owner need only demonstrate:

- 1) a demand for the product during the period in question;
- 2) an absence, during that period, of acceptable non-infringing substitutes;
- 3) its own manufacturing and marketing capability to meet or exploit that demand; and
- 4) a detailed computation of the amount of the profit it would have made.

*Panduit Corp. v. Stahl Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1156, 197 U.S.P.Q. 726 (6th Cir. Mich. 1978); *Radio Steel & Mfg. Co. v. MTD Prods., Inc.*, 788 F.2d 1554, 1555, 229 U.S.P.Q. 431 (Fed. Cir. 1986).

152. In a two-supplier market it is reasonable to assume, provided the patent owner has the manufacturing capabilities, that the patent owner would have made the infringer's sales but for the infringement. *State Indus. v. Mor-Flo Indus.*, 883 F.2d 1573, 1578, 12 U.S.P.Q.2d 1026 (Fed. Cir. 1989).

153. The "[m]ere existence of a competing device does not make that device an acceptable substitute." *TWM Mfg. Co., Inc. v. Dura Corp.*, 789 F.2d 895, 901, 229 U.S.P.Q. 525 (Fed. Cir. 1986), *cert. denied*. A product on the market that lacks the advantages of the patented product can hardly be termed a substitute acceptable to the customer who wants those advantages. *Standard Havens Products, Inc. v. Gencor Industries, Inc.*, 953 F.2d 1360, 1373, 21 U.S.P.Q.2d 1321 (Fed. Cir. 1991), *cert. denied*. If purchasers are motivated to purchase because of particular features available only from the patented product, products without such features would most certainly not be acceptable non-infringing substitutes. *Id.*

154. Also, courts have generally held that an infringer's acceptable substitute argument is of "limited influence" when it [the infringer] ignores those substitutes while selling the patented invention. (Emphasis added). *TWM*, 789 F.2d at 902. This is exactly what Peterson did.

155. In an alternative approach, however, the "entire market value rule" may be used to determine the device for calculating lost profits. In *Beatrice Foods*, the Court stated that the law does not bar the inclusion of convoyed sales in an award of lost profits damages. *Beatrice Foods Co. v. New England Printing & Lithographic Co.*, 899 F.2d 1171, 1175, 14 U.S.P.Q.2d 1020 (Fed. Cir. 1991).

156. The "entire market value rule" allows for the recovery of damages based on the value of an entire apparatus containing several features, even though only one feature is patented. *Paper Converting Machine Co. v. Magna-Graphics, Corp.*, 745 F.2d 11, 33, 223 U.S.P.Q. 591 (Fed. Cir. 1984).

157. The "entire market value rule" further permits recovery of damages based on the value of the entire apparatus containing several features, when the patent-related feature is the basis for customer demand. See *TWM*, 789 F.2d at 901.

158. The "entire market value rule" is appropriate where both the patented and unpatented components together are analogous to components of a single assembly, parts of a complete machine, or constitute a functional unit. See *Rite-Hite v. Kelly Co.*, 56 F.3d 1538, 1550, 35 U.S.P.Q.2d 1065 (Fed. Cir. 1995).

#### WILLFULNESS / EXCEPTIONAL CASE

159. In addition to requiring "damages adequate to compensate for the infringement," Section 284 of the Patent Act authorizes a district court to "increase damages up to three times the amount found or assessed." 35 U.S.C. § 284.

160. The Federal Circuit has interpreted this provision of Section 284 as requiring a two-step process: "First the fact-finder must determine whether an infringer is guilty of conduct upon which increased damages may be based." *Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1570, 38 U.S.P.Q.2d 1397 (Fed. Cir. 1996). "If so, the Court then determines, exercising its sound discretion, whether, and to what extent, to increase the damage award given the totality of the circumstances." *Id.*

161. "An act of willful infringement satisfies this culpability requirement, and is, without doubt, sufficient to meet the first requirement to increase a compensatory damages award." *Id.* Thus, once a proper willfulness finding is made, the first step in determining whether damages should be enhanced is complete. *Id.* At that point, the Court need consider only whether, and to what extent, the compensatory damages awarded by the fact finder should be increased, in light of "the egregiousness of the Defendant's conduct based on all the facts and circumstances of the case." *Id.*

162. "A potential infringer having actual notice of another's patent rights has an affirmative duty of care." *Spindelfabrik Suessen-Schurr, Stahlecker & Grill GmbH v. Schubert & Salzer Maschinenfabrik Aktiengesellschaft*, 829 F.2d 1075, 1084 (Fed. Cir. 1987). An act of infringement is thus deemed willful when the infringer is aware of another's patent and fails to exercise due care to avoid infringement. *Electro Medical Sys., S.A. v. Cooper Life Sciences, Inc.*, 34 F.3d 1048, 1056 (Fed. Cir. 1994); *Rolls-Royce Ltd. v. GTE Valeron Corp.*, 800 F.2d 1101, 1109 (Fed. Cir. 1986). This standard of care typically requires an opinion from competent patent counsel prior to engaging in any potentially infringing activities. *Underwater Devices, Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380, 1389-90 (Fed. Cir. 1983). To establish willfulness, Blount must demonstrate by clear and convincing

evidence, considering the "totality of the circumstances," that Peterson willfully infringed its patent. *Electro Medical*, 34 F.2d at 1056.

163. The prosecution history of a patent in question is an important element of any competent opinion. *Underwater Devices*, 717 F.2d at 1389-90.

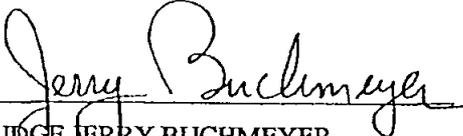
164. A holding of willful infringement is usually sufficient to make a case exceptional and entitles the opposing party to its attorney's fees. 35 U.S.C. § 285 (2002); *Avia Group Intl. Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1567 (Fed. Cir. 1988).

### CONCLUSION

For the reasons set forth above, the Court concludes that Peterson's manufactured products infringe the claims of the '159 patent. Blount is entitled to actual damages from Peterson in the amount of \$429,256. The infringement of Peterson was willful, thus the actual damages are trebled, totaling \$1,287,768. Blount is also awarded prejudgment interest, which shall be calculated on a simple rather than compound basis, on the actual damages of \$429,256 at the rate of 5.0% for the period from December 16, 1999, to August 9, 2002. This is an exceptional case under 35 U.S.C. § 285, thus reasonable attorneys' fees are awarded to Blount. Blount is further awarded post judgment interest, calculated pursuant to 28 U.S.C. §1961, on the sum of the trebled damages and attorney's fees at the highest rate allowed by the law from the date of August 9, 2002, to April 19, 2004, and resuming from the date of the signing of the final judgment. Based upon the fact that infringement causes irreparable harm, an injunction is granted against Peterson.

It is so ORDERED

SIGNED: 2 day of September, 2004.

  
JUDGE JERRY BUCHMEYER  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

DEC 15 2004  
CLERK, U.S. DISTRICT COURT  
By \_\_\_\_\_ Deputy  
Civil Action No.

GOLDEN BLOUNT, INC.,

Plaintiff,

v.

ROBERT H. PETERSON CO.,

Defendant.

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3-01-CV-0127-R

DISMISSAL OF REMAINING PENDING MOTIONS

Consistent with the Order dated November 15, 2004, it is hereby **ORDERED** that any remaining pending motions, which includes Golden Blount, Inc.'s Motion for New Trial filed July 6, 2004, are Dismissed.

IT IS SO ORDERED.

ENTERED: this 15 day of Dec., 2004.

*Jerry Buchmeyer*  
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JERRY BUCHMEYER  
SENIOR UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF TEXAS

ORIGINAL

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

215143  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
**FILED**  
JAN 14 2005  
CLERK, U.S. DISTRICT COURT  
By Deputy

GOLDEN BLOUNT, INC.

Plaintiff,

v.

ROBERT H. PETERSON CO.

Defendant.

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Civil Action No. 3-01CV0127-R

(JURY TRIAL DEMANDED)

NOTICE OF APPEAL

Notice is hereby given that the Robert H. Peterson Co., Defendant in the above-identified action, hereby appeals to the United States Court of Appeals for the Federal Circuit from this Court's December 15, 2004 Final Judgment (attached hereto as Exhibit A).

Defendant Robert H. Peterson Co. also appeals from this Court's November 12, 2004 Order Granting In Part and Denying In Part Plaintiff's September 8, 2004 Application for Attorneys' Fees and September 9, 2004 Application for Costs (attached hereto as Exhibit B) which was timely appealed on December 10, 2005.

Additionally, Defendant Robert H. Peterson Co. appeals from the following Orders which were timely appealed on September 17, 2004:

- 1) Order entered August 18, 2004, vacating Defendant's findings of fact and conclusions of law and adopting Plaintiff's findings of fact and conclusions of law (attached hereto as Exhibit C);

- 2) Order entered September 2, 2004, vacating Defendant Robert H. Peterson's Application for Attorneys' Fees previously adopted on August 11, 2004 (attached hereto as Exhibit D);
- 3) Order entered September 2, 2004, vacating Defendant's Findings of Fact and Conclusions of Law previously adopted on June 22, 2004 and adopting Plaintiff's Findings of Fact and Conclusions of Law submitted on August 31, 2004 (attached hereto as Exhibit E); and
- 4) Findings of Fact and Conclusions of Law dated September 2, 2004 (attached hereto as Exhibit F).

Dated: January 14, 2004

Respectfully submitted,



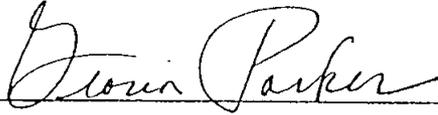
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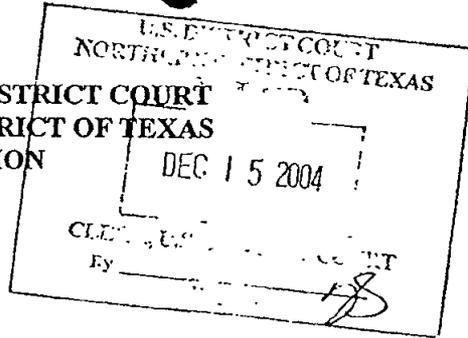
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CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing document was served by first-class mail, postage prepaid, to counsel for Plaintiff, William D. Harris, Jr., Schultz & Associates, P.C., 5400 LBJ Freeway, One Lincoln Center, Suite 525, Dallas, Texas 75240, and Charles Gaines, Hitt Gaines, P.C., 2435 North Central Plaza, Suite 1300, Richardson, Texas 75080, this 14th day of January, 2005.

  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION



GOLDEN BLOUNT, INC.,

Plaintiff,

v.

ROBERT H. PETERSON CO.,

Defendant.

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Civil Action No.

3-01-CV-0127-R

FINAL JUDGMENT

Pursuant to Rule 58 of the Federal Rules of Civil Procedure and the Court's Findings of Fact and Conclusions of Law entered September 2, 2004, it is hereby **ORDERED** that judgment is entered for Plaintiff. It is further **ORDERED** that Plaintiff recover damages, as set forth in the Court's Findings of Fact and Conclusions of Law of September 2, 2004, and reasonable attorneys fees and costs, as set forth in the Court's Order Granting Attorney's Fees and Costs of November 15, 2004. Moreover, it is **ORDERED** that interest shall run on the damages, attorney's fees and costs, as set forth in the Court's Findings of Fact and Conclusions of Law of September 2, 2004. Based upon the fact that infringement causes irreparable harm, it is additionally **ORDERED** that Defendant be permanently enjoined from making, using, offering to sell, selling or importing into the United States the device found to infringe the adjudicated claims of United States Patent No. 5,988,159, or colorable variations thereof.

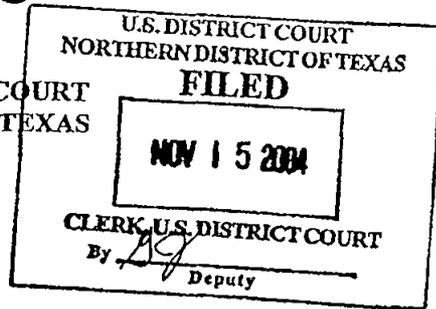
IT IS SO ORDERED.

ENTERED: this 15 day of Dec., 2004.

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JERRY BUCHMEYER  
SENIOR UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF TEXAS

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BF  
ORIGINAL

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION



GOLDEN BLOUNT, INC.,

Plaintiff,

v.

ROBERT H. PETERSON CO.,

Defendant.

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Civil Action No. 3:01-CV-0127-R

ORDER

Pursuant to the District Court's Order of Reference, entered September 16, 2004, Plaintiff Golden Blount, Inc.'s ("Plaintiff") Application for Attorney Fees, filed September 8, 2004, and Plaintiff's Application for Costs, filed September 9, 2004, (collectively "Applications") have been referred to the United States Magistrate Judge for hearing if necessary and determination. Having considered Plaintiff's Applications, Defendant Robert H. Peterson's ("Defendant") Opposition to Plaintiff's Applications for Attorneys' Fees and Costs ("Opposition"), Plaintiff's Reply to Defendant's Opposition to Plaintiff's Applications for Attorney's Fees and Costs and Objection to Defendant's Untimely Filing of Notice of Appeal ("Reply"), and the applicable law, Plaintiff's Applications are **GRANTED in part and DENIED in part.**

Specifically, this Court grants Plaintiff's request for attorney fees in the amount of \$622,015.00 and Plaintiff's request for costs in the amount of \$3,679.83. Plaintiff's request for costs in the amount of \$6,351.21 is denied. On September 2, 2004, the District Court adopted Plaintiff's Findings of Fact and Conclusions of Law ("Findings and Conclusions"), filed August 31, 2004, which awards Plaintiff post judgment interest on attorney fees from August 9, 2002 to April 19, 2004, and resuming from the date the final judgment is signed. Therefore, Plaintiff's

request for post judgment interest on attorney fees from September 2, 2004 is denied, because the District Court has already determined that the post judgment interest should resume from the date the final judgment is signed.

**I. Background<sup>1</sup>**

The District Court issued a judgment favorable to Plaintiff on August 9, 2002. On April 19, 2004, the United States Court of Appeals for the Federal Circuit remanded the case to the District Court to issue more specific findings regarding the patent infringement, willfulness, the exceptional nature of the case, and the damages amount. On May 11, 2004, the District Court ordered the parties to submit proposed findings of fact and conclusions of law. The District Court adopted Defendant's Findings and Conclusions on June 22, 2004 ("June 22, 2004 Order"). Plaintiff filed its Request for Reconsideration of Adoption of Defendant's Findings of Fact and Conclusions of Law, Alternative Motion for New Trial ("Motions for Reconsideration and New Trial") on July 6, 2004. At a hearing on August 18, 2004, the District Court decided to vacate its previous adoption of Defendant's Findings and Conclusions and to adopt Plaintiff's Findings and Conclusions, and ordered Plaintiff to provide the necessary findings and final judgment ("August 18, 2004 Minute Order"). On September 2, 2004, the District Court entered an Order vacating Defendant's Findings and Conclusions and adopting Plaintiff's August 31, 2004 Findings and Conclusions ("September 2, 2004 Order").

In the Findings and Conclusions adopted by the District Court on September 2, 2004, Plaintiff was awarded reasonable attorney fees under 35 U.S.C. § 285, and post judgment

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<sup>1</sup> The background information comes from Defendant Robert H. Peterson Co.'s Opposition to Plaintiff's Applications for Attorney Fees and Costs, filed September 17, 2004, and Plaintiff's Memorandum in Support of Golden Blount, Inc.'s Application for Attorneys' Fees, filed September 8, 2004.

interest, calculated pursuant to 28 U.S.C. § 1961, on attorney fees at the highest rate allowed by the law from August 9, 2004, to April 19, 2004, and resuming again on the date the final judgment is signed. Plaintiff subsequently filed its Applications on September 8, 2004 and on September 9, 2004. Defendant disputes the District Court's jurisdiction to entertain Plaintiff's Applications on the basis that the August 18, 2004 Minute Order constituted the final judgment, and therefore, Plaintiff's Applications, filed September 8, 2004, and September 9, 2004, were under the Federal Rules of Civil Procedures 52(b) and 54(d).

## II. Analysis

### A. Timeliness of Plaintiff's Applications

#### 1. Plaintiff's Motion for New Trial

The District Court has jurisdiction to entertain Plaintiff's Applications, because they were timely filed under the Federal Rules. Defendant asserts that since the District Court's August 18, 2004 Minute Order disposed of Plaintiff's Motions for Reconsideration and a New Trial, under Federal Rule of Civil Procedure ("FRCP") 58(a)(1)(D), a separate document is not required for the entry of judgment. However, a "judgment" [is] defined as 'a decree or any order from which an appeal lies.'" *Freudensprung v. Offshore Tech. Servs.*, 379 F.3d 327, 336 (5th Cir. 2004) (quoting *Theriot v. ASW Well Serv.*, 951 F.2d 84, 88 (5th Cir. 1992)). Further, under Federal Rule of Appellate Procedure ("FRAP") 4(a)(4)(A), "If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the *last such remaining motion*."<sup>2</sup>

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<sup>2</sup> See also FRAP 4(a)(4)(B)(i) ("If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in FRAP 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.").

(emphasis added). The provisions of FRAP 4(a)(4)(A)(iv) and FRAP 4(a)(4)(A)(v) list the identical motions set out in FRCP 58(a)(1)(D).<sup>3</sup> Since an appeal does not lie until the District Court enters an order disposing of both Plaintiff's Request for Reconsideration and Plaintiff's Motion for New Trial, and since there is nothing on the docket disposing of Plaintiff's Motion for a New Trial, there is no judgment. See FED. R. CIV. P. 58(b)(1) (If a separate document is not required under FRCP 58(a)(1), a judgment is deemed entered when it is entered in the civil docket in accordance with FRCP 79(a).).

Even if this Court were to accept Defendant's argument that the District Court adopted Plaintiff's June 10, 2004 Findings and Conclusions at its August 18, 2004 hearing and that the adoption disposed of Plaintiff's Request for Reconsideration of Adoption of Defendant's Findings of Fact and Conclusions of Law when the minute entry of that hearing was entered on the docket, Plaintiff's Alternative Motion for New Trial is still pending. Therefore, Plaintiff's Applications were timely filed, because the time to file motions under FRCP 52(b) and FRCP 54(b) do not start running until a judgment is entered, and the judgment is not entered for Plaintiff's Motions for Reconsideration and New Trial until the District Court enters an order disposing of Plaintiff's Motion for New Trial.

Also, even if the District Court's August 18, 2004 Minute Order could be considered a judgment, Plaintiff's applications would still be timely filed "because the ... order lacked a

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<sup>3</sup> The motions enumerated in FRAP 4(a)(4)(A)(i) through FRAP4(a)(4)(A)(vi) track the motions listed in FRCP 58(a)(1)(A) through FRCP 58(a)(1)(E) as exceptions to the separate document requirement. In fact, the Advisory Committee Notes for 2002 after FRCP 58 specifically state that the amendments to FRCP 58(a)(1) were made in order to address the problems that arise under FRAP 4. See also *Freudensprung*, 379 F.3d at 334 ("Certain Amendments, effective December 1, 2002, were made to resolve uncertainties concerning how Rule 4(a)(7)'s 'definition of when a judgment or order is deemed entered interacts with the requirement in [Rule] 58 that, to be effective, a judgment must be set forth on a separate document.'" (internal quotations omitted) (quoting Notes of Advisory Committee on Rules 2002 Amendments, following Rule 4)).

required separate document, under amended Rules 4 and 58(b), the order was not deemed 'entered' – and the time to file notice of appeal did not begin to run ....” *Freudensprung*, 379 F.3d at 337. Under FRCP 58(b)(2)(B), a judgment is also considered entered, even where it is lacking a required separate document, when 150 days have run from its entry on the docket pursuant to FRCP 79(a). However, this does not apply here because 150 days from August 18, 2004 is January 15, 2005.

**2. Plaintiff’s Request for Reconsideration**

Plaintiff’s Applications were also timely filed because the District Court’s August 18, 2004 Minute Order did not dispose of Plaintiff’s Request for Reconsideration under FRCP 58(a)(1)(D) as a “motion to alter or amend the judgment.” The District Court’s June 22, 2004 adoption of Defendant’s Findings of Fact and Conclusions of Law is not an entered judgment until it is set forth on a separate document, and no such separate document exists. *See* FED. R. Civ. P. 58(b)(2)(A); *see also Freudensprung*, 379 F.3d at 334 (“[A] judgment or order is deemed ‘entered’ within the meaning of Rule 4(a) when it is set forth on a separate document in compliance with Federal Rules of Civil Procedure 58(a)(1) and entered on the district court’s civil docket as required by Federal Rules of Civil Procedure 79(a).”). The Provisions of FRCP 58(b)(2)(B) also do not apply here because 150 days from June 22, 2004 is November 19, 2004.

Further, the District Court’s June 22, 2004 Order cannot be considered “an order disposing of a motion” and hence cannot fit under the exception to the separate document requirement in FRCP 58(A)(1). Defendant’s Findings and Conclusions, adopted in the District

Court's June 22, 2004 Order, do not constitute a motion.<sup>4</sup> "[The document] was not styled as a motion. The writing did not 'state with particularity the grounds' ..." of the motion.<sup>5</sup> Defendant's Opposition ("Def.'s Opp.") at 4 (quoting FED. R. CIV. P. 7(b)(1)). However, even if Defendant's Findings and Conclusions could be considered a motion, they do not fall under the enumerated motions listed in FRCP 58(a)(1)(A) through FRCP 58(a)(1)(E).<sup>6</sup>

### 3. The District Court's Instructions and Adoption

Contrary to Defendant's assertion, the District Court's order at the August 18, 2004 hearing for the Plaintiff "to present [the Court] with the necessary findings and necessary final judgment ..." clearly shows that the District Court did not make a final decision regarding which version of the findings it was going to adopt. (Pl.'s Rep. at 3). Therefore, the District Court's August 18, 2004 Minute Order did not dispose of Plaintiff's motions under FRCP 58(a)(1)(D), making Plaintiff's Applications timely under FRCP 52(b) and FRCP 54(d). The District Court's instruction to Plaintiff was not "language calculated to conclude all claims before the court." (Def.'s Opp. at 5 (citing *Moreau v. Harris County*, 158 F.3d 241, 244 (5th Cir. 1998))). At the August 18, 2004 hearing, the District Court only made the decision to vacate Defendant's

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<sup>4</sup> A motion is defined as a "written or oral application requesting a court to make a specified ruling or order." BLACK'S LAW DICTIONARY 458 (2d pocket ed. 2001). Defendant's proposed findings and conclusions was not an "application requesting" the Court to make a certain ruling or an order.

<sup>5</sup> This was the reasoning put forth by Defendant as to why Plaintiff's August 31, 2004 Findings and Conclusions do not constitute a proper FRCP 52(b) motion. (Def.'s Opp. at 4).

<sup>6</sup> Defendant's Findings and Conclusions do not fit (1) under FRCP 58(a)(1)(A) as a motion for judgment under FRCP 50(b), which discusses renewing a motion for judgment after trial or an alternative motion for a new trial; (2) under FRCP 58(a)(1)(B) as a motion to amend or make additional findings of fact under FRCP 52(b); (3) under FRCP 58(a)(1)(C) as a motion for attorney fees under FRCP 54, which states that claims for attorneys' fees and related non-taxable expenses shall be made by a motion; (4) under FRCP 58(a)(1)(D) as a motion for a new trial or to alter or amend the judgment under FRCP 59; (5) under FRCP 58(a)(1)(E) as a motion for relief under FRCP 60, which states that relief may be granted for mistakes, inadvertence, excusable neglect, newly discovered evidence, etc..

findings and to adopt Plaintiff's instead, and it did not adopt Plaintiff's June 10, 2004 findings as the Defendant asserts. If that was the District Court's intent, it would not have instructed Plaintiff to submit the necessary findings since the June 10, 2004 version had previously been submitted to the District Court. It is apparent from the facts that the District Court's decision regarding which version of the findings and conclusions it wished to adopt was not finalized until September 2, 2004.

Defendant states that the "August 31 [v]ersion [of Plaintiff's findings and conclusions] contains significant additional findings and conclusions which alter and amend those set forth in the June 10 [f]indings." (Def.'s Opp. at 3). The District Court's September 2, 2004 adoption of those findings without any indication that it is vacating the adoption of the June 10, 2004 findings, also makes it clear that the District Court never adopted Plaintiff's June 10, 2004 Findings and Conclusions at its August 18, 2004 hearing. The District Court's September 2, 2004 Order states, "[C]onsistent with its ruling at the conclusion of the Oral Hearing on August 18, 2004, [the District Court] is of the opinion that the Plaintiff's Findings of Fact and Conclusions of law submitted on August 31, 2004, are correct, and they are hereby adopted as the Findings and Conclusions of this Court." (emphasis omitted). This Order clearly shows that the District Court only adopted the August 31, 2004 version of Plaintiff's findings and conclusions. The District Court waited for the version of the findings that Plaintiff submitted pursuant to its request, and after reviewing it and finding it to be satisfactory, the District Court adopted it on September 2, 2004.

**B. Reasonableness of the Plaintiff's Requested Attorney Fees and Costs**

**1. Attorney Fees**

The District Court has already determined that under 35 U.S.C. § 285, this is an exceptional case entitling Plaintiff to attorney fees. Therefore, the issue left before this Court is whether the amount of attorney fees requested by Plaintiff is reasonable. The Federal Circuit's precedent governs the substantive interpretation of 35 U.S.C. § 285. *Pharmacia & Upjohn Co. v. Mylan Pharms., Inc.*, 182 F.3d 1356, 1359 (Fed. Cir. 1999). However, "[t]he methodology of assessing a reasonable award under 35 U.S.C. § 285 is within the discretion of the district court." *Mathis v. Spears*, 857 F.2d 749, 754 (Fed. Cir. 1988) (citing *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1068 (Fed. Cir. 1983)). This Court applies the lodestar analysis. The lodestar amount is determined by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate. *Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 661 (5th Cir. 2002) (quoting *Rutherford v. Harris County, Tex.*, 197 F.3d 173, 192 (5th Cir. 1999)). The factors set out in *Johnson v. Georgia Highway Express, Inc.* are considered in analyzing the reasonableness of the hours expended and the hourly rates requested. 488 F.2d 714, 717-19 (5th Cir. 1974).<sup>7</sup> Further, the work performed by paralegals should be legal work, not clerical tasks, for their fees to be recoverable as attorney fees. *Vela v. City of Houston*, 276 F.3d 659, 681 (5th Cir. 2001) (citing *Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. 1982)).

"Otherwise, paralegal expenses are separately unrecoverable overhead expenses." *Allen*, 665

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<sup>7</sup> The factors set out in *Johnson* are: (1) the time and labor required; (2) the novelty and difficulty of the issues involved; (3) the skill required to litigate the case; (4) the ability of the attorney to accept other work; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances of the case; (8) the amount involved and results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the attorney-client relationship; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19.

F.2d at 697 (citing *Jones v. Armstrong Cork Co.*, 630 F.2d 324, 325 & n.1 (5th Cir. 1980)).

Plaintiff seeks attorney fees for the three law firms that represented it throughout the course of this case. Plaintiff seeks compensation for: 80.15 hours for the services of the Locke, Liddle & Sapp, L.L.P. ("Locke") attorneys who served as counsel before the case was turned over to Hitt Gaines, P.C. ("Hitt"), and Schultz, & Associates, P.C. ("Schultz"); 66.5 hours for the services of the Hitt's paralegals and 2,185.1 hours for the services of the Hitt attorneys; and 171.7 hours for the services of the Schultz attorneys. Plaintiff seeks compensation for its counsel at hourly rates ranging from \$135.00 to \$375.00, and for Hitt's paralegals at hourly rates ranging from \$65.00 to \$90.00.<sup>8</sup>

This Court has considered the *Johnson* factors, as well as Plaintiff's Application for Attorney Fees, Memorandum in Support of Plaintiff's Application for Attorney Fees, and Appendix in Support of Plaintiff's Application for Attorney Fees. The number of hours that Plaintiff seeks compensation for are reasonable for this case, and Plaintiff's requested hourly rates are reasonable for this case in this community. Plaintiff has also sufficiently shown that the work done by Hitt's paralegals is "work traditionally done by an attorney," and thus the paralegals' hours are recoverable as the prevailing party's attorney fees. *Allen*, 665 F.2d 689 at 697. Defendant has not contested the reasonableness of the number of hours or the hourly rates Plaintiff is requesting for its counsel and paralegals. Taking into consideration Plaintiff's requested hourly rates and the number of hours for which Plaintiff seeks compensation, Plaintiff

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<sup>8</sup> On page 6 of Plaintiff's Application for Attorney fees, and on page A-112 of the Appendix in Support of Plaintiff's Application for Attorney Fees ("Attorney Fees Appendix"), attorney Charles Phipps' billing rate is listed as \$130.00. However, in the Appendix at page A-87, his billing rate is listed as \$230.00. It appears from Locke's statements itemizing its services that Charles Phipps' billing rate is \$230.00. Therefore, this Court assessed the reasonableness of Plaintiff's request for attorney fees for the services rendered by Charles Phipps at the hourly rate of \$230.00.

is awarded attorney fees at the following rates for the following number of hours: \$249.39 per hour for 2,180.04 hours for the services rendered by Hitt; \$71.57 per hour for 66.34 hours for the services rendered by Hitt's paralegals; \$318.11 per hour for 171.7 hours for the services rendered by Schultz; and \$236.65 per hour for 80.15 hours for the service rendered by Locke. In sum, Plaintiff is awarded a lodestar amount of \$622,015.00.<sup>9</sup>

Once the lodestar has been determined, it may be adjusted upward or downward, if the *Johnson* factors, not "already considered in calculating the lodestar," warrant such an adjustment. *Shipes v. Trinity Indus.*, 987 F.2d 311, 320 (5th Cir. 1993) (citing *Von Clark v. Butler*, 916 F.2d 255, 258 (5th Cir. 1980)). However, the lodestar is presumptively reasonable and should be modified only in exceptional cases. *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993), *on remand*, 852 F. Supp. 542 (S.D. Miss. 1994), *aff'd*, 49 F.3d 728 (5th Cir. 1995) (citing *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992), *on remand*, 976 F.2d 801 (2d Cir. 1991)). Plaintiff does not seek a fee enhancement and Defendant does not dispute the reasonableness of the amount of fees requested by Plaintiff. Therefore, this Court determines that the lodestar amount should not be adjusted.

## 2. Costs

Plaintiff seeks \$10,031.04 in costs. Costs other than attorney fees may be awarded to the prevailing party under FRCP 54(d)(1). *Gaddis v. United States*, 381 F.3d 444, 452 (5th Cir. 2004) (quoting *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 891 (5th Cir. 1993)). "28 U.S.C. § 1920 defines recoverable costs, and a district court may decline to award the costs listed in the

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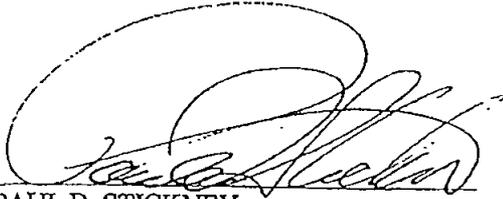
<sup>9</sup> See Plaintiff's Attorney Fees Appendix for the specific hourly rates and the number of hours requested.

statute but may not award costs omitted from the list.”<sup>10</sup> *Id.* Although Defendant has not disputed the reasonableness of Plaintiff’s requested costs, upon reviewed of Plaintiff’s Bill of Costs, this Court determines that Plaintiff should only be awarded \$3,679.83 in costs. It is not apparent that the other costs requested, in the amount of \$6,351.21 for postage, facsimile, courier services, on-line search expenses, trial supplies, obtaining patents, taxi and airfare for a deposition, parking for and in preparation of trial fit within 28 U.S.C. § 1920 as recoverable costs. *See Coats*, 5 F.3d at 891 (Travel expenses, costs incurred for “blow ups” used at trial, and video technician fees for a deposition are not recoverable as costs, because they are not expenses included in 28 U.S.C. § 1920.).

### III. Conclusion

Based on the above, Plaintiff’s Application for Attorneys’ Fees and Plaintiff’s Application for Costs are **GRANTED in part and DENIED in part**. Defendant is ordered to pay Plaintiff the above mentioned amounts within 30 days from the District Court’s entry of the final judgment.

SO ORDERED. November 12, 2004.

  
PAUL D. STICKNEY  
UNITED STATES MAGISTRATE JUDGE

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<sup>10</sup> The costs listed in 28 U.S.C. § 1920 are: (1) fees of the clerk and marshal; (2) fees of the court reporter for stenographic transcript necessarily obtained for use in the case; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and copies of papers necessarily obtained for use in the case; (5) docket fees under 28 U.S.C. § 1923; (6) compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under 28 U.S.C. § 1828.

**MINUTE ORDER**

**UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS**

PLACE: Dallas                      JUDGE: Jerry Buchmeyer                      DATE: August 18, 2004

REPORTER: Joe Belton                      COURTROOM DEPUTY: Tannica Stewart

INTERPRETER:                      CSO: Present                      COURT TIME: 2.0

**CIVIL ACTION**

<u>TIME</u>	<u>CASE NUMBER &amp; STYLE</u>	<u>TYPE OF HEARING</u>	<u>ATTYS PRESENT</u>
10:00 a.m.	3:01-CV-127-R Golden Blount, v. Peterson	Motion Hearing	P - Charles Gaines D - Leland Hutchinson

Dft's findings of fact and conclusion of law  
VACATED....Plaintiff's findings of fact and  
conclusions of law adopted.

11:40 a.m.                      Court adjourned

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
**FILED**  
AUG 18 2004  
CLERK, U.S. DISTRICT COURT  
By \_\_\_\_\_ Deputy *JS*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
SEP - 2 2004  
CLERK, U.S. DISTRICT COURT  
By Deputy *[Signature]*

GOLDEN BLOUNT, INC.,

Plaintiff,

v.

ROBERT H. PETERSON CO.,

Defendant.

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Civil Action No.

3-01CV0127-R

ORDER

This Court, consistent with its ruling at the conclusion of the Oral Hearing on August 18, 2004, hereby VACATES Defendant Robert H. Peterson's Application for Attorneys' Fees previously adopted on August 11, 2004.

IT IS SO ORDERED.

ENTERED: this 2 day of Sept., 2004.

*[Signature]*  
JERRY BUCHMEYER  
SENIOR UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
SEP - 2 2004  
CLERK, U.S. DISTRICT COURT  
By \_\_\_\_\_ Deputy

GOLDEN BLOUNT, INC.,  
Plaintiff,

v.

ROBERT H. PETERSON CO.,  
Defendant.

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Civil Action No.

3-01CV0127-R

ORDER

This Court, consistent with its ruling at the conclusion of the Oral Hearing on August 18, 2004, hereby VACATES Defendant's Findings of Fact and Conclusions of Law previously adopted on June 22, 2004. The Court, also consistent with its ruling at the conclusion of the Oral Hearing on August 18, 2004, is of the opinion that the Plaintiff's Findings of Fact and Conclusions of Law submitted on August 31, 2004, are correct, and they are hereby **ADOPTED** as the Findings and Conclusions of this Court.

**IT IS SO ORDERED.**

ENTERED: this 2 day of Sept., 2004.

  
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JERRY BUCHMEYER  
SENIOR UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
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CLERK, U.S. DISTRICT COURT  
By \_\_\_\_\_ Deputy

GOLDEN BLOUNT, INC.,

Plaintiff,

v.

ROBERT H. PETERSON CO.,

Defendant.

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Civil Action No.

3-01CV0127-R

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has conducted a bench trial on plaintiff Golden Blount Inc.'s claims against defendant Robert H. Peterson for a finding of infringement of U.S. Patent No. 5,988,159 and permanent injunction, and on Peterson's counterclaims of invalidity and non-infringement. In accordance with FED. R. CIV. P. 52(a) and consistent with the Court of Appeals for the Federal Circuit's Opinion<sup>1</sup> decided April 19, 2004, the Court enters the following findings of fact and conclusions of law.<sup>2</sup>

**FINDINGS OF FACT**

1. This is an action for patent infringement. The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1338(a). The Court has personal jurisdiction over the parties. Venue in this judicial district is proper under 28 U.S.C. § 1391.

<sup>1</sup> While the Appellate Court held that the patent was not invalid, and that the defense of unenforceability was waived, this Court includes general reference to these elements for completeness. *Golden Blount, Inc. v. Robert H. Peterson Co.*, 365 F.3d 1054 (Fed. Cir. 2004).

<sup>2</sup> This order contains both findings of fact ("Findings") and conclusions of law ("Conclusions"). To the extent that any Findings may be deemed conclusions of law, they shall also be considered Conclusions. To the extent that any Conclusions may be deemed findings of fact, they shall also be considered Findings. See *Miller v. Fenton*, 474 U.S. 104, 113-14, 88 L. Ed. 2d 405, 106 S. Ct. 445 (1985).

2. Plaintiff Golden Blount, Inc. ("Blount") is a United States corporation having a principal place of business in Addison, Texas.

3. Defendant Robert H. Peterson Co. ("Peterson") is a United States corporation having a principal place of business in City of Industry, California.

4. Blount is the owner by assignment of U.S. Patent No. 5,988,159 ("the '159 patent"), entitled "Gas-Fired Artificial Logs and Coals-Burner Assembly," which issued on November 23, 1999. The '159 patent expires on November 23, 2016.

5. Blount filed this suit for infringement of the '159 patent under 35 U.S.C. §§ 271(a) thru 271 (c) on January 18, 2001.

6. On March 19, 2001, Peterson filed its Answer and Counterclaim. Peterson denied infringement and asserted counterclaims for noninfringement and invalidity of the '159 patent.

7. A bench trial, by agreement of the parties, commenced on July 29, 2002, and ended on July 31, 2002.

8. Claims 1, 2, 5, 7-9, 11-13 and 15-17 are at issue in this case. Claims 1 and 17 are independent claims. All the other claims at issue are dependent on claim 1.

9. Claim 1 of the '159 patent reads as follows:

A gas-fired artificial logs and coals-burner assembly for fireplace comprising:  
an elongated primary burner tube including a plurality of gas discharge ports;  
a secondary coals burner elongated tube positioned forwardly of the primary burner tube;

a support means for holding the elongated primary burner tube in a raised level relative to the forwardly position secondary coals burner elongated tube;

the secondary coals burner elongated tube including a plurality of gas discharge ports;

the elongated primary burner tube and the secondary coals burner elongated tube communicating through tubular connection means wherein the gas flow to the secondary elongated coals burner tube is fed through the primary burner tube and the tubular connection means;

a valve for adjusting gas flow to the secondary coals burner elongated tube positioned in the tubular gas connection means; and

the primary burner tube being in communication with a gas source with a gas flow control means therein for controlling gas flow into said primary burner tube.

10. Claim 2 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the support means for the primary burner tube is comprised of an open frame pan for supporting the primary burner tube in an elevated position relative to the fireplace floor.

11. Claim 5 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the secondary coals burner elongated tube is substantially parallel to the primary burner tube and has a smaller inside diameter than the primary burner tube with the valve adjusting gas flow for coals burn and forwarding heat radiation from the fireplace.

12. Claim 7 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the elongated primary burner tube and the secondary coals burner elongated tube are spaced apart on different planes at from about four to about eight inches.

13. Claim 8 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the secondary coals burner elongated tube is of a smaller diameter than the primary burner tube which allows for a lower profile of coals and sand coverage.

14. Claim 9 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the secondary coals burner elongated tube is adjustable in height relative to the floor of the fireplace and the elevated primary burner tube.

15. Claim 11 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the primary and secondary burner tubes have apertures of from about 1/32 inch to about 1/8 inch.

16. Claim 12 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the gas flow adjustment valve has a removable handle, the gas flow adjustment allowing a variety of settings from full closed to full open.

17. Claim 13 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the connection means is comprised of a connector attached to the terminal end of the primary burner tube at a first end of a connector and attached to the secondary coals burner elongated tube to a connector second end with the valve interposed between the primary burner tube and the secondary burner tube.

18. Claim 15 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the open frame pan and primary elongated burner tube is positioned under an artificial logs and grate support means.

19. Claim 16 of the '159 patent reads as follows:

The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the primary elongated burner tube is covered with sand and the secondary

elongated burner tube is covered with sand, mica, and fibrous materials which simulate coals and ember burn.

20. Claim 17 of the '159 patent reads as follows:

A gas-fired artificial coals- and embers-burner apparatus suitable for attaching to a gas-fired primary artificial log burner tube said primary artificial log burner tube having a terminal end comprising:

a secondary coals burning elongated tube;

a connector means for connecting said terminal end in communication with the secondary burner tube, the secondary burner tube positioned substantially parallel, forward and below the primary burner tube, the connector means having interposed between the primary and secondary burner tubes a gas flow adjustment valve, the primary and secondary burner tubes having a plurality of gas discharge ports, the secondary burner tube being in gas flow communication with the primary burner tube being the connection means, a gas distribution ports of the secondary burner tube directed away from the fireplace opening.

21. At the time the patent issued, Blount's commercial structure covered by the '159 patent had been marketed for approximately six years. (Trial Transcript, hereafter referred to as "Tr.", vol. 1, pg. 158). The invention covered by the '159 patent is a simple yet very useful device that is to be used in artificial gas fireplaces. The general idea is that the device has two tubes, with the main or primary burner tube being higher than the ember burner tube to allow for artificial embers and sand to be fanned out over the tubes with a decreasing depth of materials to simulate a natural angle of repose of coals in a real fireplace. A secondary valve controls the flow of gas from the primary burner tube to the ember burner to allow for an adjustment of flame from the ember burner. Thus, with the presence of the ember burner forward the primary burner tube, more flame can be provided out front of the gas logs to better simulate a real fireplace and thereby make the artificial fireplace more aesthetically pleasing. Evidence presented at trial establishes that Peterson's accused device fulfills exactly the same purpose. (Tr. vol. 2, pg 175; Defendant's Ex. No. D-33).

22. Blount's sales of its commercial structure grew significantly during the time spanning the filing of the application that resulted in the '159 patent and the issuance of the '159 patent. (Tr., vol. 1, pg. 36-37).

23. In late 1996 or early 1997, Peterson began manufacturing, advertising and selling a device that was strikingly similar to, if not a virtual copy of, Blount's commercial structure. (Tr., vol. 2, pg. 76 and pg. 172).

24. Blount's '159 patent issued on November 23, 1999. (Plaintiff's Ex. No. 1).

25. Blount notified Peterson of the existence of the '159 patent and Peterson's infringing activities on December 16, 1999, using a certified letter postmarked December 10, 1999, from Mr. Dan Tucker (attorney for Blount) to Peterson's president, Mr. Leslie Bortz. (Plaintiff's Ex. No. 10).

26. This first certified letter included a copy of the '159 patent, and informed Peterson that Blount was prepared to take whatever steps were reasonable and necessary to prevent infringement. Blount requested a response regarding this matter from Peterson by January 14, 2000. (Plaintiff's Ex. No. 10).

27. On December 17, 1999, Mr. Tod Corrin (Peterson's Vice President) forwarded the December 10, 1999, certified letter onto Peterson's patent counsel, Mr. William McLaughlin. Mr. Corrin wrote, in a cover letter included with the copy of the first certified letter, "[e]nclosed is a *patent infringement* letter we received from Golden Blount's Attorney." (Plaintiff's Ex. No. 17, emphasis added). Given the letter from Blount's attorney and this acknowledgment by Mr. Corrin, this Court finds that Peterson had knowledge of its infringement of the '159 patent as of December 16, 1999.

28. On December 30, 1999, Peterson responded to Blount's letter of December 10, 1999, explaining that Peterson had forwarded the December 10, 1999, letter to its attorneys and that Peterson would get back with Blount as soon as possible. Given the December Holidays, as well as the New Year, Peterson informed Blount that Blount's January 14, 2000, response date was unreasonable. (Plaintiff's Ex. No. 11).

29. After receiving no response from Peterson for more than four months, Blount sent a second certified letter to Peterson on May 3, 2000, again informing Peterson of its patent infringement. The May 3, 2000, letter advised Peterson that Blount "will take [the] necessary steps to stop any such *infringement*." (Plaintiff's Ex. No. 12, emphasis added).

30. Peterson responded to the May 3, 2000, letter on May 16, 2000, that it disagreed with Blount's assertion that Peterson was marketing a device that was substantially similar to the burner assembly claimed in the '159 patent. Peterson further asked that Blount explain to it, in detail, the basis upon which Blount believed that Peterson was infringing the patent. (Plaintiff's Ex. No. 13).

This Court finds that Peterson's disagreement lacks any serious credibility, since a simple comparison of the device as illustrated in the '159 patent with Peterson's product would have revealed to any reasonable person that infringement was highly likely. Moreover, the record before this Court reveals that Peterson did not have any documents before it or its attorney at this time that provides a reasonable basis for this statement. Even though Blount did not give any explanation to Peterson, this did not relieve Peterson of its obligation to investigate in good faith whether it was in fact infringing the '159 patent. This Court further finds that the May 3, 2000, letter was written simply for the purpose of delay, or even with the hope that the infringement matter would go away. This Court, therefore, concludes that the request was not genuine.

31. On January 18, 2001, over a year after Peterson received its first notice of infringement letter, Blount filed suit. (Plaintiff's Ex. No. 14). Blount's initial notice letter of December 10, 1999, met the notice requirements under 35 U.S.C. § 287(a), and therefore, Peterson's additional information request did not relieve Peterson of its obligation to determine if it was infringing the '159 patent.

32. Blount sent a final letter on January 19, 2001, to Peterson advising Peterson that suit was brought in view of its failure to respond or indicate in any manner its intentions with respect to its infringing product. (Plaintiff's Ex. No. 14).

33. Peterson made no efforts to cease its infringing activities either in the time period spanning the December 10, 1999, letter and the January 19, 2001, letter, or for that matter, up and until the commencement of this trial. (Plaintiff's Ex. No. 17 & Updated Sales Figures provided by Peterson in response to this Court's request).

34. During the period between December 16, 1999, and September 19, 2002, Peterson sold 3,723 ember flame burner units ("ember burners"). (Tr., vol. 2, pg. 181 and Peterson Company's Objection to Golden Blount's Motion for Updated Damages filed on September 18, 2002).

35. Peterson's ember burner is intended to be attached to its G-4 series burner system or G-5 series burner system. (Joint Pretrial Order--Stipulations, pg. 6). In addition to selling the ember

burner, Peterson also sells log sets that can be used with the ember burner and often uses the ember burner to entice their customers to come back in and buy new log sets. (Tr. vol. 2, pg 178).

36. The G-4 and G-5 series burner systems are substantially identical except that Peterson pre-assembles the G-5 burner system according to certain Canadian Gas Association specifications. (Tr., vol. 2, pg. 179).

37. At least 10 of the 3,723 Ember burners sold by Peterson were included on the pre-assembled G-5 series burner systems. (Oct. 5, 2001, deposition of Mr. Leslie Bortz, pg. 154-55).

38. At trial, Blount introduced Plaintiff's Exhibit No. 4A, which is one of Peterson's manufactured products including a Peterson G-4 burner pan with Peterson's ember burner attached to it. Blount properly laid foundation for this Plaintiff's Exhibit No. 4A through the testimony of one of Peterson's own witnesses, Mr. Jankowski, who stated that he recognized Plaintiff's Exhibit No. 4A as Peterson's products. (Tr. vol. 2, pg. 145). Also, Mr. Blount, whose business competes with Peterson's, identified Plaintiff's Exhibit No. 4A as being Peterson's competing product. (Tr. vol. 1, pg. 144). This Court also finds that foundation for this device is further established because the Court finds it to be virtually identical to the picture on page 3 of Peterson's own general installation instructions (introduced at trial by Peterson as Defendant's Ex. No. D-34), except for the valve knob, which is not at issue.

#### LITERAL INFRINGEMENT-DIRECT

39. The construction of the claims appears under paragraphs 120 thru 123 of the Conclusions of Law section. The determination of infringement based on the construed claims is factual and is therefore organized here under the Findings of Fact.

40. The analysis with respect to the literal infringement of claim 1 is as follows:

The first element of claim 1 reads: "an elongated primary burner tube including a plurality of gas discharge ports." Based upon the totality of the evidence, including unrebutted testimony of Mr. Golden Blount and this Court's own observations of the accused device, it is this Court's finding that the primary burner tube is the fundamental burner tube used in a majority of all gas operated fireplaces. Similarly, the plurality of gas discharge ports allow the flammable gas to escape from the primary burner tube and be ignited to provide a flame. Blount presented the unrebutted oral testimony of Mr. Blount, who using an infringement chart (Plaintiff's Ex. No. 9) as a guide, testified

that Peterson's manufactured products include a primary burner tube having gas discharge ports therein. (Tr., vol. 1, pg. 45-50). In addition to this un rebutted testimony, this Court had the opportunity to closely observe an assembled version of Peterson's manufactured product<sup>3</sup>, wherein this Court observed Peterson's manufactured product having the primary burner tube including two or more gas discharge ports. (Tr., vol. 2, pg. 28). Peterson even admitted and stipulated to the presence of this element in its device. (Tr., vol. 2, pg. 173; Joint Pretrial Order--Stipulations, pg. 6). Further, Peterson never presented any evidence that its manufactured products did not contain the aforementioned claimed element. Thus, Peterson's manufactured products meet the first limitation of claim 1, which reads: "an elongated primary burner tube including a plurality of gas discharge ports."

41. The second element of claim 1 reads: "a secondary coals burner elongated tube positioned forwardly of the primary burner tube." Given the claim interpretation as set forth by the Court of Appeals for the Federal Circuit and based upon the totality of the evidence, the secondary coals burner elongated tube is positioned toward the opening of the fireplace, at least as compared to the primary burner tube, and is designed to provide a realistic flame, likened to a flame that might emanate from burning coals. Blount again presented evidence in the form of oral testimony of Mr. Blount, that Peterson's manufactured products include a secondary coals burner elongated tube, and that it is positioned forwardly of the primary burner tube. (Tr., vol. 1, pg. 45-50). Based on this Court's close observation of Peterson's manufactured product<sup>4</sup>, this Court finds that Peterson's manufactured products contain the claimed secondary coals burner elongated tube, which in Plaintiff's Exhibit No. 4A is Peterson's Ember Flame Booster (ember burner), and that it was positioned forwardly the primary burner tube. (Tr., vol. 2, pg. 28). Peterson even admitted and stipulated to the presence of this element in its device. (Tr., vol. 2, pg. 173; Joint Pretrial Order--Stipulations, pg. 6). Further, Peterson never presented evidence that conclusively established that its manufactured products did not contain the aforementioned claimed element. Thus, Peterson's manufactured products meet the second limitation of claim 1, which reads: "a secondary coals burner elongated tube positioned forwardly of the primary burner tube."

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<sup>3</sup> See Finding of Fact No. 38, discussed above.

<sup>4</sup> See Finding of Fact No. 38, discussed above.

42. The third element of claim 1 reads: "a support means for holding the elongated primary burner tube in a raised level relative to the forwardly position[ed] secondary coals burner elongated tube." The previous two paragraphs already demonstrate that Peterson's manufactured products include both the elongated primary burner tube and the forwardly positioned secondary coals burner elongated tube. The only additional limitation added by this element is that a support means holds the elongated primary burner tube in a raised level relative to the secondary coals burner elongated tube. Peterson's manufactured products include a support means that holds the primary burner tube. Actually, Peterson's support means, which is an industry standard pan, is substantially identical if not completely identical, in shape and function to the support means illustrated in the '159 patent. (Tr., vol. 1, pg. 47). The question for this Court to rule on is whether Peterson's support means holds Peterson's elongated primary burner tube in a raised level relative to its secondary coals burner elongated tube. As affirmed by the Court of Appeal for the Federal Circuit, this Court construes the term "raised level" to mean that the top of the primary burner tube is at a raised level with respect to the top of the secondary burner tube. Blount offered evidence at trial that the top of Peterson's primary burner tube was higher than the top of Peterson's ember burner tube, by demonstrating before this Court, using a carpenter's level laid across the tops of the tubes of Plaintiff's Exhibit No. 4A, that Peterson's primary burner tube was raised with respect to its secondary burner. (Tr., vol. 2, pg. 28). Even Peterson's own patent attorney, Mr. McLaughlin, admitted during the demonstration that "assuming the table is level, the top of the front burner is below the top of the rear burner." (Tr., vol. 2, pg. 29). Also, Peterson's executive Mr. Bortz admitted that the top of the ember burner was lower than the top of the primary burner. (Tr., vol. 2, pg. 42). Similarly, Mr. Corrin testified that the tube is below the top of the main burner tube. (Tr., vol. 2, pg. 173 and Defendant's Ex. No. 8). The above evidence was, for the most part, unrebutted because Peterson based the majority of its case in chief on the argument that the relative height of the primary burner tube with respect to the secondary coals burner elongated tube should be measured from the bottoms of the respective tubes, or the ports. This Court further observed a general set of instructions included within the box of each ember burner, (Defendant's Ex. No. D-34 at pg. 3), which instructs the person assembling the device to tighten the Ember Flame Booster (ember burner) so that the valve faces forward and flush with the burner pan. According to the testimony of Mr. Bortz, the normal configuration is to have the valve resting on the fireplace floor because it serves as a support

for the ember burner. (Leslie Bortz Deposition, vol. 1, pg. 70-71). At trial, and as observed by this Court, when the valve was resting on the table flush with the pan, the top of the primary burner was above the top of the ember burner. Additionally, Peterson actually offered to this Court, (Defendant's Ex. No. D-30), which it stated was provided to customers and installers to illustrate how to properly install the assembly. (Tr. vol. 2, pg. 183). While Defendant's Exhibit No. D-30 was offered in an attempt to establish non-infringement based upon Peterson's asserted bottoms test that it was proposing, the instructions clearly illustrate that Peterson's preferred installation has the tops of the primary burner tube being in a raised level with respect to the tops of the secondary coals burner elongated tube. Thus, given the above discussed interpretation, and in view of the evidence presented, Peterson's manufactured products meet the third limitation of claim 1, which reads: "a support means for holding the elongated primary burner tube in a raised level relative to the forwardly position[ed] secondary coals burner elongated tube."

43. The fourth element of claim 1 reads: "the secondary coals burner elongated tube including a plurality of gas discharge ports." Blount again presented oral testimony of Mr. Blount that the secondary coals burner elongated tube of Peterson's manufactured products include a plurality of gas discharge ports. (Tr., vol. 1, pg. 45-50). Further, this Court's close observation of Peterson's manufactured product<sup>5</sup> established that Peterson's secondary coals burner elongated tube includes a plurality of gas discharge ports. (Tr., vol. 2, pg. 28). Peterson also admitted to the presence of a plurality of gas discharge ports or jets, (Tr., vol. 2, pg. 174), and mentions this claimed element in its installation instructions. (Defendant's Ex. No. D-34). Further, Peterson never presented any evidence that its manufactured products did not contain the aforementioned claimed element that successfully rebuts Blount's evidence on this point. Thus, Peterson's manufactured products meet the fourth limitation of claim 1, which reads: "the secondary coals burner elongated tube including a plurality of gas discharge ports."

44. The fifth element of claim 1 reads: "the elongated primary burner tube and the secondary coals burner elongated tube communicating through tubular connection means wherein the gas flow to the secondary elongated coals burner tube is fed through the primary burner tube and the tubular connection means." Blount presented the oral testimony of Mr. Blount that Peterson's manufactured

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<sup>5</sup> See Finding of Fact No. 38, discussed above.

products include the tubular connection means and that the gas flow to the secondary elongated coals burner tube is fed through the primary burner tube and tubular connection means. (Tr., vol. 1, pg. 45-50). Additionally, this Court physically observed this claimed element in Peterson's manufactured product<sup>4</sup>, (Tr., vol. 2, pg. 28), and again notes that the illustration in Defendant's Exhibit No. D-34 shows this tubular connection means. Moreover, Peterson never presented any evidence that its manufactured products did not contain the aforementioned claimed element. Thus, Peterson's manufactured products meet the fifth limitation of claim 1, which reads: "the elongated primary burner tube and the secondary coals burner elongated tube communicating through tubular connection means wherein the gas flow to the secondary elongated coals burner tube is fed through the primary burner tube and the tubular connection means."

45. The sixth element of claim 1 reads: "a valve for adjusting gas flow to the secondary coals burner elongated tube positioned in the tubular gas connection means." The evidence as established by Mr. Blount's testimony, Peterson's general instructions (Defendant's Ex. No. D-34), and this Court's own inspection of Plaintiff's Exhibit No. 4A, confirms the presence of the valve. (Tr., vol. 1, pg. 45-50 and vol. 2, pg. 28). Peterson even admitted and stipulated to the presence of this element in its device. (Tr., vol. 2, pg. 173; Joint Pretrial Order--Stipulations, pg. 6). Further, Peterson never presented any evidence that its manufactured products did not contain the aforementioned claimed element. Thus, Peterson's manufactured products meet the sixth limitation of claim 1, which reads: "a valve for adjusting gas flow to the secondary coals burner elongated tube positioned in the tubular gas connection means."

46. The seventh element of claim 1 reads: "the primary burner tube being in communication with a gas source with a gas flow control means therein for controlling gas flow into said primary burner tube." Blount again presented the oral testimony of Mr. Blount that the primary burner tube of Peterson's manufactured products would ultimately be coupled to a gas source with a gas flow control means therein for controlling gas flow into the primary burner tube. (Tr., vol. 1, pg. 45-50). Furthermore, the parties stipulated prior to the commencement of the trial that "Robert H. Peterson Co.'s ember burner is intended to be attached to its G-4 series burner system or G-5 series burner system and the combined unit comprises a primary burner pipe, an ember pan that supports the

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<sup>4</sup> See Finding of Fact No. 38, discussed above.

primary burner pipe, a secondary burner tube and a valve that controls a flow of gas between the primary burner pipe and the secondary burner tube, and that an end user *would* connect the primary burner pipe to a gas source having a valve associated therewith." (Joint Pretrial Order--Stipulations, pg. 6). Thus, Peterson's manufactured products would ultimately meet the seventh limitation of claim 1, which reads: "the primary burner tube being in communication with a gas source with a gas flow control means therein for controlling gas flow into said primary burner tube."

47. This Court finds that the above evidence is substantial and it clearly establishes that Peterson's accused device contains each and every element of claim 1 of the '159 patent.

48. The evidence presented at trial establishes that Peterson provided its customers with two sets of installation instructions. One set was a general set of instructions, (Defendant's Ex. No. D-34 at pg. 3), which instructs the person assembling the device to tighten the Ember Flame Booster (ember burner) so that the valve faces forward and flush with the burner pan. According to the testimony of Mr. Bortz, the normal configuration is to have the valve resting on the fireplace floor because it serves as a support for the ember burner. (Leslie Bortz Deposition, vol. 1, pg. 70-71). At trial, and as observed by this Court, when the valve is resting on the table flush with the pan, the top of the primary burner is above the top of the ember burner. The other set of instructions, (Defendant's Ex. No. D-30), was very specific in the way in which the ember burner was to be oriented with respect to the primary burner. When the device is installed pursuant to these instructions, Defendant's Exhibit No. D-30 clearly shows that the top of the primary burner is above the top of the ember burner. Thus, both of these instructions consistently show that when the G-4 or the G-5 and the ember burner of Peterson's accused device are installed pursuant to these instructions, it would result in an infringing configuration.

49. Although Peterson did not make this argument at any time during trial, Peterson asserts on remand that Blount has not established direct infringement by it or its customers because Blount never directly proved how the devices were actually assembled. Peterson, instead relied on its case-in-chief that it did not infringe because of its urged claim construction and that the '159 patent was invalid, both of which this Court and the Federal Circuit rejected. Moreover, Peterson's position is against the weight of the evidence, both direct and circumstantial, in this case. This Court finds that the evidence clearly supports a case of direct infringement, not only by Peterson, but by its customers as well. Case law holds that when instructions are provided with an infringing device, it can be

circumstantially inferred that the customer follows those instructions with respect to the accused device. Thus, it is reasonable for this Court to conclude that both Peterson and its customers would have assembled the devices in the way set forth in both sets of Peterson's assembly instructions. Peterson's direct infringement of claim 1 is established by the testimony of Messrs. Bortz and Corrin, both corporate officers of Peterson, who testified that Peterson assembled and operated the infringing device for distributors so they had the opportunity to see how the item worked. (Tr., vol. 2, pg. 65-66 and 199). In addition, Peterson itself assembled and sold at least 10 G-5 devices with a preassembled ember burner, which are the same as the G-4 except for being preassembled to comply with ANSI regulations. Mr. Bortz testified that he was sure that the ember burner was used with the G-5 because Peterson preassembled it and put it together, presumably in accordance with its own instructions. (Leslie Bortz Deposition, vol. 1, pg. 36). There has been no reasons given to this Court why Peterson didn't assemble these devices in accordance with its own instructions. Thus, the record establishes direct infringement on the part of Peterson itself.

50. Direct infringement by the ultimate purchasers of claim 1 is established by the evidence that proves that Peterson supplied all the required elements of claims 1, 15 and 17 of the '159 patent, as well as installation instructions, (Defendant's Ex. Nos. D-34 & D-30; Tr. vol. 2, pg. 177, 183), to its ultimate purchasers. It is reasonable to conclude that these instructions were used by Peterson's ultimate customers to assemble the ember burner, its associated components, and connect it to a gas source as stipulated by the parties. (Tr., vol. 1, pg. 45-50). These facts provide this Court with both direct and circumstantial evidence to find that direct infringement of claim 1 did indeed occur by Peterson's ultimate consumers.

51. Therefore, Blount has clearly established direct infringement on the part of Peterson and the ultimate purchaser of claim 1 of the '159 patent.

52. Dependent claim 15 includes all of the elements of independent claim 1 plus the element that "the open frame pan and primary elongated burner tube is positioned under an artificial logs and grate support means." Literal infringement of dependent claim 15 is particularly important because claim 15 includes the artificial logs and the grate support means. As set forth above, Peterson also manufactures and sells logs and other accessory items that can be sold with its G-4 or G-5 and the ember burner, and in fact uses the ember burner to entice customers to come back and buy new logs. (Tr., vol. 2, pg 178).

53. Sufficient evidence exists in the record to establish that Peterson's burner will ultimately be positioned under an artificial logs and grate support means. Therefore, Blount has clearly established direct infringement on the part of Peterson and the ultimate purchaser of claim 15 of the '159 patent.

54. This Court further concludes that in addition to directly infringing independent claims 1 & 15 of the '159 patent, Peterson and the ultimate purchasers directly infringe independent claim 17 of the '159 patent.

55. With the exception of a few additional elements included in independent claim 17 not included in independent claim 1, and a few elements included within independent claim 1 that are not included within independent claim 17, claims 1 and 17 are substantially similar.

56. Independent claim 17 does not include the claim limitation of independent claim 1 that the primary burner is in communication with a gas flow control means. Thus, this element need not be found in Peterson's manufactured products to find direct infringement by Peterson of independent claim 17.

57. The first element of independent claim 17 recites: "a secondary coals burning elongated tube," and is similar to the fourth element of independent claim 1. Accordingly, the discussion above with respect to the fourth element of independent claim 1 may be applied to the first element of independent claim 17. Thus, Peterson's manufactured products will ultimately meet the first limitation of claim 17, which reads: "a secondary coals burning elongated tube."

58. The second element of independent claim 17 recites: "a connector means for connecting said terminal end in communication with the secondary burner tube, the secondary burner tube positioned substantially parallel, forward and below the primary burner tube, the connector means having interposed between the primary and secondary burner tubes a gas flow adjustment valve, the primary and secondary burner tubes having a plurality of gas discharge ports, the secondary burner tube being in gas flow communication with the primary burner tube being the connection means, gas distribution ports of the secondary burner tube directed away from the fireplace opening."

59. Thus, independent claim 17 requires that the gas distribution ports of the secondary burner tube be directed away from the fireplace opening. As specifically construed and affirmed by the Court of Appeals for the Federal Circuit, this Court previously construed the term "directed away from" to mean that the gas ports of the secondary burner tube may be positioned in any direction that does not include a horizontal component pointed toward the vertical plane of the fireplace opening.

*Golden Blount, Inc. v. Robert H. Peterson Co.*, 365 F.3d 1054, 1059-60 (Fed. Cir. 2004). Blount presented oral testimony of Mr. Blount that the gas ports of Peterson's manufactured products are positioned directly down, which according to the above-referenced interpretation, are away from the fireplace opening. (Tr., vol. 1, pg. 45-50). In addition to this testimony, this Court closely observed an assembled version of Peterson's manufactured product<sup>7</sup>, wherein it observed the manufactured product having the gas ports directed away from the fireplace opening. (Tr., vol. 2, pg. 28). Because Peterson believed the term "directed away from" would ultimately be construed to mean that the ports must be directed at least partially toward the back of the fireplace, Peterson went so far as to require the ports of its secondary burner tube to be positioned directly downward. Given the claim construction as construed and affirmed by the Federal Circuit, this required configuration results in a device that meets the "directed away from" limitation of claim 17.

60. As the other claimed elements of the second limitation of independent claim 17 have been found in Peterson's manufactured products, as established above with respect to paragraphs 40 thru 46, this Court finds that the evidence establishes direct infringement by Peterson and by the ultimate purchasers of Peterson's products of claim 17. Moreover, the evidence establishes that Peterson itself directly infringed claim 17 when Peterson assembled the G-5 series burner systems and then sold them to customers.

61. Therefore, this Court finds that Peterson and the ultimate purchaser directly infringed at least claims 1, 15 and 17, as construed under paragraphs 120 thru 123 below, of the '159 patent.

#### LITERAL INFRINGEMENT-CONTRIBUTORY

62. Blount established at trial, through stipulation, that Robert H. Peterson Co.'s ember burner is intended to be attached to its G-4 series burner system or G-5 series burner system and the combined unit comprises a primary burner pipe, an ember pan that supports the primary burner pipe, a secondary burner tube and a valve that controls a flow of gas between the primary burner pipe and the secondary burner tube, and that an end user would connect the primary burner pipe to a gas source having a valve associated therewith. (Joint Pretrial Order--Stipulations, pg. 6).

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<sup>7</sup> See Finding of Fact No. 38, discussed above.

63. Peterson was made aware of the '159 patent as early as December 16, 1999, by the letter from Mr. Tucker, which is referenced above. (Plaintiff's Ex. No. 10). Given these facts, it is clear that Peterson was aware that the combination for which its components were especially made was patented and infringing, as required by 35 U.S.C. § 271(c).

64. Blount further established through the testimony of Mr. Bortz that Peterson's ember burner is especially adapted for use in an infringement of the '159 patent, had no substantial non-infringing uses, and that it was intended to be used with both the G-4 and G-5 burner pans. (Tr., vol. 2, pg. 67; Leslie Bortz Deposition, vol. 1, pg. 36). Thus, the Court also finds that the testimony of Mr. Bortz and Mr. Corrin, as well as Mr. Blount, supports the fact that the ember burner was not a staple article of commerce.

65. As discussed above, this Court finds that direct infringement existed. For those units covered by stipulation for hookup, they were normally hooked up by professional installers or persons from the dealer. With their experience and relation to Peterson and with all of Peterson's literature (including Defendant's Ex. Nos. D-34 & D-30) one can count on proper installations pursuant to Peterson's installation instructions as discussed above. Thus, each installation ultimately results in a direct infringement. (Tr., vol. 2, pg. 189). Blount has clearly proven contributory infringement on the part of Peterson of claims 1, 15 and 17 for those units.

#### LITERAL INFRINGEMENT-INDUCEMENT

66. The record establishes that Peterson sold the ember burner. In addition, the record also establishes that Peterson sold the G-4, which includes the primary burner and support pan, and sold the G-5, ten at least of which, had the ember burner attached. Further, given the stipulation that the ultimate assembly would be connected to a gas source, there is sufficient basis to conclude that Peterson knew or should have known that this ultimate configuration would infringe independent claims 1 and 17. (Joint Pretrial Order--Stipulations, pg. 6).

67. Peterson was made aware of the '159 patent as early as December 16, 1999, by the letter of December 10, 1999, from Mr. Tucker, which is referenced above. (Plaintiff's Ex. No. 10). Given these facts, it is clear that Peterson was aware that the combination for which its components were especially made was patented and infringing.

68. The record is also clear that Peterson provided literature and assembly instructions to consumers, as discussed above, detailing how to install the components in a preferred configuration, which induced its customers to install the components in an infringing manner. (Tr., vol. 2, pg. 173-174, 177, 183; Defendant's Ex. Nos. D-34 & D-30). Also, Peterson fully assembled and hooked up in a fireplace an accused structure and demonstrated it and its use to independent distributors, which this Court finds to be a substantial inducement.

69. Because Peterson provided the consumers with detailed instructions, (Defendant's Ex. Nos. D-34 & D-30), how to assemble the parts in an infringing manner, and given the fact that Peterson had knowledge of the '159 patent by way of the notice letter of December 16, 1999, Peterson knew or should have known that such actions would induce direct infringement. Thus, there is little doubt and almost a certainty that the installation was in fact done in accordance with Peterson's published installation instructions. The demonstrations of a properly connected device to distributors further shows inducement because this information was passed on to dealers and ultimately to assemblers and customers. Invariably, infringement occurred. (Tr., vol. 2, pg. 189).

70. As found by this Court in paragraphs 40 thru 61 above, there was direct infringement by Peterson or its ultimate purchasers of claims 1, 15 and 17 of the '159 patent.

71. Accordingly, this Court finds that in those instances where direct infringement by Peterson was not conclusively established on a unit by unit basis, Blount has clearly proven induced infringement on the part of Peterson of claims 1, 15 and 17 for those units.

72. Because Peterson's manufactured products literally infringe claims 1, 15 and 17 of the '159 patent, they infringe the patent. Thus, comparison of Peterson's product to the remaining claims depending from independent claim 1, whether it be in determining direct infringement, contributory infringement or induced infringement, is generally unnecessary and is therefore not addressed herein.

#### INFRINGEMENT-DOCTRINE OF EQUIVALENTS

73. Blount offered un rebutted testimony at trial that every element of Peterson's manufactured products perform substantially the same function in substantially the same way to obtain the same result as the claimed elements of the '159 patent. (Tr., vol. 1, pg. 59-60).

74. Blount further offered un rebutted testimony by Mr. Blount at trial that any difference between Peterson's manufactured products and the claim elements were insubstantial at best. Mr. Blount

actually testified that they were an exact copy. (Tr., vol. 1, pg. 30, 37, 46, 48, 56 and 60). In addition, through this Court's own observance of the accused product 4A, this Court finds that there was a substantial equivalent of each and every element of at least claims 1, 15 and 17 in Peterson's accused products.

75. Based on the evidence presented to it, this Court finds that there is no prosecution history estoppel that limits the range of equivalents regarding the claimed elements.

76. Thus, this Court finds that in those instances where literal infringement might not exist, there is infringement of the claims of the '159 patent under the doctrine of equivalence.

77. In summation, this Court concludes that Blount established literal infringement (e.g., directly, by inducement, or contributorily) or infringement under the doctrine of equivalents, each of claims 1, 15 and 17 of the '159 patent, by Peterson by at least a preponderance of the evidence.

#### DAMAGES

78. Damages have been determined using the *Panduit* factors. Mr. Blount testified for Blount at trial as to the demand that existed for the product during the period in question. (Tr., vol. 1, pg. 61). Thus, Blount has conclusively established the first required element of *Panduit*.<sup>8</sup>

79. In addition to establishing a demand for the patented product during the period in question, Blount established an absence, during the period of infringement, of acceptable non-infringing substitutes. (Tr., vol. 1, pg. 63-65).

80. Peterson argued that other acceptable non-infringing substitutes exist.

81. Here the patented product offers quite unique and novel results. (Tr., vol. 1, pg. 28-30). The so called "acceptable non-infringing substitutes" Peterson has introduced are either not acceptable, or they too infringe, although no third party infringing device was offered by either side.

82. Blount established at trial that Peterson's front flame director was not an acceptable substitute. (Tr., vol. 2, pgs. 184, 195). Peterson's own Vice President, Mr. Corrin, testified that the front flame director lacked the valve for adjusting the height of the front flame. Even more telling, Mr. Corrin testified that the front flame director was not as good as their ember burner. (Tr., vol. 2, pgs. 184, 195).

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<sup>8</sup> See the Conclusions of Law section, paragraph 151, where the *Panduit* factors are set forth.

83. As the valve to adjust the height of the front flame is one of the particular features available only from the patented product, under the law set forth in *Standard Havens*, the front flame director, lacking that valve or any adjustment means, is not an acceptable non-infringing substitute.

84. Peterson further argues that Blount admitted at trial that at least five products on the market perform roughly the same function as Blount's patented device. (Tr., vol. 1, pg. 63). The record is clear that those five products were infringing substitutes and not acceptable non-infringing substitutes. (Tr., vol. 1, pg. 63). In fact, the record indicates that Blount sent the manufactures of those five products the identical notice of infringement letter at the same time it sent Peterson its letter. (Tr., vol. 1, pg. 63). No evidence exists in the record that the aforementioned five instances of infringement continued after the notice of infringement letters were received. In fact, Mr. Blount's testimony indicates that while the other companies were moving in and were interested in the outcome of this trial, none were still infringing after receipt of their notice of infringement letter. (Tr., vol. 1, pg. 62-64).

85. Therefore, this Court finds that Blount provided sufficient evidence to support the finding that there were no acceptable non-infringing substitutes that could have decreased the market share Blount and Peterson together held. Thus, Blount has conclusively established the second required element of *Panduit*.

86. Blount also offered sufficient evidence through Mr. Blount's testimony that Blount had more than enough manufacturing and marketing capability to promote the device, thus entitling Blount to actual damages. (Tr., vol. 1, pgs. 62, 66). Thus, Blount has conclusively established the third required element of *Panduit*.

87. Because the *Panduit* factors have been established, it is reasonable for this Court to infer that the lost profits claimed were in fact caused by Peterson's infringing sales. This Court now only needs to determine a detailed computation of the amount of profit Blount would have made, to meet the final required element of *Panduit*.

88. In addition, however, the Court also finds that the facts of the present case establish a two-supplier market. Blount offered evidence through the testimony of Mr. Blount that Blount and Peterson together held approximately 95 percent or more of the market associated with ember burners similar to that covered by the '159 patent. (Tr., vol. 1, pg. 64). While Peterson attempted to impeach Mr. Blount's testimony on this point, this Court finds that Peterson failed to do so.

Therefore, this Court finds that Mr. Blount's testimony is sufficient to establish a two supplier market. The supposed 5 percent of the market that Blount and Peterson might not have held is de minimus, and therefore, for damage calculations a two-supplier market has been found to exist in this case. Therefore, causation may be inferred, that is, "but for" Peterson's infringing activities, Blount would have made the sales it normally would have made.

89. To determine the actual damage amount in a lost profit case, the Court can multiply Blount's per unit profit times the number of infringing devices that Peterson sold.

90. To do this, however, the Court must determine the device upon which lost profits are to be calculated.

91. Using two different approaches, Blount has established that the device for calculating lost profits includes the entire burner assembly (including the secondary burner and valve), the grate, and a full set of artificial logs. This Court finds that Blount ultimately lost the sale of the entire burner assembly (including the secondary burner and valve), the grate, and a full set of artificial logs.

92. Dependent claim 15, which was established as literally infringed above, recites that the gas-fired artificial logs and coals-burner of claim 1 are positioned under artificial logs and a grate support means. Because the artificial logs and the grate support means are positively claimed in dependent claim 15, the artificial logs and the grate support means should be included in the device upon which damages for direct infringement as well as lost profits are to be calculated.

93. Accordingly, the device for calculating lost profits includes the entire burner assembly (including the secondary burner and valve), the grate and a full set of artificial logs, which must be the case here, because apart from the artificial logs and grate, the coals burner unit has no purpose or function.

94. Given the circumstances, the entire market value rule is appropriate here as an alternative, second approach. Evidence was offered at trial by Peterson's own officer, Mr. Corrin, that Peterson used the ember burner to entice customers to come back to the store to purchase newer log sets, and at the same time, purchase Peterson's ember burner, which improved the overall appearance of the fireplace. (Tr., vol. 2, pg. 177-79). These facts are sufficient to establish that the ember burner is the basis for the customer's demand, as set forth by *TWM*, see *infra*.

95. Blount also offered evidence that the glowing embers from the ember burner are what draws a customer's attention to a particular log and burner set, and what ultimately makes the sale. (Tr., vol. 1, pg. 157-63).

96. Blount also offered testimony at trial that the elements of independent claims 1 and 17 constitute a functional unit with the artificial logs and the grate support.

97. Blount presented a third-party witness retailer, Mr. Charlie Hanft of Atlanta, with extensive sales experience with gas fireplaces and ember burner and gas log sets. He testified that 97 ½ percent of the time that he sells an ember burner, he also sells an entire burner assembly and log set with it. (Tr., vol. 1, pg. 160). Peterson did not successfully rebut Blount's evidence on this point because Peterson presented no testimony to quantify even in a general way when the two would not ultimately be sold together.

98. Peterson failed to rebut Blount's evidence because it did not offer any numerical evidence regarding how often it sells one of its Ember burners with the entire burner and log set.

99. In summation of this point, Blount introduced testimony as to the standard practice in the industry for selling the ember burner, and Peterson failed to introduce its own testimony to rebut Blount's testimony.

100. Because the evidence establishes that 97 ½ percent of the sales of the ember burner would also encompass the sale of the entire burner assembly and log set, the record supports a proration of the damage amount based upon this percentage.

101. Based on the record, of the 3,723 EMB's sold by Peterson, 2 ½ percent (i.e., 94 EMB's) were sold without an associated burner assembly and log set, and the remaining 97 ½ percent (i.e., 3,629) were sold with an associated burner assembly and log set.

102. Blount established at trial that its profit on the ember burner alone is \$14.09 per unit and its profit on the ember burner, entire burner assembly and full set of logs is \$117.92 per unit. (Plaintiff's Ex. No. 18).

103. This Court finds, based on the percentages and profits established in the paragraphs above, that the total actual damages amount to \$429,256.

WILLFULNESS / EXCEPTIONAL CASE

104. Having carefully reviewed the record herein, the Court concludes that Peterson's minimal attempt to attain a competent opinion is permeated by a lack of due care and was willful, which leads this Court to find that the case is exceptional. Blount has established by clear and convincing evidence that Peterson's supposed oral opinion was an incompetent, conclusory opinion to be used only as an illusory shield against a later charge of willful infringement, rather than in a good faith attempt to avoid infringing another's patent.

105. Throughout the 2½ years from the time the first notice letter was sent, Peterson simply never obtained a single written opinion suggesting that their commercial embodiment avoided infringement. Also, the denial that the first letter related to notice of infringement is shown unlikely by Mr. Corrin's own characterization of it as an "*infringement letter*" in his correspondence with his patent counsel. (Tr., vol. 2, pg. 192). Also, this Court finds it disingenuous for Peterson to argue at trial that the interrogatories answered well after suit was filed and during discovery, form the written opinion upon which they relied.

106. The first time Peterson spoke to Mr. McLaughlin was on or about December 30, 1999, however, Mr. McLaughlin did not have the accused infringing device at this time. (Tr., vol. 1, pg. 181). The record establishes that Mr. McLaughlin, at this time, only had a picture of the accused infringing device. (Tr., vol. 1, pg. 181). Neither did Mr. McLaughlin have the prosecution history of the '159 patent at this time, which is an important element of any competent opinion. (Tr., vol. 1, pgs. 183, 202-03).

107. This non-substantive conversation cannot be construed to be an opinion upon which Peterson could reasonably rely because it was based solely on a supposition. This supposition amounted to a representation on the part of Mr. Bortz that the invention had been around 20 to 30 years. (Tr., vol. 2, pg. 55-56). Mr. McLaughlin, with only the evidence listed above, said that "if we *could* prove that the invention had been around for 20 to 30 years then it *would* be a strong argument of invalidity." (Tr., vol. 2, pg. 55-56, emphasis added). This "if this, then that" statement plainly does not amount to an opinion upon which a prudent person could reasonably rely.

108. Importantly, this Court has found that Peterson made no further efforts to determine whether it was truly infringing or not, until after suit was filed, almost a year and two months after receiving the first notice letter. (Tr., vol. 1, pg. 202-03).

109. Peterson argues that it did nothing further because it was awaiting "additional information or further explanation from Blount's attorney." This Court finds this argument lacking merit. Blount did not, after sending multiple notice of infringement letters to Peterson under the law, owe Peterson any obligation with regard to advising Peterson how they actually were infringing.

110. Nevertheless, Blount's failure to respond to Peterson's additional information request did not relieve Peterson of its obligation to determine if it was willfully infringing the '159 patent.<sup>9</sup> To the contrary, Peterson continued its infringing activities even after May 16, 2000, and actually even through the trial proceedings. (Tr., vol. 2, pg. 181 and Peterson Company's Objection to Golden Blount's Motion for Updated Damages filed on September 18, 2002). This reflects an egregious and willful disregard for the '159 patent.

111. It was not until after the lawsuit was filed in January 2001 that Peterson finally became concerned, not with the damages associated with the infringing activity, but apparently with the attorney's fees that Peterson might be required to pay as a willful infringer. (Tr., vol. 2, pg. 60-62). By Mr. Bortz' own admission, he told Mr. McLaughlin that this was not a very meaningful case "dollar wise" but that he heard a person might have to pay attorneys' fees if he loses a patent lawsuit, and he asked Mr. McLaughlin what he should do. (Tr., vol. 2, pg. 60-62 & Dec. 19, 2001, deposition of Mr. Leslie Bortz, pg. 60). Mr. McLaughlin told him that one way that attorney's fees could be avoided was by obtaining an opinion. (Id). This set of facts underscores Peterson's true intentions with respect to its willful disregard of the '159 patent, that it was concerned more with having to pay attorneys' fees than it was with its own infringement. The Court finds that this constitutes an intentional disregard for the '159 patent on the part of Peterson.

112. At no time when Mr. McLaughlin gave Mr. Bortz advice did Mr. McLaughlin ever see the actual accused structure. (Tr., vol. 1, pg. 181). While some advertisements of Peterson's structure were shown, detailed drawings were never provided at this time to Mr. McLaughlin, including the installation instructions that were apparently sold with the device. Thus, Mr. McLaughlin never had a full understanding of the accused structure, (Tr., vol. 1, pg. 200), and Mr. McLaughlin should have known that his opinion would not be reasonable without such an understanding.

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<sup>9</sup> See also, Finding of Fact No. 30.

113. While Peterson argues that three oral consultations occurred, this Court finds that only one oral opinion of counsel, if it can even be called that, was rendered. This oral opinion was rendered by Mr. McLaughlin on or about May 1, 2001, about 4 months after suit had been filed and 2½ years after Peterson was first noticed of its infringing activity. (Tr., vol. 1, pg. 179-83).

114. This Court believes that Peterson did get what it asked for, a statement that there was no infringement. Peterson's primary desire, however, was to avoid paying attorneys' fees or increased damages, and this appears to have been the sole reason for consultation with counsel, and these actions show a willful and egregious disregard for the '159 patent.

115. In summary, this Court finds that Peterson had three consultations with its Attorney. All were oral. Only the last oral consultation approached what was needed to determine infringement and validity issues, and even it was made with a search limited to the company's own records and with there having been no accused structure shown the patent attorney. This third consultation occurred a number of months after suit had been filed and was motivated by the apprehension of Peterson having to pay attorneys' fees, and not for a concern of infringement of the '159 patent.

116. Peterson's cavalier attempt to obtain an opinion and the non-persuasive trial testimony of Peterson's witnesses are classic examples of conduct that clearly and convincingly demonstrates an exceptional case, an indication of which is gross willfulness.

117. This Court therefore finds that the infringement of Peterson was willful, thus the actual damages are trebled, totaling \$1,287,766.

118. Given Peterson's conduct and its overall willful disregard for the '159 patent, such an award is appropriate here. The Court finds that as a result of Peterson's continued infringement, without a reasonable basis for believing that it had a right to make, use or sell its product prior to the expiration of the '159 patent, Blount has been compelled to prosecute an infringement claim at great expense. Under these circumstances, an award of attorneys' fees is proper in addition to the enhanced damage award.

119. This Court therefore finds this to be an exceptional case under 35 U.S.C. § 285, thus reasonable attorneys' fees are awarded to Blount.

## CONCLUSIONS OF LAW

### CLAIM CONSTRUCTION

120. The parties dispute the meaning of two terms in the claims of the patent in suit, namely the phrase "raised level," as recited in claim 1, and the term "below" and the phrase "away from the fire place opening," as recited in claim 17.

121. As affirmed by the Court of Appeals for the Federal Circuit in its opinion dated April 19, 2004, this Court construes that the term "at a raised level" in claim 1 refers to the top of the two burner tubes, and that the tops of the tubes should be used to determine whether the primary burner tube is held at a raised level with respect to the secondary burner tube as recited in claim 1. This Court also construes that the term "below" in claim 17 refers to the tops of the two burner tubes, and that the tops of the tubes should be used to determine whether the secondary burner tube is positioned below the primary burner tube as recited in claim 17. *Golden Blount, Inc. v. Robert H. Peterson Co.*, 365 F.3d 1054, 1059-60 (Fed. Cir. 2004).

122. As affirmed by the Court of Appeals for the Federal Circuit in its opinion dated April 19, 2004, this Court construes the term "away from the fireplace opening" to mean that the gas ports may be positioned in any direction that does not include a horizontal component pointed toward the vertical plane of the fireplace opening. *Id.*

123. All the other terms in the claims at issue are construed to have a plain and ordinary meaning, which appear not to have been contested at trial.

### VALIDITY

124. A validity analysis begins with the presumption of validity. An issued patent is presumed valid. 35 U.S.C. § 282.

125. An "accused infringer who raises patent invalidity as a defense bears the burden of showing invalidity by facts supported by clear and convincing evidence." *Robotic Vision Systems, Inc. v. View Engineering, Inc.*, 189 F.3d 1370, 1377 (Fed. Cir. 1999); *Weatherchem Corp. v. J.L. Clark, Inc.*, 163 F.3d 1326, 1334-35 (Fed. Cir. 1998).

126. As affirmed and determined by the Court of Appeals for the Federal Circuit on April 19, 2004, this Court concludes that Peterson has failed to prove by clear and convincing evidence that

the '159 patent is invalid. This Court therefore finds the '159 patent not to be invalid. *Golden Blount, Inc.* at 1061-62.

#### LITERAL INFRINGEMENT-DIRECT

127. The claims define the metes and bounds of the invention, and only they may be infringed. *SmithKline Diagnostics, Inc. v. Helena Labs. Corp.*, 859 F.2d 878, 882 (Fed. Cir. 1988); *Corning Glass Works v. Sumitomo Elec. USA, Inc.*, 868 F.2d 1251 (Fed. Cir. 1989).

128. The patentee's burden is to show literal infringement by a preponderance of the evidence. *Braun v. Dynamics Corp.*, 975 F.2d 815 (Fed. Cir. 1992).

129. A patent claim is literally infringed if the accused product or process contains each element of the claim. *Tate Access Floors v. Maxcess Techs.*, 222 F.3d 958, 964 (Fed. Cir. 2000); *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1054 (Fed. Cir. 1988). If each element is present, literal infringement exists and "that is the end of it." *Graver Tank v. Linde Co.*, 339 U.S. 605, 607, 94 L. Ed. 1097, 70 S. Ct. 854, 1950 Dec. Comm'r Pat. 597 (1950).

130. In determining infringement, the accused product is compared to the patent claims, not the patentee's product. *Zenith Laboratories, Inc. v. Bristol-Myers Squibb Co.*, 19 F.3d 1418, 1423 (Fed. Cir. 1994); *Glaxo Inc. v. TorPharm Inc.*, 153 F.3d 1366, 1373 (Fed. Cir. 1998).

131. Infringement of a single claim is infringement, *Panduit Corp. v. Dennison Mfg. Co. Inc.*, 836 F.2d 1329, 1330 n.1 (Fed. Cir. 1987); *Intervet America v. Kee-Vet Laboratories*, 887 F.2d 1050, 1055 (Fed. Cir. 1989), and entitles the patentee to the full panoply of statutory remedies. *Intervet*, 887 F.2d at 1055.

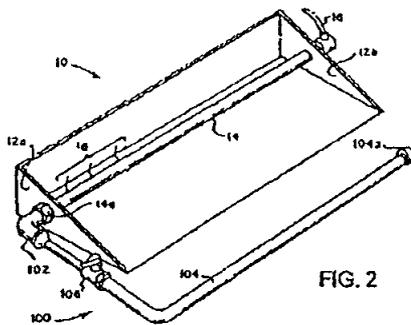
132. If one is arguing that proof of inducing infringement or direct infringement requires *direct*, as opposed to *circumstantial evidence*, the Federal Circuit disagrees. It is hornbook law that direct evidence of a fact is not necessary. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Metabolite Laboratories, Inc. v. Laboratory Corp. of America*, 370 F.3d 1354, 1365 (Fed. Cir. 2004) (citing *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 1272 (Fed. Cir. 1986)).

133. In determining whether a product claim is infringed, the Federal Circuit has held that an accused device may be found to infringe if it is reasonably capable of satisfying the claim limitations,

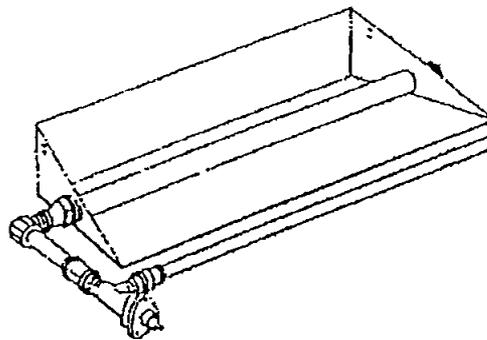
even though it may also be capable of non-infringing modes of operation. See, *Intel Corp. v. United States Int'l Trade Comm'n*, 946 F.2d 821, 832, 20 USPQ2d 1161, 1171 (Fed.Cir.1991); *Key Pharms., Inc. v. Hercon Labs. Corp.*, 981 F.Supp. 299, 310 (D.Del.1997), *aff'd*, 161 F.3d 709, 48 USPQ2d 1911 (Fed.Cir.1998); *Huck Mfg. Co. v. Textron, Inc.*, 187 USPQ 388, 408 (E.D.Mich.1975) ("The fact that a device may be used in a manner so as not to infringe the patent is not a defense to a claim of infringement against a manufacturer of the device if it is also reasonably capable of a use that infringes the patent."); cf. *High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551, 1556, 33 USPQ2d 2005, 2009 (Fed.Cir.1995).

134. Circumstantial evidence of product sales and instructions indicating how to use the product is sufficient to prove third party direct infringement. *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 1272 (Fed. Cir. 1986).

135. This Court understands that in determining infringement, the accused product is compared to the patent claims, not the patentee's product. However, FIG. 2 of the '159 patent is representative of the claims of the '159 patent and the claims may be read on the FIG. 2 structure. For this reason a comparison of one of Blount's devices and Peterson's manufactured product is highly instructive for purposes of this Court's analysis, and is, therefore, provided.



**Blount's Patented Device**  
FIG. 2 of the '159 Patent



**Peterson's Manufactured Product**  
Figure 2 of Peterson's Installation Instructions  
without the control knob shown

136. The findings in the sections above make out a clear case of direct infringement on all of the devices sold.

#### LITERAL INFRINGEMENT-CONTRIBUTORY

137. Contributory infringement liability arises when one "sells within the United States . . . a component of a patented machine . . . constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantially noninfringing use." 35 U.S.C. § 271(c) (2002).

138. Thus, Blount must show that Peterson "knew that the combination for which its components were especially made was both patented and infringing." *Preemption Devices, Inc. v. Minn. Mining & Mfg. Co.*, 803 F.2d 1170, 1174 (Fed. Cir. 1986).

139. An appropriate infringement notice letter from the patentee to the accused infringer provides the requisite knowledge required by 35 U.S.C. § 271(c). *Aro Manufacturing Co., Inc. v. Convertible Top Replacement Co.*, 377 U.S. 476, 490 (1964).

140. Further, Blount must show that Peterson's components have no substantially noninfringing uses, while meeting the other elements of the statute. *Alloc, Inc. v. ITC*, 342 F.3d 1361, 1374 (Fed. Cir. 2003).

141. It is not necessary for a plaintiff to make the direct infringer a party defendant in order to recover on a claim of contributory infringement. It is enough for the plaintiff to prove, by either circumstantial or direct evidence, that a direct infringement has occurred. *Amersham International PLC v. Corning Glass Works*, 618 F. Supp. 507 (D. Mich., 1985).

142. The findings in the sections above make out a clear case of Contributory infringement on all of the devices sold.

#### LITERAL INFRINGEMENT-INDUCEMENT

143. In order to find Peterson liable for inducing infringement under 35 U.S.C. § 271 (b), Blount must show that Peterson took actions that actually induced infringement. *Met-Coil Sys. Corp. v. Korners Unlimited, Inc.*, 803 F.2d 684, 687 (Fed. Cir. 1986) ("There can be no inducement of infringement without direct infringement by some party.")

144. Further, Blount must show that Peterson knew or should have known that such actions would induce direct infringement. *Micro Chem. Inc. v. Great Plains Chem. Co.*, 194 F.3d 1250 (Fed. Cir. 1999).

145. Dissemination of instructions along with sale of the product to an ultimate consumer is sufficient to prove infringement by an inducement. *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 1272 (Fed. Cir. 1986). Thus, Blount has met its burden of showing infringement under section 35 U.S.C. 271(b).

146. The findings in the sections above make out a clear case of induced infringement on all of the devices sold.

#### INFRINGEMENT-DOCTRINE OF EQUIVALENTS

147. Infringement under the doctrine of equivalents occurs when a claimed limitation and the accused product perform substantially the same function in substantially the same way to obtain the same result. See *Warner-Jenkinson Co. v. Hilton-Davis Chem. Co.*, 520 U.S. 17, 39-40, 137 L. Ed. 2d 146, 117 S. Ct. 1040 (1997).

148. Infringement under the doctrine of equivalents also requires that any difference between the claim elements at issue and the corresponding elements of the accused product be insubstantial. *Id.*

149. This Court finds alternatively (or cumulatively) that there was infringement under the doctrine of equivalents.

#### DAMAGES

150. To recover lost profit damages, the patentee need only show causation and the factual basis for causation between the infringement and the lost profits. *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1065, 219 U.S.P.Q. 670 (Fed. Cir. 1983).

151. To do this, *Panduit* established that the patent owner need only demonstrate:

- 1) a demand for the product during the period in question;
- 2) an absence, during that period, of acceptable non-infringing substitutes;
- 3) its own manufacturing and marketing capability to meet or exploit that demand; and
- 4) a detailed computation of the amount of the profit it would have made.

*Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1156, 197 U.S.P.Q. 726 (6th Cir. Mich. 1978); *Radio Steel & Mfg. Co. v. MTD Prods., Inc.*, 788 F.2d 1554, 1555, 229 U.S.P.Q. 431 (Fed. Cir. 1986).

152. In a two-supplier market it is reasonable to assume, provided the patent owner has the manufacturing capabilities, that the patent owner would have made the infringer's sales but for the infringement. *State Indus. v. Mor-Flo Indus.*, 883 F.2d 1573, 1578, 12 U.S.P.Q.2d 1026 (Fed. Cir. 1989).

153. The "[m]ere existence of a competing device does not make that device an acceptable substitute." *TWM Mfg. Co., Inc. v. Dura Corp.*, 789 F.2d 895, 901, 229 U.S.P.Q. 525 (Fed. Cir. 1986), *cert. denied*. A product on the market that lacks the advantages of the patented product can hardly be termed a substitute acceptable to the customer who wants those advantages. *Standard Havens Products, Inc. v. Gencor Industries, Inc.*, 953 F.2d 1360, 1373, 21 U.S.P.Q.2d 1321 (Fed. Cir. 1991), *cert. denied*. If purchasers are motivated to purchase because of particular features available only from the patented product, products without such features would most certainly not be acceptable non-infringing substitutes. *Id.*

154. Also, courts have generally held that an infringer's acceptable substitute argument is of "limited influence" when it [the infringer] ignores those substitutes while selling the patented invention. (Emphasis added). *TWM*, 789 F.2d at 902. This is exactly what Peterson did.

155. In an alternative approach, however, the "entire market value rule" may be used to determine the device for calculating lost profits. In *Beatrice Foods*, the Court stated that the law does not bar the inclusion of convoyed sales in an award of lost profits damages. *Beatrice Foods Co. v. New England Printing & Lithographic Co.*, 899 F.2d 1171, 1175, 14 U.S.P.Q.2d 1020 (Fed. Cir. 1991).

156. The "entire market value rule" allows for the recovery of damages based on the value of an entire apparatus containing several features, even though only one feature is patented. *Paper Converting Machine Co., v. Magna-Graphics, Corp.*, 745 F.2d 11, 33, 223 U.S.P.Q. 591 (Fed. Cir. 1984).

157. The "entire market value rule" further permits recovery of damages based on the value of the entire apparatus containing several features, when the patent-related feature is the basis for customer demand. See *TWM*, 789 F.2d at 901.

158. The "entire market value rule" is appropriate where both the patented and unpatented components together are analogous to components of a single assembly, parts of a complete machine, or constitute a functional unit. See *Rite-Hite v. Kelly Co.*, 56 F.3d 1538, 1550, 35 U.S.P.Q.2d 1065 (Fed. Cir. 1995).

#### WILLFULNESS / EXCEPTIONAL CASE

159. In addition to requiring "damages adequate to compensate for the infringement," Section 284 of the Patent Act authorizes a district court to "increase damages up to three times the amount found or assessed." 35 U.S.C. § 284.

160. The Federal Circuit has interpreted this provision of Section 284 as requiring a two-step process: "First the fact-finder must determine whether an infringer is guilty of conduct upon which increased damages may be based." *Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1570, 38 U.S.P.Q.2d 1397 (Fed. Cir. 1996). "If so, the Court then determines, exercising its sound discretion, whether, and to what extent, to increase the damage award given the totality of the circumstances." *Id.*

161. "An act of willful infringement satisfies this culpability requirement, and is, without doubt, sufficient to meet the first requirement to increase a compensatory damages award." *Id.* Thus, once a proper willfulness finding is made, the first step in determining whether damages should be enhanced is complete. *Id.* At that point, the Court need consider only whether, and to what extent, the compensatory damages awarded by the fact finder should be increased, in light of "the egregiousness of the Defendant's conduct based on all the facts and circumstances of the case." *Id.*

162. "A potential infringer having actual notice of another's patent rights has an affirmative duty of care." *Spindelfabrik Suessen-Schurr, Stahlecker & Grill GmbH v. Schubert & Salzer Maschinenfabrik Aktiengesellschaft*, 829 F.2d 1075, 1084 (Fed. Cir. 1987). An act of infringement is thus deemed willful when the infringer is aware of another's patent and fails to exercise due care to avoid infringement. *Electro Medical Sys., S.A. v. Cooper Life Sciences, Inc.*, 34 F.3d 1048, 1056 (Fed. Cir. 1994); *Rolls-Royce Ltd. v. GTE Valeron Corp.*, 800 F.2d 1101, 1109 (Fed. Cir. 1986). This standard of care typically requires an opinion from competent patent counsel prior to engaging in any potentially infringing activities. *Underwater Devices, Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380, 1389-90 (Fed. Cir. 1983). To establish willfulness, Blount must demonstrate by clear and convincing

evidence, considering the "totality of the circumstances," that Peterson willfully infringed its patent. *Electro Medical*, 34 F.2d at 1056.

163. The prosecution history of a patent in question is an important element of any competent opinion. *Underwater Devices*, 717 F.2d at 1389-90.

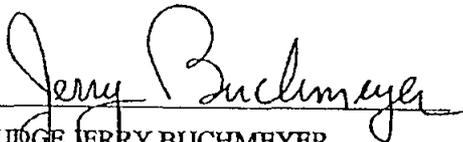
164. A holding of willful infringement is usually sufficient to make a case exceptional and entitles the opposing party to its attorney's fees. 35 U.S.C. § 285 (2002); *Avia Group Intl. Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1567 (Fed. Cir. 1988).

#### CONCLUSION

For the reasons set forth above, the Court concludes that Peterson's manufactured products infringe the claims of the '159 patent. Blount is entitled to actual damages from Peterson in the amount of \$429,256. The infringement of Peterson was willful, thus the actual damages are trebled, totaling \$1,287,768. Blount is also awarded prejudgment interest, which shall be calculated on a simple rather than compound basis, on the actual damages of \$429,256 at the rate of 5.0% for the period from December 16, 1999, to August 9, 2002. This is an exceptional case under 35 U.S.C. § 285, thus reasonable attorneys' fees are awarded to Blount. Blount is further awarded post judgment interest, calculated pursuant to 28 U.S.C. § 1961, on the sum of the trebled damages and attorney's fees at the highest rate allowed by the law from the date of August 9, 2002, to April 19, 2004, and resuming from the date of the signing of the final judgment. Based upon the fact that infringement causes irreparable harm, an injunction is granted against Peterson.

It is so ORDERED

SIGNED: 2 day of September, 2004.

  
\_\_\_\_\_  
JUDGE JERRY BUCHMEYER  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS

R

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

05-1141, -1202

GOLDEN BLOUNT, INC.,

U.S. DISTRICT COURT  
 NORTHERN DISTRICT OF TEXAS  
**FILED**  
 JAN 31 2005  
 CLERK, U.S. DISTRICT COURT  
 Plaintiff-Appellee, <sup>By</sup> Deputy

v.

ROBERT H. PETERSON CO.,

Defendant-Appellant.

ORDER

UPON CONSIDERATION of the notices of appeal filed by Robert H. Peterson Co. on December 9, 2004 (docketed as 05-1141) and on January 14, 2005 (docketed as 05-1202),

IT IS ORDERED THAT:

The appeals are consolidated. The revised official caption appears above.

January 27, 2005

FOR THE COURT

*Jan Horbaly*

Jan Horbaly  
Clerk

c: Charles W. Gaines, Esq.  
Leland W. Hutchinson, Jr., Esq.  
✓ Clerk, U.S. District Court (3:01-CV-00127) - R

FILED  
U.S. COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT

JAN 27 2005

JAN HORBALY  
CLERK

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

## United States Court of Appeals for the Federal Circuit

04-1609, 05-1141, -1202

GOLDEN BLOUNT, INC.,

Plaintiff-Appellee,

v.

ROBERT H. PETERSON CO.,

Defendant-Appellant.

ON MOTION

Before SCHALL, Circuit Judge.

### ORDER

Golden Blount, Inc. moves for reconsideration, vacation, or modification of the court's February 15, 2005 order. Robert H. Peterson Co. opposes. Golden Blount replies.

Upon consideration thereof,

IT IS ORDERED THAT:

The motion is denied.

MAR 29 2005

Date



Alvin A. Schall  
Circuit Judge

cc: Charles W. Gaines, Esq.  
Leland W. Hutchinson, Jr., Esq.

s17

**FILED**  
U.S. COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT

MAR 29 2005

**JAN HORBALY**  
CLERK

JT-APP 3369

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REVISED: February 15, 2005

Official Caption<sup>1</sup>

04-1609, 05-1141, -1202

GOLDEN BLOUNT, INC.,

Plaintiff-Appellee,

v.

ROBERT H. PETERSON CO.,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Texas  
in case no. 3:01-CV-00127, Senior Judge Jerry Buchmeyer.

Authorized Abbreviated Caption<sup>2</sup>

GOLDEN BLOUNT v RBT H PETERSON CO, 04-1609, 05-1141, -1202

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<sup>1</sup> Required for use on petitions, formal briefs and appendices, court opinions, and dispositive court orders.  
FRAP 12(a); 32(a).

<sup>2</sup> Authorized for use only on items not requiring the Official Caption as listed in note 1.

NOTE: Pursuant to Fed. Cir. R. 47.6, this order  
is not citable as precedent. It is a public order.

## United States Court of Appeals for the Federal Circuit

04-1609, 05-1141, -1202

GOLDEN BLOUNT, INC.,

Plaintiff-Appellee,

v.

ROBERT H. PETERSON CO.,

Defendant-Appellant.

ON MOTION

Before SCHALL, Circuit Judge.

### ORDER

Golden Blount, Inc. moves to dismiss Robert H. Peterson Co.'s appeal 04-1609 and requests attorney fees and costs. Peterson opposes. Golden Blount replies. Peterson moves to consolidate 04-1609 with 05-1141, -1202. Peterson moves for an extension of time, until April 25, 2005, to file his brief or, in the alternative, for a stay of briefing pending a ruling on the motion to dismiss.

Golden Blount argues that Peterson's appeal 04-1609 should be dismissed as premature and requests attorney fees and costs. In 04-1609, Peterson appealed from the August 18, 2004 minute order of the United States District Court for the Northern District of Texas in Golden Blount v. Peterson, No. 3:01-CV-127 adopting Golden Blount's findings of fact and conclusions of law. In 05-1141, Peterson appealed from the district court's November 12, 2004 order granting in part and denying in part Golden Blount's applications for attorney fees and costs. In 05-1202, Peterson appealed from

the district court's final judgment dated December 15, 2004.

The district court's August 18, 2004 minute order appeared to resolve all outstanding issues other than attorney fees. There was confusion about whether the separate document requirement of Fed. R. Civ. P. 58(a) applied or whether the minute order was an appealable final judgment. Due to the confusion, we determine that Peterson's filing of a notice of appeal from the minute order was prudent and Golden Blount's request for attorney fees and costs is without foundation.

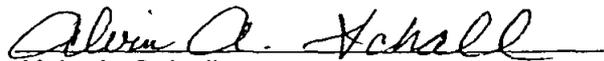
Accordingly,

IT IS ORDERED THAT:

- (1) Golden Blount's motion is denied.
- (2) Peterson's motion to consolidate is granted. The revised official caption is reflected above.
- (3) Peterson's motion for an extension of time is granted.
- (4) Peterson's alternative motion for a stay is moot.

**FEB 15 2005**

\_\_\_\_\_  
Date



Alvin A. Schall  
Circuit Judge

cc: Charles W. Gaines, Esq.  
Leland W. Hutchinson, Jr., Esq.

s17

**FILED**  
**U.S. COURT OF APPEALS FOR**  
**THE FEDERAL CIRCUIT**

**FEB 15 2005**

**JAN HORBALY**  
**CLERK**

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03-1298

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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GOLDEN BLOUNT, INC.

Plaintiff-Appellee,

v.

ROBERT H. PETERSON CO.,

Defendant-Appellant

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF TEXAS IN 3:01-CV-127-R  
JUDGE JERRY BUCHMEYER

---

BRIEF OF PLAINTIFF-APPELLEE  
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June 30, 2003

Attorneys for Plaintiff-Appellee

JT-APP 3373

**CERTIFICATE OF INTEREST**

Counsel for Golden Blount, Inc., certifies the following:

1. The full name of every party of amicus represented by the counsel is:  
  
Golden Blount, Inc.
  
2. The name of the real party in interest represented by this counsel, if the party named in the caption is not the real party in interest:  
  
Not applicable
  
3. All parent companies and any publicly held companies that own 10 percent or more of the stock of the party or amicus represented by this counsel are:  
  
Not applicable
  
4. The name of all firms and the partners or associates that appeared for the party or amicus now represented by this counsel in the trial or agency or are expected to appear in this court are:

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**STATEMENT OF RELATED CASES**

This case was not formerly before the United States Court of Appeals for the Federal Circuit or any other appellate court under the same or similar title.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. There exists no issue of unenforceability. It is a non-issue--the Defendant never pled it, never mentioned it pre-trial, never tried it and never referred to it post-trial. The Defendant introduced the issue for the first time on appeal in its Appellant's Brief. It is totally superfluous, and in any event the Defendant repeatedly waived it.
2. The Defendant's issues 6, 8 [sic] and 9 [sic] are introduced in a self-serving manner, assuming facts that do not exist.

## STATEMENT OF THE CASE

Golden Blount, Inc. (hereafter referred to as Blount), objects to the Defendant's Statement of the Case because it includes the argument that Blount's failure to disclose prior art was the reason for United States Patent No. 5,988,159 issuing. This assertion belongs in the Argument section, if anywhere.

## STATEMENT OF THE FACTS

Blount does not fully agree with the Defendant's Statement of the Facts. The Defendant omits and misstates key facts. For this reason, Blount wishes to present this Court with a corrected Statement of the Facts.

United States Patent No. 5,988,159 (the '159 Patent), entitled GAS-FIRED

ARTIFICIAL LOGS AND COALS-BURNER ASSEMBLY. (JA--1402-09). The '159 Patent is a relatively simple invention, on hind sight, but for the first time in many years was capable of providing a very pleasing and striking effect equal in beauty to a wood burning fireplace. Golden Blount, an individual, is the inventor of the '159 Patent, and the '159 Patent is assigned to Blount. (JA--0881). The '159 Patent was filed as a continuation-in-part application on April 2, 1996, basing its priority on a patent application originally filed on May 17, 1993, and a second continuation-in-part. The '159 Patent issued on November 23, 1999.

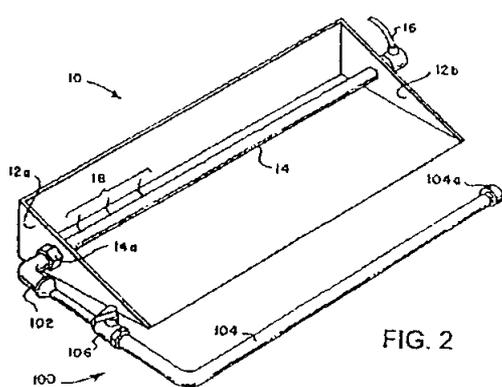
The first application was pro se, as Mr. Blount had limited resources. The second continuation-in-part, while certainly the same invention, seemed to focus on retrofits, an area of no significance in the final application that resulted in the '159 Patent. The final application is directed to a coals burner assembly with a primary burner tube (hereafter referred to as the primary burner) supported by a pan and having a secondary coals burner elongated tube (hereafter referred to as the secondary burner tube) positioned in front of the primary burner. A valve for adjusting gas flow is located between the primary burner and the secondary burner. (JA--2083, 86).

Turning to the prosecution of the application of the patent-in-suit, with the exception of a few amendments made to independent Claims 1 and 17 in response to an Examiner's Action dated April 3, 1997, (JA--2098-103), as well as in response to

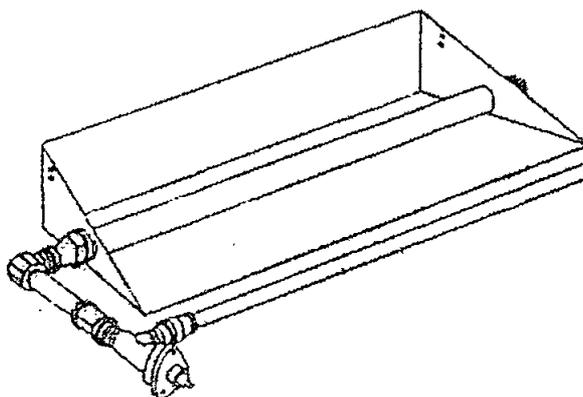
an Examiner's interview on January 19, 1999, (JA--2116), no substantial amendments were made to the Claims that affect the range of equivalents of the so-called "vertical limitation," or the port orientation (the latter appearing in Claim 17 only). The final amendments to independent Claims 1 and 17 addressed only a cosmetic 35 U.S.C. § 112 rejection (the word "forwardly" substituted for "forward") and to place the Claims in better form for issuance (the phrase "gas flow control means"). (JA--2105-10, JA--2116). While a valve for adjusting gas flow to the secondary burner was previously added to independent Claims 1 and 17 to overcome the art of record, the other amendments were not related to any art rejections. Therefore that the ranges of equivalents should be unaffected. The Defendant's infringing structure already has a valve, so no issue exists on this point. Therefore, after a thorough examination by the same Examiner over a six-year period of time, the '159 Patent issued on November 23, 1999, with the presumption of validity accorded all United States issued patents.

When Blount began marketing and selling an embodiment of the structure covered by the Claims that subsequently issued in the '159 Patent, no known imitations or viable substitutes were on the market, and the Defendant did not have a competitive device. The ability to control the ember burn in front of the artificial log and grate set and thereby create a realistic burn that more closely approximates the look of a real wood-burning fireplace, as provided by the patented structure, eventually

significantly increased the sales of the patented device. (JA--0890-91). Between the years of 1993 and 1996, Blount sold many of its Controlled Ember Bed Burners (CEBB) and associated artificial logs and grate sets through its distributors. In about late 1996 or early 1997, the Defendant began manufacturing, advertising and selling a device that was strikingly similar to, if not virtually a copy of, Blount's patented device, as shown immediately below. (JA--1143-45; JA--1240). Defendant was not able to show any evidence of independent design or development.



**Blount's Patented Device**  
(JA--1403).  
FIG. 2 of the '159 Patent



**The Defendant's Accused Infringing Device**  
(JA--1421-22).  
Figure 2 of EMB Installation Instructions

On November 23, 1999, the '159 Patent issued with three independent claims, of which independent Claims 1 and 17 are in suit. The '159 Patent also issued with 16 dependent claims; however, only dependent Claims 2, 5, 7-9, 11-13, 15-16 are in suit. Blount notified the Defendant of the '159 Patent and its infringing activities on

December 16, 1999, by a certified letter dated December 10, 1999, from Dan Tucker (attorney for Blount) to the Defendant's president, Mr. Leslie Bortz. (JA--1436, JA--2187). The letter included a copy of the '159 Patent, informing the Defendant that Blount was prepared to take whatever steps are reasonable and necessary to prevent infringement. (Id.). A response was requested by January 14, 2000. (Id.). On December 17, 1999, Tod Corrin (the Defendant's Vice President) forwarded the December 10, 1999, letter to their patent counsel, Mr. William McLaughlin, stating "[e]nclosed is a *patent infringement* letter we received from Golden Blount's Attorney," (JA--2188, emphasis added).

Soon after forwarding the initial patent infringement notice letter to Mr. McLaughlin, the Defendant sent him a brochure concerning the accused infringing device and a picture of the accused infringing device. (JA--2237-40; JA--2241; JA--1072). Mr. McLaughlin did not see an actual accused infringing device and had no other documents before him. (JA--1031). A face-to-face meeting never occurred. Although the Defendant and Mr. McLaughlin officed only a few miles from one another, all contacts regarding the Defendant's infringement were only by telephone until long after suit was filed. (JA--1036-37).

During a telephone conversation, Mr. Bortz told Mr. McLaughlin that the Defendant had been practicing something similar to the patented invention for about

20 to 30 years. (JA--1852-54; JA--1143-45). Mr. McLaughlin's sole comment at this time was: "if you have been doing this for 20 or 30 years, that would be a strong argument, or words to that effect, of invalidity or infringement." (JA--1122-24). In accordance with Mr. McLaughlin's suggestion, the Defendant responded to the letter of December 10, 1999, by merely sending a put-off letter from Mr. Corrin to Dan Tucker on December 30, 1999. (JA--1437).

The Defendant never once wrote or called Blount to discuss its "intentions regarding the continued sale of [its] products vis-a-vis the subject patent" as requested in the original cease and desist letter. All the while, the Defendant continued to market, manufacture, sell and offer to sell the infringing device. After receiving no response for more than four months, Blount sent a second letter to the Defendant on May 3, 2000, again accusing the Defendant of patent infringement. (JA--1439; JA--2191). The May 3, 2000, letter advised the Defendant that Blount "will take [the] necessary steps to stop any such *infringement*." (Id., emphasis added).

The Defendant responded to the May 3, 2000, certified letter with a second put-off letter dated May 16, 2000. (JA--1440; JA--2192). The May 16, 2000, letter asked that Blount explain to the Defendant, in detail, the basis upon which Blount believed that the Defendant was infringing the patent. (Id.). The Defendant still made no effort to cease manufacturing, advertising, selling or offering to sell the infringing device, nor

had the Defendant sought or obtained any significant oral or written advice concerning infringement or validity from any attorney.

On January 18, 2001, over a year after the Defendant received its first notice of infringement letter, Blount, without any other options, filed suit. (JA--0024-38). Blount sent a final letter to the Defendant advising it that suit was brought in view of its failure to respond or indicate in any manner its intentions with respect to the infringing product. (JA--1441; JA--2193). The Defendant still made no effort to cease its infringing activities in the time period between the May 3, 2000, letter and the January 19, 2001, letter, or for that matter, until the district court's decision. (Appellant's Principal Brief pg. 7).

It was not until February 2001, after the suit was brought and some 14 months after receiving the initial notice of infringement letter, that the Defendant expressed serious concerns about its infringing activities. Mr. Bortz gave Mr. McLaughlin a telephone call to voice his concern, not that the Defendant might be infringing, but that he had heard that if someone was found to be a willful infringer he might have to pay the other side's attorney's fees. (JA--1128-29). Mr. Bortz then asked Mr. McLaughlin what a patent infringer might do to keep from having to pay those attorney's fees. In response, Mr. McLaughlin stated that one way was to obtain an opinion. (JA--1858). The record indicates that the possibility of losing the suit did not concern Mr. Bortz

because of the very minor amount of money involved. The appropriation of Blount's property rights were of no concern either; the only issue in Mr. Bortz' mind was the other parties' attorney's fees. (JA--1128-30).

Thereafter, the Defendant agreed that Mr. McLaughlin needed to perform a prior art search and order the prosecution history of the '159 Patent. (JA--1058-59; JA--1030). Mr. McLaughlin never undertook a professional prior art search. Instead, Mr. McLaughlin only relied upon documents the Defendant purported to be prior art; ones that it found in its own archives. (JA--1059). Nobody made mention of a written opinion, and Mr. McLaughlin never gave one. (JA--1079-80). Mr. McLaughlin did not remember whether he even recommended one. (JA--1038; JA--1838).

After receiving the internally gathered prior art from Mr. Bortz and obtaining the prosecution history of the '159 Patent, sometime in May 2001 and at least five months after suit had been brought, Mr. McLaughlin provided the Defendant an oral opinion regarding infringement and validity of the '159 Patent. (JA--1035). Even at this point in time, Mr. McLaughlin still did not have the actual infringing device available for his inspection and analysis, nor had he had a face-to-face meeting with any representative of the Defendant regarding the matter, even though the parties worked only a few miles apart. (JA--1036-38). Mr. McLaughlin based his after-the-fact, bobtailed oral opinion solely upon the brochure of the infringing device, (JA--2237-40), the picture of the

infringing device, (JA--2241), the Defendant's purported prior art, Mr. Bortz' oral representations, and the prosecution history of the '159 Patent. It was not until long after Mr. McLaughlin's final oral opinion that he had a chance to view a physical representation of the Defendant's infringing device. (JA--1036-38).

The Defendant made no effort to cease its infringing activities until after the district court entered a permanent injunction. At no time during its 2½ years of infringing activity did the Defendant seek a written opinion regarding the infringement of the '159 Patent or its validity, including from the time that it received the initial notice of infringement letter up to and through the end of the trial. (JA--1079-80). Instead, the Defendant was relegated to asserting that its responses to interrogatories made during discovery constituted a written opinion. (JA--1074-75).

After the Defendant began manufacturing its infringing device in the 1996/1997 season, it sold both the G4 and G5 burner packages, both of which the Defendant intended to be sold with and connected to its Ember Flame Booster (EMB). (JA--1134-36). The G4 and G5 burner packages are identical except that the Defendant pre-assembles the G5 burner package according to certain Canadian Gas Association specifications. (JA--1183; JA--1246-47; JA--1264-65).

Between December 16, 1999, and the district court's judgment on August 9, 2002, the Defendant sold 3,723 EMB units in the United States, (JA--0770; JA--1521-

24; JA--0014), of which at least 10 were of the pre-assembled G5 burner package. (Appellant's Principal Brief pg. 7; JA--1140-41; JA--1247; JA--1710-14). Additionally, on a number of occasions, the Defendant itself attached EMBs to G4 burner systems and demonstrated the combination to distributors, customers and the like, for the purpose of showing how the combination produces an aesthetically pleasing front flame. (JA--1133-34). The Defendant testified that it started making the EMB because customers asked for such an effect. (JA--1243). The Defendant sold both the G4 and G5 burner assemblies and EMBs to ultimate consumers with one of a number of types of the Defendant's artificial logs and a log grate. The ultimate consumers connect the primary burner to a gas source having a valve associated therewith. (JA--0212, Stipulation No. 6).

The trial against the Defendant for infringement of the '159 Patent began on July 29, 2002, before the Honorable Jerry Buchmeyer. The trial lasted 2½ days, during which time Judge Buchmeyer observed not only the demeanor of the witnesses, but the Defendant's infringing device in comparison to the claimed structure. He watched a videotape comparing the infringing device and a commercial embodiment of the patented device during their operation, and he came down from the bench to view in detail the orientation of the Defendant's structure. (JA--1096). The Judge ultimately found, among other things, that the Defendant infringed Claims 1, 2, 5, 7-9, 11-13 and

15-17 of the '159 Patent literally and under the doctrine of equivalents. (JA--0008, Conclusion of Law No. 5).

### SUMMARY OF THE ARGUMENT

The district court did not err in any of its findings of fact or conclusions of law. All of its findings and conclusions were based on 2½ days of oral testimony and numerous exhibits. A number of witnesses were called and cross-examined. Moreover, both parties introduced numerous exhibits and made opening and closing arguments. Additionally, the district court judge, who has presided over numerous patent infringement cases, actually stepped down from the bench and viewed the Defendant's infringing structure closely and at eye level, viewed, first hand, demonstrations pertinent to the issue of infringement, and also evaluated the demeanor of each witness. Thus, there was more than ample evidence on which the district court based its findings and conclusions.

In view of the significant amount of evidence before it, the district court found that there was infringement after a responsive interpretation of the claims. The district court felt so strongly on the matter that it not only found literal infringement, but it also found infringement under the doctrine of equivalents. As to what Defendant says about invalidity, it is truly nothing. Not only is it Defendant's burden by clear and

convincing evidence to show invalidity, but if Blount instead had that burden we would not be concerned! Defendant tries to prey on its presentation of a rather simple and ancient structure--again. However, they overlook that for many years such structures did not manifest the present invention. The invention only happened when Mr. Golden Blount invented it. Not one piece of prior art, whether of record in the patent office or introduced at trial, blights this invention.

Blount is also astonished that Defendant would attempt to bring up "inequitable conduct" for the very first time on Appeal. Blount may repeat this disdain several times in this brief, but it is offended so much that it hopes this Court will pardon its redundancy. So--we repeat that this is a phony, late and waived issue.

As to damages, they are both supported by Claim 15 or by the established law, such as "conveyed" law or "the entire market value rule". Considering willfulness, what can be said? This is a classic example of one trying to cheat a patent owner, as will be established. Finally, this is certainly an exceptional case. The rotten smell of Defendant's conduct makes it so.

## STANDARD OF REVIEW

Defendant gives no Standard of Review, so Blount is obligated to offer its own.

The present appeal is from a bench trial. Accordingly, this Court reviews the district court's decision for errors of law *de novo* and findings of fact under the clearly erroneous standard. *F. R. Civ. P. 52(a); Brown & Williamson Tobacco Corp. v. Philip Morris Inc.*, 229 F.3d 1120, 1123, 56 U.S.P.Q.2d 1456 (Fed. Cir. 2000).

The district court found that the Defendant infringed the '159 Patent literally and in the alternative under the doctrine of equivalents. A determination of infringement, whether literal or under the doctrine of equivalents, is a question of fact reviewed under the clearly erroneous standard. *Biovail Corp. Int'l v. Andrx Pharms., Inc.*, 239 F.3d 1297, 1300, 57 U.S.P.Q.2d 1813 (Fed. Cir. 2001) and *See, Bai v. L & L Wings, Inc.*, 160 F.3d 1350, 1353, 48 U.S.P.Q.2d 1674 (Fed. Cir. 1998). Claim construction, is an issue of law, *see, Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 970-71, 34 U.S.P.Q.2d 1321 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996) that this Court reviews *de novo*. *See, Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1454, 46 U.S.P.Q.2d 1169 (Fed. Cir. 1998) (en banc).

The district court also found that the '159 Patent was valid. Invalidity based on obviousness is a question of law (reviewed *de novo*) that is, in turn, based on underlying factual findings (reviewed under the clearly erroneous standard). *Graham*

*v. John Deere Co.*, 383 U.S. 1, 17 (1966); *Dennison Mfg. v. Panduit Corp.*, 475 U.S. 809, 810-11 (1986) and *Brown & Williamson*, 229 F.3d at 1124. An issued patent is presumed to be valid under 35 U.S.C. § 282; the burden to show facts supporting a conclusion of invalidity is clear and convincing evidence. *WMS Gaming Inc. v. Int'l Game Techs.*, 184 F.3d 1339, 1355, 51 U.S.P.Q.2d 1385 (Fed. Cir. 1999).

The district court found that the Defendant was a willful infringer and that the case was exceptional. It awarded treble damages and attorney's fees under 35 U.S.C. § 284 and 35 U.S.C. § 285. When this Court reviews damages, the clearly erroneous standard applies to the review of the amount of damages, while the abuse of discretion standard applies to the review of the theory chosen to compute damages. *Institut Pasteur v. Cambridge Biotech Corp.* 186 F.3d 1356, 51 U.S.P.Q.2d 1321 (Fed. Cir. 1999); *See, Unisplay, S.A. v. American Elec. Sign Co.*, 69 F.3d 512, 517 n.8, 36 U.S.P.Q.2d 1540 (Fed. Cir. 1995); *see also, SmithKline Diagnostics, Inc. v. Helena Lab. Corp.*, 926 F.2d 1161, 1164-65 & n.2, 17 U.S.P.Q.2d 1922 (Fed. Cir. 1991). The district court's finding of willful infringement is one of fact, subject to the clearly erroneous standard. *Slimfold Mfg. Co. v. Kinkead Indus., Inc.*, 932 F.2d 1453, 1459, 18 U.S.P.Q.2d 1842 (Fed. Cir. 1991).

The finding that the case was exceptional is also one of fact and is reviewed based on clear error. *Enzo Biochem, Inc. v. Calgene, Inc.*, 188 F.3d 1362, 1370, 52

U.S.P.Q.2d 1129 (Fed. Cir. 1999). If the case is found to be exceptional, any award of attorney's fees is reviewed by this Court for abuse of discretion. *Id.* at 1370. This Court also reviews any trebling of damages for abuse of discretion. Trebling of damages is within the discretion of the district court and should not be overturned absent a clear showing of abuse of discretion. *Underwater Devices Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380, 219 U.S.P.Q. 569 (Fed. Cir. 1983); *White Consolidated Ind. v. Vega Servo-Control, Inc.*, 713 F.2d 788, 218 U.S.P.Q. 961 (Fed. Cir. 1983).

## ARGUMENT

### **I. Claim Construction**

The Defendant presented two issues for review regarding claim construction. First, the Defendant asserts that the district court erred in its construction of the term "raised level," with respect to the relative vertical location of the primary and secondary burners, as independent Claims 1 and 17 recite. Second, the Defendant asserts that the district court erred in its construction of the term "away from the fireplace opening," with respect to the orientation of the secondary burner's gas discharge ports, as only independent Claim 17 recites.

A. “Claims 1 and 17: Raised Level”

The district court did not err as a matter of law in concluding that “raised level” means that the elongated primary burner is at a raised level with respect to the secondary burner. The intrinsic evidence of the ‘159 Patent, including its claims, specification (including drawing figures), and prosecution history (including cited art), all of which is assisted by trial testimony, supports the district court’s conclusion that “raised level” means that the elongated primary burner is held up by the side of the pan at a raised level with respect to the secondary burner. (JA-0007, Conclusion of Law No. 2).

The Defendant contends that the district court’s construction of “raised level” is incorrect, as the relative positions of the primary burner and secondary burner should be taken from their respective ports, and not with respect to the tops or centerlines, as it concluded. In support of its position, the Defendant takes out of context a passage in the ‘159 Patent.

It is not the vertical positioning of the ports that matters, but the ability to fan out the sand to a lesser thickness over the top of the secondary burner. (JA--1355). The specification recites in pertinent part that “[t]he secondary elongated burner tube can also have adjustments for height . . . depending on the depth and size of the coals and embers fire bed.” (JA--1408, col. 6, lns. 30-35). This leads to the conclusion that

the relative height of the secondary burner with respect to the raised primary burner depends on the depth and size of the coals and embers to be illuminated. Thus, the desire to have the sand fan out from the raised primary burner to the front of the fireplace such that the lower secondary burner is covered by the sand primarily governs the vertical position of the secondary burner. (JA--1355). The trial testimony richly supports this. Mr. Blount testified that the reference point of the secondary burner is its uppermost portion:

Q Mr. Blount, would you consider the primary tube raised relative to the secondary tube when you look at the tops of the tubes? Which one is higher? Let me put it to you that way. Which one is higher?

A The primary tube.

Q Is that important in your patent?

A Well, yes. You want to cover up the primary -- the secondary tube with embers and such. If you raise it too high, there's no way you're not going to see the tube.

Q So if you're measuring, then, from these things, it's the top that matters; is that correct?

A That's right.

Q And the reason for it is, as you just stated if I'm understanding you correctly and I want to make sure I understand you correctly, is that when you have the primary here and the secondary here, you've got to fan those materials out? Is that what you just said?

A Absolutely. You want to cover the secondary tube.

Q It's the top, then, of the tubes that matter the most, not the bottoms?

A Absolutely. You want to cover the tube totally so people won't see the burner there.

(JA--1351-52).

The Defendant also implicitly argues that the description of FIG. 3 of the '159 Patent calls for the flames emanating from the ports of the secondary burner to be lower than the flames emanating from the ports of the primary burner, "thus providing an aesthetically pleasing sight." (JA--1408, col. 6, lns. 47-52). In advancing this argument, the Defendant attempts to mislead this Court into thinking that the ports are the place from which the flames emanate. However, the aesthetically pleasing flames to which the Defendant refers do not emanate from the ports, but instead emanates from the sand covering the secondary burner. (JA--1408, col. 5, lns. 20-22; JA--1404 at FIG. 3, reference numbers 30 and 40). Further, it makes no sense to judge whether one tube is raised with respect to the other by looking at their respective bottoms. Thus, the district court did not err by rejecting the Defendant's asserted construction.

In the alternative, the Defendant argues that the district court's construction of the term "raised level" is limited to determining the relative heights of the tubes from

their respective centerlines. Clearly, the district court did not intend to base its determination solely on the centerlines. It was but one possible reference point that the district court could have used to support its broader construction. The district court deliberately used “*e.g.*,” (“for example”) before the word “centerline” to indicate that other possible reference points could be used to fulfill the “raised level” limitation. (JA--0007, Conclusion of Law No. 2) The Defendant disingenuously seizes this single notation to weave an erroneous argument that the district court limited its construction to determining the relative heights of the two tubes based solely from their centerlines.

If no other evidence or testimony were presented to the district court regarding this matter, the Defendant’s argument might be plausible. That is not the case. To the contrary, as indicated by the Markman briefs and the trial testimony, substantial evidence exists supporting the construction that the tops of the tubes are an additional reference point. (JA--0294-348; JA--0368-80; JA--1549-50). Moreover, had the district court intended to limit the reference point to the centerlines of the respective tubes (as the Defendant would have it do), it would have used “*i.e.*,” (“in other words”), rather than “*e.g.*.” The Defendant invites this Court to rule on the district court’s supporting example rather than its actual construction of the limitation. This Court should decline. Instead, in its *de novo* review Blount urges this Court to recognize that the construction of the limitation includes the centerline, the top, and all

other reasonable limitations as found by the district court.

The weight of the record unequivocally supports the district court's conclusion that "raised level" means that the elongated primary burner is held up by the side of the pan at a raised level with respect to the secondary burner. Therefore, the district court's Claim construction regarding "raised level" was not erroneous.

**B. "Claim 17: Away from the fireplace opening"**

The district court did not err in concluding that "away from the fireplace opening," regarding the orientation of the gas ports, as recited only in independent Claim 17, is any direction that does not include a horizontal component pointed toward the vertical plane of the fireplace opening, with the exception that the gas discharge ports cannot be pointed substantially vertically upward. (JA--0008, Conclusion of Law No. 2). As this Court's own precedent well establishes, the specification is the first thing to which a court should look in interpreting the language of a claim. *Bell Comm. Res., v. Vitalink Comm. Corp.*, 55 F.3d 615, 621, 34 U.S.P.Q.2d 1816 (Fed. Cir. 1995). Here, the specification's teachings fully support the district court's construction stated above.

The specification recites, *inter alia*, that "[i]n the secondary burner tube 104, the gas is discharged in a direction away from the opening of the fireplace, or in another aspect, is directed somewhat toward or directly toward the primary burner

14.” (JA--1408, col. 5, lns. 58-62). This language supports at least two embodiments: one where the gas discharge ports are directed somewhat or directly toward the primary burner and another that provides for all other orientations of the ports, except those directed toward the fireplace opening. The latter embodiment fully encompasses ports oriented in a vertical downward direction. If this language does not support these two embodiments, it has no meaning within the context of the specification. In addition, the district court could have reasonably relied on the testimony of Mr. Blount that the direction of the ports could include a vertical downward position. (JA--0931; JA--0999).

In challenging the district court’s finding, the Defendant attempts to focus attention exclusively on a preferred embodiment by arguing that its vertically downward oriented ports are not directed away from the fireplace opening because gas discharged from the downward facing ports would strike the fireplace floor and disperse in approximately equal volumes both toward and away from the fireplace opening. Essentially, the Defendant is arguing that Claim 17 cannot be construed to include a vertical downward orientation of the ports, because, according to its argument, all of the gas must be discharged toward the primary burner, a limitation that cannot be found in either the specification or the claims. In making this imaginative argument, the Defendant confuses the direction of the gas discharge with the direction

of the ports. Its confusion was evident in the way counsel for the Defendant cross-examined Mr. Blount, the text of which the Defendant cited in its brief. (Appellant's Principal Brief pg. 17). However, during redirect, Mr. Blount clarified the distinction between the gas flow and the orientation of the ports when he testified as follows:

Q Have you considered that when gas is discharged from the bottom of these tubes straight down, is there a draft that occurs naturally in fireplaces?

A Certainly.

Q Would some of the draft pull some of the gas or flame or whatever over to that side?

A Absolutely.

Q So you would wind up with only a fraction on the one side and a large fraction on the other side. And that doesn't take a rocket scientist to know that, does it?

A It shouldn't.

Q And so for the most part it's fair to say, as you said, I believe, that even if it goes straight down, okay, that's away from the front of the fireplace?

A Yeah. Are you through with me?

(JA--0999). And a hostile witness, Mr. Jankowski, testified how substantial the draft was: "the draft was so direct that it was taking all the flame in the G 4 burner to the back of the fireplace. And they weren't able to get any flame in front." (JA--1197).

As much as the Defendant would like this Court to adopt its confusion, Claim 17 does not refer to any direction of gas flow, but only requires that the ports be directed away from the fireplace opening. As Mr. Blount testified, if the jets are facing down, they are not toward the fireplace opening. (JA--0931; JA--0999). The specification further supports this distinction, teaching that the sand acts as a filter or channeling system for the gas. (A--1408, col. 5, lns. 15-22). Thus, the sand diffuses gas exiting the ports such that the gas and resulting flames may appear on both sides of the secondary burner, as illustrated by the position of the flames in FIG. 3 of the '159 Patent. (JA--1404 at FIG. 3). Thus, the direction of the gas flow has little to do with the orientation of the gas discharge ports.

While the specification discusses the advantages of a preferred embodiment, which is the subject of the Defendant's exclusive focus, the district court did not err in its Claim construction because it did not limit the language in Claim 17 to that preferred embodiment. Claim 17 only requires that the ports be directed away from the fireplace opening. Therefore, the district court's Claim construction was not mistaken.

## **II. Invalidity**

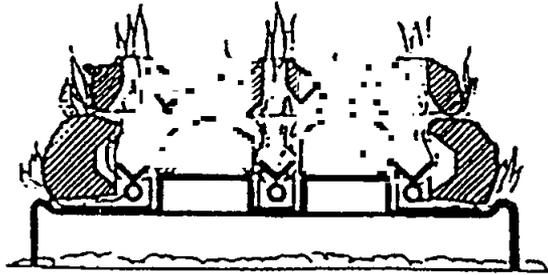
The district court did not err in concluding that Claims 1, 2, 5, 7-9, 11-13, 15

and 16-17 were not obvious over the prior art cited by the Patent and Trademark Office (PTO) and the prior art introduced at trial. Upon reviewing the entire record before it, the district court's ruling regarding obviousness was entirely proper. The district court allowed all the prior art that the Defendant introduced at trial into evidence, including the so-called multiple burner "F3" and Jankowski art. Having allowed the newly introduced art into evidence and having heard more than 2½ days of testimony by both Blount's and the Defendant's witnesses as to the materiality of the newly introduced art as compared to the cited art, the district court correctly found that all the prior art failed to overcome the presumption of validity. (JA--0008, Conclusion of Law No. 6).

The Defendant contends that the district court did not accept the F3 or Jankowski art as prior art. The trial record belies that contention. (JA--1167). Blount made no objection when the Defendant offered these exhibits into evidence. (Id.). Clearly, then, the F3 and Jankowski art were admitted into evidence and considered by the district court in reaching its conclusion. (JA--0008, Conclusion of Law No. 6).

The Defendant also contends that the F3 art is more material than the district court found. The Defendant argues that the F3 art contained both the independent burner valves and a primary burner at a raised level from the secondary burner. Nothing in the record supports the Defendant's argument that the primary burner of

the F3 is at a raised level to the secondary burner. Actually, one of Defendant's own trial exhibits, as set forth below, illustrates a cross-sectional view of the F3 art, which depicts the primary burner and two secondary burners on an identical level.



The Defendant's Trial Exhibit D-45  
(JA--2244).

Thus, the Defendant's own trial exhibit shows the primary burner and two secondary burners to be level with respect to one another. The Defendant inferentially suggests, erroneously, that a so-called "fireplace log rest," (JA--2264), is coupled to the F3 to position the primary burner at a raised level to the secondary burners. The "fireplace log rest" is not even shown to be for the purpose of cooperating with the F3. No evidence in the record supports the Defendant's suggestion. Rather, the record supports only that the F3 is a multi-valve burner system for see-through and circular log sets in which the primary and secondary burners are on the same level.

The Defendant further contends that, had the district court admitted the F3 and Jankowski art, it would have found the '159 Patent invalid for obviousness, as the only

differences argued to the Examiner during prosecution were shown to be old by the F3 and Jankowski art. However, as this Court's own precedent has long established, old components are routinely and inventively combined to result in new and patentable apparatus. *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1540, 218 U.S.P.Q. 871, 880 (Fed. Cir. 1983). As Judge Markey said, "[o]nly God works from nothing. Men must work with old elements." Markey, *Why Not the Statute*, 65 JPOS 331 (1983). Even though Blount's burner assembly is assembled from well-known components, it is assembled in a unique and novel way that provides a novel and strikingly realistic looking ember burner for artificial gas log fireplaces, which has previously not been achieved.

The testimony during trial solidly supports the district court's finding that no motivation exists to combine the multiple valves from the F3 art or the single valve of the Jankowski art with that taught by Eiklor to render the Claims of the '159 Patent obvious. The district court did not err.

One skilled in the art would not be motivated to include an additional valve as taught by either the F3 or Jankowski reference within Eiklor, as to do so would interfere with Eiklor's specific functioning. Eiklor's general teachings are to prevent the uneven distribution of the gas in the first  $\frac{1}{4}$  of the ports in the front burner as compared to the other  $\frac{3}{4}$  of the ports in the front burner. (JA--2153, col.1, lns. 44-59).

To correct this problem, Eiklor teaches inserting a metallic strip that partially blocks the first  $\frac{1}{4}$  of the ports in the front burner, such that the gas is more evenly distributed in the last  $\frac{3}{4}$  of the ports and gives a better overall appearance of flame distribution along the front burner. (JA--2154, col. 3, lns. 39-66). The district court could have easily concluded that one skilled in the art would not be motivated to include an adjustable valve between the first and second burners because to do so would affect the pressure of the gas supplied to the second burner such that it could not be effectively emitted from the first  $\frac{1}{4}$  of the ports due to the blockage of the metallic strip. For this reason, no motivation exists to add a valve, because it would interfere with the functioning of the metallic strip as Eiklor intended.

Thus, the district court properly considered the references made of record during trial and properly concluded that their combined teachings did not render the Claims of the '159 Patent invalid for obviousness. The old art from Defendant's archives and files is at most cumulative, not because it is an obsolete buggy whip as testified to by Defendant's Mr. Bortz, but because it is not on point. (JA--1145).

### **III. Inequitable Conduct**

The Defendant's argument that the district court erred by failing to hold the '159 Patent unenforceable because of inequitable conduct is without one scintilla of

support. The argument is so groundless that Blount should not respond to Defendant's claim. Reluctantly, Blount believes it would be remiss not to respond without being subject to waiver.

Defendant's inequitable conduct argument is fallacious. First, never once before the filing of the Defendant's Brief did the Defendant ever raise an inequitable conduct issue. The law requires that inequitable conduct be specifically pled and that it be an element or defense clearly brought up in the case. Fed. R. Civ. P. 9. Moreover, the cases are legion requiring such a pleading. See, *Chisum on Patents* §19.03 stating "recent Federal decisions indicate that "gross negligence" will not suffice to establish inequitable conduct"; "intent to deceive must be shown." See also, note 3.

Despite the requirement, never once did the Defendant mention or even remotely suggest inequitable conduct in the pleadings. (JA--0039-42; JA--0246-63). The Defendant authorized or filed not one document in the lawsuit that in any way hinted at the issue. The absence of the issue until the Defendant's Brief precludes it for consideration on appeal. The Defendant has waived the issue.

Nonetheless, Blount will briefly address the merits of the phantom charge of inequitable conduct. For inequitable conduct to exist, intent must be present. Contrary to the Defendant's assertions, gross negligence is insufficient to find intent. *Kansas Jack Inc. v. Kuhn*, 719 F.2d 1144, 219 U.S.P.Q. 857 (Fed. Cir. 1983),

decided against the charge of inequitable conduct based on lack of gross negligence. Its discussion of the significance of gross negligence is in a limited context and is not conclusive of an inequitable finding since the case was decided for the accused party. Federal Circuit cases since *Kansas Jack* have not followed a “gross negligence” rule. Exemplary are *Kingsdown Medical Consultants, Ltd. v. Hollister, Inc.*, 863 F.2d 867 (Fed. Cir. 1988) and *Speedplay, Inc. v. Behop, Inc.*, 21 F.3d 1245 (Fed. Cir. 2000). The law is clear that looking to gross negligence for intent is insufficient.

In any event, Blount should not be found to be grossly negligent. Mr. Blount, the inventor, testified that he was aware of certain old Peterson structures but that he did not know he needed to inform the PTO about them. (JA--0966-73). He considered the product to be quite different from his own device, as he so testified. (JA--0966; JA--0996-97). Mr. Blount’s testimony is candid and clear that it never occurred to him that his scant knowledge should be passed on to the PTO. Of course Mr. Blount was hardly a patent expert. He testified that he did not know what effect such information would have had on the Examiner. (JA--0970).

Materiality is not proven by Mr. Blount’s simple statement that he didn’t know how the Examiner would have reacted. It was to him a very different multiple burner with multiple valves for a completely different purpose. (JA--0996-97). Therefore, even if the Defendant had properly placed the issue before the district court, the

evidence on the record is sufficient to establish that inequitable conduct did not occur, and a finding along those lines should not be reversed as clearly erroneous. However, it should be stated again that this response is moot because the Defendant erred in not specifically pleading inequitable conduct as the law requires.

#### **IV. Infringement**

The district court did not err when it found that the Defendant directly infringed, contributorily infringed, infringed by inducement, and infringed under the doctrine of equivalents, Claims 1, 2, 5, 7-9, 11-13 and 15-17. The Defendant has not met its burden of establishing that the district court's factual findings are clearly erroneous under the standards of review of the Federal Circuit and F. R. Civ. P. 52(a).

##### **A. Direct Infringement**

Based on the significant amount of evidence, the district court's finding of direct infringement of Claims 1, 2, 5, 7-9, 11-13 and 15-17 by the Defendant was correct. The district court's findings were based on 2½ days of oral testimony and numerous exhibits. Both Blount and the Defendant called witnesses, cross-examined those witnesses, introduced numerous exhibits and made opening and closing arguments. Additionally, the district court judge, who has presided over numerous patent infringement cases, took the opportunity to step down from the bench and view

the Defendant's infringing structure closely and at eye level, view a live demonstration pertinent to infringement, view a comparative video, consider and weigh each exhibit, and hear and evaluate the demeanor of each witness. Each party had ample opportunity to tell its side of this factual dispute, and in this case, the district court found that the Defendant directly infringed Claims 1, 2, 5, 7-9, 11-13 and 15-17.

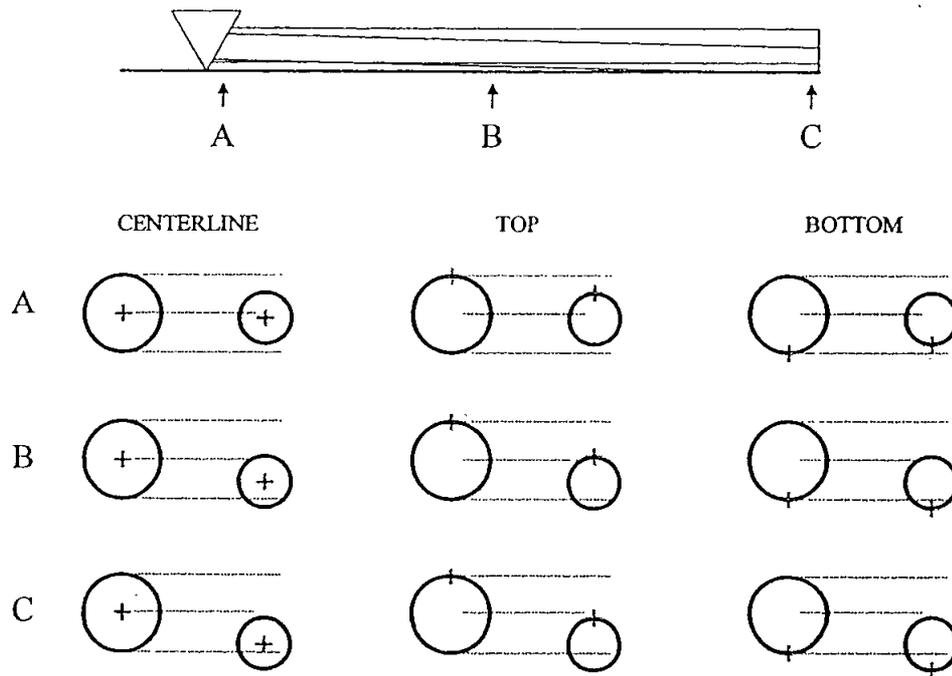
The Defendant argues that Blount failed to prove even a single act of direct infringement because Blount failed to establish that any of the 10 pre-assembled burner assemblies configured by the Defendant satisfy the "vertical limitation" required by independent Claims 1 and 17. This is incorrect. Blount presented significant evidence to the district court to provide a basis for direct infringement regardless of whether the relative height determinations were taken from the tops, the centerlines or even the bottom of the tubes.

For example, Blount introduced evidence that the coals and embers are of sufficient weight to force the distal end of the EMB to bend down and touch the fireplace floor. (JA--0998). The Defendant's own Vice President, Mr. Corrin, supported Blount's evidence when he testified as follows:

Q Sir, if the valve hits the floor and you still put a weight on the extending cantilever, it will go down, won't it?

A It will, yes.

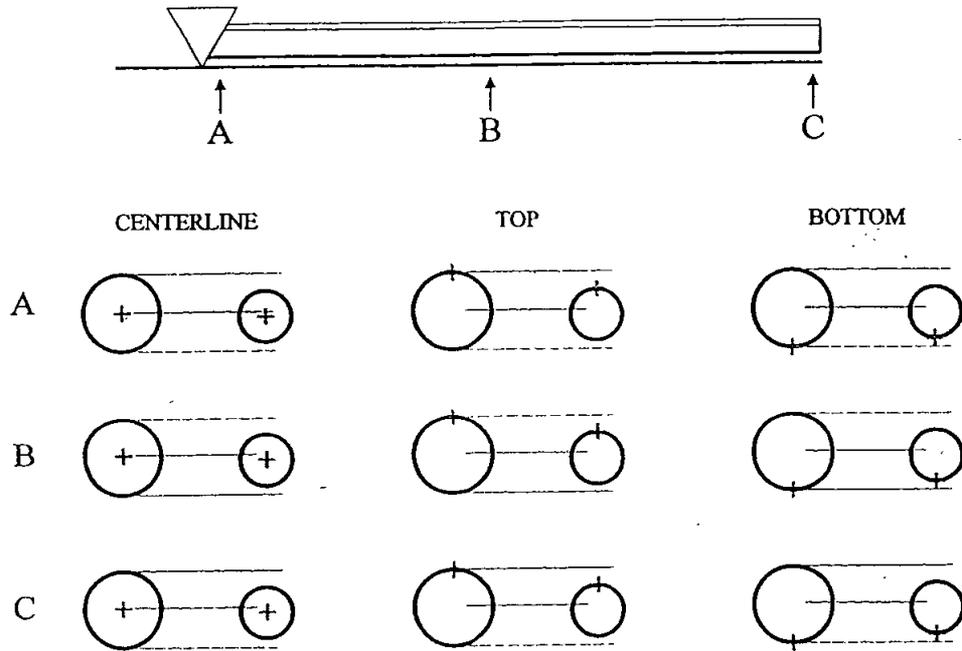
(JA--1270-71). Blount also offered evidence, in the form of Blount's Trial Exhibit 22, (JA--1549), (reproduced below) that regardless of whether the relative positions of the EMB and primary burner are judged from their respective centerlines, tops or bottoms (ports), the ports located at the tip (C) of the EMB forced down by the sand and embers satisfy all possible claim constructions regarding the so-called "vertical limitation."



Blount's Trial Exhibit 22  
(JA-1549).

Additionally, Blount, using a carpenter's level on the Defendant's infringing device, offered testimony that shows that the primary burner is raised with respect to the secondary burner. Interestingly, even the Defendant's own patent attorney, Mr.

McLaughlin, admitted this when he testified at trial that “assuming the table is level, the top of the front burner is below the top of the rear burner.” (JA--1097). Thus, the record supports the district court’s finding of direct infringement.



**Blount’s Trial Exhibit 22**  
(JA--1550).

The Defendant further argues that Blount failed to prove a single act of direct infringement because the Defendant never connected the device up to a main gas source. Ironically, the testimony of two of the Defendant’s own witnesses belie the Defendant’s argument. Messrs. Bortz and Corrin, both corporate officers of the Defendant, each testified that on multiple occasions the Defendant assembled and operated the infringing device. For example, Mr. Bortz testified that the Defendant

“certainly had one EMB set-up in the lab” to display to the distributors so they had the opportunity to see how the item worked. (JA--1133-34). Similarly, Mr. Corrin testified that he had observed other employees of the Defendant adjust the EMB to different orientations for testing purposes to determine what would happen if the orientation of the front flame burner were changed. (JA--1267-68).

This testimony directly establishes two key facts. First, on multiple occasions the Defendant assembled, connected to a gas source and used the infringing structure. Second, the Defendant, on its own, changed the orientation of the front flame burner (*i.e.*, cantilevered the EMB such that its tip was against the fireplace floor) in an infringing manner during the operation thereof. Both of these instances establish at least two circumstances where the Defendant directly infringed the ‘159 Patent. These facts, standing alone, provide evidence that is more than sufficient to support the district court’s finding of direct infringement.

Additionally, and contrary to the Defendant’s labored argument, nowhere did the parties stipulate that “only” the Defendant’s end users could be the direct infringer. The Defendant has gratuitously added the word “only” to the agreed-upon language, because it cannot be found anywhere in the pertinent stipulation. (JA--0212, Stipulation No. 6). The Defendant’s argument misrepresents the stipulation. What the parties actually stipulated was that, “an end user would connect the primary burner

pipe to a gas source having a valve associated therewith.” (JA--0212, Stipulation No. 6). This stipulation arose from the Defendant’s attempts to obstruct Blount’s discovery efforts, by being unwilling to provide distributor names such that Blount could inquire as to their installation processes and discover other salient associated information. In an effort to prevent Blount from discovering this information, the Defendant agreed to make the aforementioned stipulation. (JA--1720-23).

As indicated above, the parties stipulated that the infringing device “would” be connected up to a primary gas valve. (JA--0212, Stipulation No. 6). Defendant admits it sold at least 10 pre-assembled EMB units. (Appellant’s Principal Brief pg. 7). Thus, at the very least, Blount proved direct infringement with respect to these 10 pre-assembled EMB units that end users would install in a fireplace using a primary valve. Therefore, the record conclusively supports the district court’s finding that the Defendant’s 10 pre-assembled EMB units directly infringe the Claims of the ‘159 Patent.

The district court not only had ample evidence and testimony before it to establish direct infringement with the G5 units, but the G4 units as well. At trial Mr. Bortz testified that the Defendant intended the G4 and the EMB to go together and that the EMB was not a staple article of commerce and could not be used for anything else. (JA--1135-36). In view of this, the evidence supports the fact that the EMB had no

use other than an infringing use (connected to the G4). To close the door on the Defendant's argument, Mr. Corrin testified at trial that if the end user did not install it himself, a paid professional installer would install it for the end user. (JA--1257-58).

While more than enough direct evidence exists to support the district court's findings, a substantial amount of circumstantial evidence also exists to support the findings beyond what the clearly erroneous standard requires. The law is clear that proof of inducing infringement or direct infringement may be shown by circumstantial evidence. See *Moleculon Research Corp. v. CBS*, 793 F.2d 1261, 299 U.S.P.Q. 805 (Fed. Cir. 1986). "It is hornbook law that direct evidence of a fact is not necessary. 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" *Id.* at 1272. Extensive circumstantial evidence exists, without any evidence to the contrary by the Defendant's own witnesses, that the G4 and EMB were connected in an infringing manner.

To conclude this point, the district court had the opportunity to observe 2½ days of testimony, hundreds of exhibits and real-time demonstrations by both parties, and found that all of this evidence supported the fact that the Defendant's device directly infringed Claims 1, 2, 5, 7-9, 11-13 and 15-17 of the '159 Patent. The Defendant has not overcome its burden of establishing that the district court's factual findings are clearly erroneous under the standards of review as this Court and F. R.

Civ. P. 52(a) require.

**B. Doctrine of Equivalents**

The district court did not err in finding that certain ones of the Defendant's devices alternatively may have infringed Claims 1, 2, 5, 7-9, 11-13 and 15-17 under the doctrine of equivalents. The Defendant argues that no range of equivalents is available for the so-called "vertical limitation." It bases its argument on two assertions. The Defendant first asserts that since this element was added during the prosecution of the '159 Patent, Blount is now estopped from any range of equivalents regarding the "vertical limitation." Then, the Defendant asserts that such a no estoppel argument would challenge the district court's construction of the "vertical limitation" based on the "centerline test." Both of these assertions are fatally flawed.

As explained above, the district court's conclusion did not rest solely on one point of reference. Blount presented two different theories from which the district court could construe "raised level." One was from the tops and the other was from the centerlines. Regardless of the theory, the district court found that the primary burner in the Defendant's device was raised with respect to its secondary burner, as previously discussed.

Nothing in the prosecution limits the ranges of equivalents. As the trial record indicates, the prosecution history shows that Claim 1 of the application as filed on

April 2, 1996, contained the language “in a raised level relative to a forward position secondary coals burner elongated tube.” (JA--2083). No amendment was made substantively changing this concept before the Examiner, and it was never a ground of rejection or controversy. Likewise, independent Claim 17 of the application of April 2, 1996, contained the language “below the primary burner,” and it was also rejected. Thereafter, Claim 17 was allowed after further proceedings with no changes in this language.

Nowhere in all of the prosecution did an issue arise about this feature nor an argument concerning its patentability in the PTO. Therefore, the district court was correct in according this “vertical limitation” the appropriate range of equivalents. The Defendant is, in essence, trying to convince this Court that in determining whether the primary burner is in a raised level with respect to the secondary burner, the difference between the top or center of the tube and the bottom of the tube was foreseeable. This argument *reductio ad absurdum* misses the point. The district court clearly could have understood, in view of the prosecution history, that even if the ports of the secondary burner were above the ports of the primary burner, it was still possible that the primary burner could be at a raised level with respect to the secondary burner, as shown above, and still provide the same result. Thus, the district court properly found that the so-called “vertical limitation” element was present in the Defendant’s device

under the doctrine of equivalents, because for purposes of determining whether one tube is raised with respect to the other, the bottoms of the tubes are equivalent to the tops or the centerlines.

More than ample evidence presented at trial provided the basis for the district court's finding, including testimony that each of Defendant's elements did the same thing in the same way to give the same results as each of the claimed elements, (JA--0914), an equivalents chart, (JA--1532-48), a videotape comparing a completely assembled and operating version of the Defendant's infringing device, including a grate and artificial logs, burning directly next to a completely assembled and operating version of Blount's commercial device (as per the patent claims), and pictures comparing the Defendant's infringing device and Blount's patented device while burning. (JA--1410; JA--1416). After hearing all the evidence from both Blount and the Defendant, the district court found that on an element by element basis, and as a whole, the accused structure did the same thing (performed the same function) in the same way to give the same result and that the very minor differences were found by the court to be insubstantial thereby resulting in infringement under the doctrine of equivalents. (JA--0005, Finding of Fact No. 19).

In short, the Defendant has utterly failed to establish that the district court's finding regarding the doctrine of equivalents was clearly erroneous. Clearly no

estoppel was proven by the Defendant. Therefore, this Court should not overturn the district court's finding.

### C. Contributory/Induced Infringement

Based on the entire record before it, the district court's finding of the Defendant's contributory and induced infringement of Claims 1, 2, 5, 7-9, 11-13 and 15-17 was entirely proper and is not subject to serious question. The gist of the Defendant's argument regarding contributory/induced infringement rests on the postulation that the "accused product" can be installed to avoid the so-called "vertical limitation" or with the gas ports of the EMB down, and that Blount failed to provide direct evidence at trial that every customer of the Defendant installed the EMB in an infringing configuration.

Mr. Bortz testified that, in effect, only one way exists to use the auxiliary ember burner, and that it was intended to be used in a fireplace and explicitly promoted it as such. (JA--1135). Furthermore, the Defendant even stipulated to this fact: "Robert H. Peterson Co.'s Ember Flame Booster is intended to be attached to its G-4 series burner system or G-5 series log set. . . ." (JA--0212). These statements alone establish a classical fact scenario for contributory and induced infringement. The notion that one might somehow mis-install such a simple device to arrive at a non-infringing configuration is farcical. While any assembly could be botched, it is not

expected, particularly given the fact that the Defendant's valve rests on the fireplace floor to self-align the device in an infringing configuration. (JA--1268; JA--1549-50). Regardless of whether the assembly was botched, Blount was damaged because of the lost opportunity to make the sale. *Stryker Corp. v. Intermedics Orthopedics, Inc.*, 96 F.3d 1409, 1417 U.S.P.Q.2d 1065 (Fed. Cir. 1996). In view of the infringing device's simple design, as well as other evidence, the district court did not err in its finding.

The Defendant implicitly argues that Blount must prove each and every act of infringement with direct evidence. However, this is contrary to established case law. As mentioned above with respect to direct infringement, the law is settled that circumstantial evidence may be used to establish proof of induced infringement. See *Moleculon, supra*.

In contrast to the position the Defendant argues, the record is replete with circumstantial evidence that the consumer ultimately assembles (either himself or by a professional installer) the EMB with a G4 or G5 burner in an infringing manner. The Defendant offered no testimony to establish that the ultimate consumer did not assemble the EMB with the G4 or G5 burner in an infringing manner, except for a Johnny-come-lately installation instruction sheet that Mr. Corrin, one of the Defendant's officers, prepared after Blount had brought the suit, and then only for

damage control. (JA--2229). The district court judge admitted the Defendant's tardy installation instructions, accorded them their appropriate weight, and apparently found them wanting.

The Defendant has altogether failed to establish that the district court's finding regarding induced infringement and contributory infringement was clearly erroneous. Therefore, this Court should not overturn the district court's finding.

## V. Damages

To recover lost profit damages, the patentee need only show causation and the factual basis for causation between the infringement and the lost profits. *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1065, 219 U.S.P.Q. 670 (Fed. Cir. 1983). To do this, *Panduit* established that the patent owner need only demonstrate:

- 1) a demand for the product during the period in question;
- 2) an absence, during that period, of acceptable non-infringing substitutes;
- 3) its own manufacturing and marketing capability to meet or exploit that demand; and
- 4) a detailed computation of the amount of the profit it would have made.

*Panduit Corp. v. Stahl Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1156, 197 U.S.P.Q. 726 (6th Cir. Mich. 1978); *Radio Steel & Mfg. Co. v. MTD Prods., Inc.*, 788 F.2d 1554, 1555, 229 U.S.P.Q. 431 (Fed. Cir. 1986). The Defendant erroneously attempts to persuade this Court that Blount failed to establish the last three of the four aforementioned *Panduit* factors. The district court, however, found to the contrary.

In addition to establishing a demand for the patented product during the period in question, Blount established an absence, during the period of infringement, of acceptable non-infringing substitutes. In a two-supplier market it is reasonable to assume, provided the patent owner has the manufacturing capabilities, that the patent owner would have made the infringer's sales but for the infringement. *State Indus. v. Mor-Flo Indus.*, 883 F.2d 1573, 1578, 12 U.S.P.Q.2d 1026 (Fed. Cir. 1989). (JA--0918). Unquestionably such is the case here, because Mr. Blount testified that he had more than enough manufacturing and marketing capability to promote the device. (JA--0916, 0920). The testimony of Mr. Hanft is also telling on this point.

The Defendant, however, argues that this is not a two-supplier market, and that other acceptable non-infringing substitutes exist. The “[m]ere existence of a competing device does not make that device an acceptable substitute.” *TWM Mfg. Co., Inc. v. Dura Corp.*, 789 F.2d 895, 901, 229 U.S.P.Q. 525 (Fed. Cir. 1986), *cert. denied*. A product on the market which lacks the advantages of the patented product

can hardly be termed a substitute acceptable to the customer who wants those advantages. *Standard Havens Products, Inc. v. Gencor Industries, Inc.*, 953 F.2d 1360, 1373, 21 U.S.P.Q.2d 1321 (Fed. Cir. 1991), *cert. denied*. If purchasers are motivated to purchase because of particular features available only from the patented product, products without such features would most certainly not be acceptable non-infringing substitutes. *Id.*

Here the patented product offers quite unique and novel results. The so called “acceptable non-infringing substitutes” the Defendant has introduced in its brief are either not acceptable, or they too infringe. Contrary to the Defendant’s argument, Blount established at trial that the Defendant’s front flame director was not an acceptable substitute. The Defendant’s own Vice President, Mr. Corrin, testified that the front flame director lacked the valve for adjusting the height of the front flame, and amazingly enough, he even testified that it was not as good as their EMB. (JA--1252; JA--1263). As the valve to adjust the height of the front flame is one of the particular features available only from the patented product, under the law set forth in *Standard Havens*, the front flame director, lacking that valve, is not an acceptable non-infringing substitute. Also, courts have generally held that an infringer’s acceptable substitute argument is of “limited influence” when it [the infringer] ignores those substitutes while

selling the patented invention. (emphasis added). *TWM*, 789 F.2d at 902. This is exactly what the Defendant did.

The Defendant further argues that Blount admitted at trial that at least five products on the market perform roughly the same function as Blount's patented device. The record is clear that those five products were infringing substitutes and not acceptable non-infringing substitutes, as the Defendant would like this Court to believe. In fact, the record indicates that Blount sent the manufactures of those five products the identical infringement notice letter at the same time it sent the Defendant its letter. (JA--0917). No evidence exists in the record that the aforementioned five instances of infringement continued after the notice of infringement letters were received. Nonetheless, the district court received abundant evidence to support its finding that there were no acceptable non-infringing substitutes that could have decreased the market share Blount and the Defendant together held.

Case law also provides that to determine the actual damage amount in a lost profit case, the court should multiply Blount's per unit profit times the number of infringing devices that the Defendant sold. First, however, the court must determine the device upon which lost profits are to be calculated. Using two different approaches, both of which are discussed below, Blount has established that the device

for calculating lost profits includes the entire burner assembly (including the secondary burner and valve), the grate, and a full set of artificial logs.

Apart from the above analysis, dependent Claim 15 recites that the gas-fired artificial logs and coals-burner of Claim 1 are positioned under an artificial logs and grate support means. (JA--1409, col. 8, lns. 20-24). Because the artificial logs and the grate support means are positively claimed in dependent Claim 15, the artificial logs and the grate support means should be included in the device upon which damages for direct infringement as well as lost profits are to be calculated. Accordingly, the device for calculating lost profits includes the entire burner assembly (including the secondary burner and valve), the grate and a full set of artificial logs, which must be the case here, because apart from the artificial logs and grate, the coals burner unit has no purpose or function. Therefore, the district court did not abuse its discretion in its finding.

In an alternative approach, however, the “entire market value rule” may be used to determine the device for calculating lost profits. In *Beatrice Foods*, the Court stated that the law does not bar the inclusion of conveyed sales in an award of lost profits damages. *Beatrice Foods Co. v. New England Printing & Lithographic Co.*, 899 F.2d 1171, 1175, 14 U.S.P.Q.2d 1020 (Fed. Cir. 1991). The “entire market value rule” allows for the recovery of damages based on the value of an entire apparatus containing several features, even though only one feature is patented. *Paper*

*Converting Machine Co., v. Magna-Graphics, Corp.*, 745 F.2d 11, 33, 223 U.S.P.Q. 591 (Fed. Cir. 1984). The “entire market value rule” further permits recovery of damages based on the value of the entire apparatus containing several features, when the patent-related feature is the basis for customer demand. See *TWM*, 789 F.2d at 901. The “entire market value rule” is appropriate where both the patented and unpatented components together are analogous to components of a single assembly, parts of a complete machine, or constitute a functional unit. See *Rite-Hite v. Kelsey Co.*, 56 F.3d 1538, 1550, 35 U.S.P.Q.2d 1065 (Fed. Cir. 1995).

The district court did not have to look any further than the testimony of the Defendant’s own officer to find that the patented feature is the basis for the customer demand. Mr. Corrin testified at trial that they used the ember booster to entice customers to come back to the store to purchase newer log sets, and at the same time, purchase the Defendant’s EMB, which improved the overall appearance of the fireplace. (JA--1245-47). Additionally Mr. Charlie Hanft, a witness at trial with more than 12 years of experience in the artificial gas logs business, including experience in carrying the Defendant’s products, testified that the glowing embers from the EMB is what draws a customer’s attention to a particular log and burner set, and what ultimately makes the sale. (JA--1013-19).

Blount also offered testimony at trial that the elements of independent Claims 1 and 17 constitute a functional unit with the artificial logs and the grate support. Mr. Hanft at trial testified that “if I sold 40 more CEBBs (as covered by the patent) from this day forward, 39 would go with a log set.” (JA--1016). The Defendant offered no testimony to rebut Mr. Hanft’s testimony. The Defendant could have called a witness at trial to testify as to how the ultimate consumer purchases its EMB, but it did not. The Defendant now comes before this Court, questioning Mr. Hanft’s testimony and the district court’s reliance on that testimony. This Court should not afford the Defendant that opportunity.

In summation of this point, Blount introduced testimony as to the standard practice in the industry for selling the EMB, the Defendant failed to introduce its own testimony to rebut Blount’s testimony, and the district court found the weight of the evidence supports the fact that virtually every one of the Defendant’s EMBs was ultimately sold with a log and burner set.

The Defendant also attempts, citing *BIC Leisure*, to convince this Court that no evidence shows that Blount’s and the Defendant’s products are interchangeable. Interchangeability is not one of the factors required by *Panduit*. Furthermore, *BIC Leisure* has no bearing on the fact whether the devices are interchangeable. The case is inapposite with respect to this issue. Moreover, even if interchangeability were an

issue, the testimony given by Mr. Blount, offered without the Defendant's objection, clearly establishes that the structures were identical in every respect, which is supported by the comparison above, (SF 4), and thus, would inherently be interchangeable. This red herring should be ignored

The Defendant attempts to confuse this Court by introducing certain misleading arguments related to lost profits. For example, the Defendant attempts to persuade this court that Blount failed to prove lost profits because it failed to include overhead in its cost figure. At trial Blount presented an "Actual Lost Profits" chart comparing its sales price to distributors to its costs, for the CEBB and log set including a pan and primary burner, individually and together. (JA--1525). Through this chart, Blount did establish a net profit for the products as required by *Panduit*. Thus, Blount showed the district court sufficient evidence of fixed costs to support the calculation of lost profits, as *Panduit* requires. (JA--0993-94).

At trial the Defendant could have cross-examined Mr. Blount thoroughly about the costs and net profits associated with the numbers provided in Blount's Trial Exhibit 18 (JA--1525). As the record shows, Blount appropriately included overhead costs in the calculations of that exhibit. The Defendant now attempts to impeach Mr. Blount's testimony regarding this exhibit by bootstrapping invoices that fall outside the

infringement period, (JA--2015-26). These invoices are not relevant to the infringing period in question.

The Defendant also attempts to persuade this Court that the district court based its damage award calculations on the wrong time period. As discussed in more detail below regarding the Defendant's willful conduct, the record is replete with testimony that Blount, in accordance with 35 U.S.C. § 287(a), notified the Defendant of the infringement on December 16, 1999, when it received the first patent infringement letter. (SF 5). Notwithstanding, the Defendant's position would be more persuasive if its own Vice President, Mr. Corrin, had not drafted a letter forwarding the December 16, 1999, letter to their patent counsel, stating "[e]nclosed is a *patent infringement letter* we received from Golden Blount's Attorney." (JA--2188, emphasis added).

The December 10, 1999, letter, in combination with Mr. Corrin's acknowledgment that the December 10, 1999, letter was an "infringement letter," constitutes ample evidence to support the district court's finding that the lost profits damages amount should be calculated from December 16, 1999, when it received the letter.

The Defendant also erroneously attempts to convince this Court that Blount's CEBB, as well as its EMB, is a retrofit unit designed to be connected and sold to customers who previously purchased an artificial log and burner set. Looking to the

specification of the '159 Patent, or in the alternative a standard dictionary, it is clear that "retrofit" is not limited to additions to previously operating structures. To the contrary, it is a device that is capable of fitting on structures of past origin (e.g., the G4 or G5 burner), whether or not the structure is an "old" structure already in service. Since retrofit is not in the claims in the patent-in-suit, it seems appropriate to lay this issues to rest.

Lastly, the Defendant erroneously attempts to convince this Court that the district court erred in not reducing the lost profit damage award by the returned units. The Defendant has, however, provided no relevant case law on point supporting its position as to the returned units. The Defendant, to its apparent surprise, induced and contributorily infringed those supposed 802 returned units. Equity alone should prevent a party from undoing its infringement of a patent to reduce damages, as the Defendant is apparently attempting to do. In the absence of case law to the contrary, which appears to be the instance here, the courts are in agreement that any uncertainty as to damages from infringement should be resolved in favor of the patent owner. *Del Mar Avionics, Inc. v. Quinton Instrument Co.*, 836 F.2d 1320, 1327, 5 U.S.P.Q.2d 1255 (Fed. Cir. 1987); *Kaufman Co. v. Lantech, Inc.*, 926 F.2d 1136, 1141, 17 U.S.P.Q.2d 1828 (Fed. Cir. 1991). Here, if any uncertainty were to exist in the mind

of this Court as to damages, this Court should rule in favor of Blount and refuse to subtract the returned units.

In view of the substantial facts before the district court, it did not abuse its discretion in determining the lost profit damages.

## VI. Willfulness

In addition to requiring “damages adequate to compensate for the infringement,” Section 284 of the Patent Act authorizes a district court to “increase damages up to three times the amount found or assessed.” 35 U.S.C. § 284. The Federal Circuit has interpreted this provision of Section 284 as requiring a two-step process: “First the fact-finder must determine whether an infringer is guilty of conduct upon which increased damages may be based.” *Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1570, 38 U.S.P.Q.2d 1397 (Fed. Cir. 1996). “If so, the Court then determines, exercising its sound discretion, whether, and to what extent, to increase the damages award given the totality of the circumstances.” *Id.* “An act of willful infringement satisfies this culpability requirement, and is, without doubt, sufficient to meet the first requirement to increase a compensatory damages award.” *Id.*

Thus, once a proper willfulness finding is made, the first step in determining whether damages should be enhanced is complete. *Id.* At that point, the court need

consider only whether, and to what extent, the compensatory damages awarded by the fact finder should be increased, in light of “the egregiousness of the Defendant’s conduct based on all the facts and circumstances of the case.” *Id.* The district court’s enhancement of damages can only be changed if it abused its discretion, which is clearly not the case.

Turning to case law, the *Bott* factors are met: (1) copying (as per the findings of judge Buchmeyer), (2) a good faith investigation was not made, and (3) the infringer’s behavior to and in the litigation (after a solemn written undertaking between counsel that precluded the use of the opinion of counsel by Defendant, the change of mind on this point required efforts of the Magistrate to clarify the matter; Defendant’s effort to bring inequitable conduct into the case when it was never, never there; and Defendant’s effort to bring into the case spurious prior art after discovery was long closed. The most egregious conduct, of course, was their effort to treat a sham opinion as a real one.) See, *Bott v. Four Star Corp.*, 807 F.2d 1567, 1572 (Fed. Cir. 1986).

As the Federal Circuit has ruled, a willfulness determination is attainable “where one continues his infringing activity, and fails to investigate and determine, in good faith, that he possesses reasonable defenses to an accusation of patent infringement.” *Jurgens*, 80 F.3d at 1571. “Such conduct occurs when an infringer merely copies a

patented invention, or where he obtains incompetent, conclusory opinions of counsel only to use as a shield against a later charge of willful infringement, rather than in a good faith attempt to avoid infringing another's patent." *Id.* Without any doubt, the Defendant demonstrated its willful infringement and bad faith in each of these respects.

The issue of copying speaks for itself. (SF 4). As is evident from the illustrations comparing Blount's device with the Defendant's device, (SF 4), the Defendant's device is a virtual copy. Additionally, numerous references were made at trial as to the Defendant's device being an exact copy. (JA--0891; JA--0900; JA--0902; JA--0910). Similarly, the fact that the Defendant's infringing device only became commercially available after Blount's patented device became desirable, further supports an inference of copying. (SF 4). In effect, the overwhelming weight of the testimony at trial properly supports the district court's finding that the facts sustain the inference of copying and that the Defendant's device is a "copycat structure." (SF 4; JA--0003, Finding of Fact No. 5; JA--0004, Finding of Fact No. 10).

Whether the Defendant's supposed oral opinion was an incompetent, conclusory opinion to be used only as a shield against a later charge of willful infringement, rather than in a good faith attempt to avoid infringing another's patent, the record is also very clear. Throughout the 2½ years from the time the first notice letter was sent, the Defendant simply never obtained a single written opinion suggesting

that their commercial embodiment avoided infringement. (SF 8). Furthermore, it is disingenuous for the Defendant now to argue that the interrogatories answered well after suit was filed and during discovery, form the written opinion upon which they relied.

The first time the Defendant spoke to Mr. McLaughlin was on or about December 30, 1999, however, Mr. McLaughlin did not have the accused infringing device, but had only a picture of the accused infringing device during their discussion. (SF 5). Mr. McLaughlin did not have the prosecution history of the '159 Patent at this time, which is an important element of any competent opinion. *Underwater Devices, Inc. v. Morrison-Knudsen Co.*, 717 F.2d at 1389-90. (SF 8). This non-substantive conversation in no way could be construed to be an opinion upon which the Defendant could reasonably rely because it was based solely on a supposition. This supposition amounted to a representation on the part of Mr. Bortz that the invention had been around 20 to 30 years. (SF 6). Mr. McLaughlin, with only the evidence listed above, said that "if we *could* prove that the invention had been around for 20 to 30 years then it *would* be a strong argument of invalidity." (SF 6; JA--1123-24, emphasis added). This "if this, then that" statement plainly does not amount to an opinion upon which a prudent person could reasonably rely. The district court agreed.

Except for a letter dated May 16, 2000, (JA--2192), which amounted to nothing more than a put-off letter, the Defendant made no further efforts to determine whether it was truly infringing or not, until after suit was filed, almost a year and two months after receiving the first notice letter. (SF 7). The Defendant argues that it did nothing further because it was awaiting “additional information or further explanation from Appellee’s attorney.” (JA--1034). However, this did not relieve the Defendant of its obligation under the law to determine if it was willfully infringing the ‘159 Patent. To the contrary, the Defendant continued its infringing activities even after May 16, 2000, and actually even through the trial proceedings. (SF 7; JA--0713).

It was not until after the lawsuit was filed in January 2001 that the Defendant finally became concerned, not with the damages associated with the infringing activity, for they were too small for such a large corporation, or Blount’s property rights, but with the attorney’s fees that the Defendant might be required to pay as a willful infringer. (SF 6, 7; JA--1128-29). By Mr. Bortz’ own admission, he told Mr. McLaughlin that he heard a person might have to pay attorney’s fees if he loses a patent lawsuit, and he asked Mr. McLaughlin what he should do. (SF 6, 7). Mr. McLaughlin told him that one way that it could be avoided is by obtaining an opinion. (SF 7, 8; JA--1858). In response, Mr. Bortz finally delivered to Mr. McLaughlin the documents needed for a proper infringement and validity opinion, and only at this time

was it decided to order the prosecution history. (SF 8; JA--1035-40). At this point, and only then, did Mr. Bortz seek to get protection he mistakenly thought would shield him from being required to pay the attorney's fees. Note that at no time before his deposition was taken, did Mr. Bortz ever have a face-to-face meeting with Mr. McLaughlin concerning the cease and desist letter, even though he and Mr. McLaughlin were both in Chicago and, in fact, only a few miles apart. (SF 8). At no time when Mr. McLaughlin gave Mr. Bortz advice did he ever see the actual accused structure. (SF 8). While some advertisements of the Defendant's structure were shown, detailed drawings were never provided to Mr. McLaughlin, not even Mr. Corrin's Johnny-come-lately installation drawing. Thus, Mr. McLaughlin never had a full understanding of the accused structure. (JA--1056).

In the final analysis, only one true oral opinion of counsel, if it can even be called that, was rendered. This oral opinion was rendered by Mr. McLaughlin on or about May 1, 2001, about 4 months after suit had been filed and 2½ years after the Defendant was first noticed of its infringing activity. In spite of, it was only initiated because of Mr. Bortz' concern for attorney's fees, and then was based only on sketches of the device, dubious prior art that Mr. Bortz gathered, the prosecution history, and the oral representations made by Mr. Bortz to Mr. McLaughlin. The district court characterized it this way: "The defendant's executive did get what he

asked for, a statement that there was no infringement. The Defendant's apparent desire was to avoid paying attorneys fees or increased damages, and this appears to have been the sole reason for consultation with counsel....." (JA--0006, Findings of Fact No. 24, inter alia).

From this quote, this Court will see that the district court properly found that the Defendant merely went through the motion of obtaining an opinion to protect itself from being required to pay attorney's fees, and that it did not acquire a timely, competent or well-considered opinion, as the law requires. The district court also properly found that the Defendant knew it was being very casual or cursory concerning the opinion.

The Defendant seeks to cloud this issue by arguing that it was Mr. Bortz' state of mind and not McLaughlin's that controls the reasonableness of the Defendant's reliance on the opinion. Contrary to the Defendant's position, it did not even meet the standards set forth in its own case law. The Defendant sites *Sri Int'l Inc. v. Advanced Tech. Lab., Inc.*, 127 F.3d 1462, 44 U.S.P.Q.2d 1422 (Fed. Cir. 1997), which states that the primary consideration is whether the infringer acting in good faith can upon due inquiry, have sound reason to believe that it had the right to act in the manner that was found to be infringing. As discussed above, the Defendant neither acted in good faith nor had the requisite due diligence required for it to have reasonably relied on the

opinion. First, it did not have the good faith because the opinion was sought only for the purpose of avoiding attorney's fees. (SF 7, 8). It did not have the due diligence because there was no competent opinion sought until after suit was brought, which was nearly 2½ years after the first notice of infringement. (SF 7, 8).

The law is well settled that after willful infringement is found, such as is the case here, the court need consider only whether, and to what extent, the compensatory damages awarded by the fact finder should be increased in light of "the egregiousness of the Defendant's conduct based on all the facts and circumstances of the case." *Jurgens*, 80 F.3d at 1570. The egregious facts discussed above, all of which are supported by the trial testimony, are more than enough to support the district court's finding of trebling the damages. The Defendant has failed to meet its burden of establishing that the district court's finding of willfulness was clearly erroneous and that its trebling of damages was an abuse of discretion. Therefore, this Court should affirm the district court's finding.

## **VII. Exceptional Case**

In addition to Section 284 of the Patent Act requiring "damages adequate to compensate for the infringement," as well as allowing the court to "increase damages up to three times the amount found or assessed," Section 285 of the Patent Act

authorizes the court in exceptional cases to award reasonable attorney's fees to the prevailing party. 35 U.S.C. § 285 The Federal Circuit has interpreted this provision of Section 285 as requiring a two-step process: "First, the district court must determine whether a case is exceptional." See, *Baldwin Hardware Corp. v. Franksu Enter. Corp.*, 78 F.3d 550, 563, 37 U.S.P.Q.2d 1829 (Fed. Cir. 1996). After determining that a case is exceptional, the district court must determine whether attorney's fees are appropriate. *Molins PLC v. Textron, Inc.*, 48 F.3d 1172, 1186, 33 U.S.P.Q.2d 1823 (Fed. Cir. 1995). An award of attorney's fees, if based on a proper finding of an exceptional case, can only be altered if the district court abused its discretion.

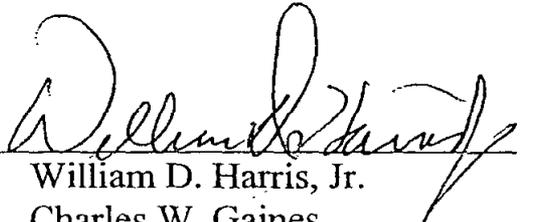
The statutory purpose of an attorney's fee award is to reach cases where the interest of justice warrants fee-shifting. *Brooktree Corp. v. Advanced Micro Devices, Inc.* 977 F.2d 1555, 24 U.S.P.Q.2d 1401 (Fed. Cir. 1992). Thus, the trial court has broad discretion in the criteria by which it determines whether to award attorney's fees. *Id.* A finding of willful infringement meets one of many possible criteria of an 'exceptional case.' *Id.* The Defendant's clear attempt to take advantage of the system upon which opinions of counsel are given, and thus the Courts, further supports the 'exceptional case' standards.

As established above, the district court's finding of willful infringement was not clearly erroneous, and the district court did not abuse its discretion in finding the case to be exceptional and awarding attorney's fees. Contrary to the Defendant's argument, a reversal on a willfulness finding does not automatically reverse a finding of an exceptional case. *Sensonics, Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1574, 38 U.S.P.Q.2d 1551 (Fed. Cir. 1996). The case the Defendant cites, *Electro Med. Sys.*, is easily distinguished on its facts from this case because the district court in *Electro* had no basis for its exceptional case finding other than the willful infringement finding. Thus, notwithstanding the willfulness finding, the testimony at trial supports the exceptional case finding.

CONCLUSION

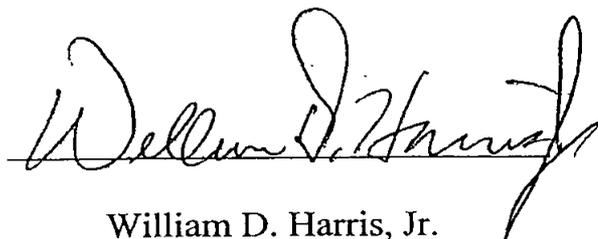
For the reasons stated above, the judgment of the district court must be Affirmed. The party Blount requests oral argument.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH FED. R. CIV. P. 32(a)(7)(B)**

The undersigned, Counsel of Record for Plaintiff-Appellee, Golden Blount, Inc., hereby certifies that this Brief of Plaintiff-Appellee Golden Blount, Inc. (Corrected) complies with the type-volume limitation provided in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. In preparing this Certificate, I relied on the word-count program of Corel WordPerfect 8. This Brief contains 13,923 words.



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Dated June 30, 2003

CERTIFICATE OF SERVICE

I, Greg H. Parker, certify that I caused a true and correct copy of the foregoing Brief of Plaintiff-Appellee Golden Blount, Inc. (Corrected), to be served on July 9, 2003, via Express Mail upon:

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A handwritten signature in black ink, appearing to read "G. Parker", written over a horizontal line.

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