No. 2006-1580

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

USA VIDEO TECHNOLOGY CORPORATION,

Plaintiff-Appellant,

v.

MOVIELINK, LLC,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Delaware in Case No. 03-CV-368, Kent A. Jordan

---

BRIEF OF DEFENDANT-APPELLEE

Jeffrey M. Olson
Robert A. Holland
Samuel N. Tiu
SIDLEY AUSTIN LLP
555 West Fifth Street, Suite 4000
Los Angeles, California 90013
(213) 896-6000 (phone)
(213) 896-6600 (fax)
jolson@sidley.com
rholland@sidley.com

Counsel for Defendant-Appellee
Movielink, LLC

February 3, 2006

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

USA VIDEO TECHNOLOGY CORPORATION v. MOVIELINK, LLC

No. 05-1451

CERTIFICATE OF INTEREST

Counsel for the Defendant-Appellee Movielink, LLC certifies the following:

1. The full name of every party or amicus represented by me is:

Movielink, LLC

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Not applicable.

3. All parent corporations and any publicly held companies that own ten (10) percent or more of the stock of the party or amicus curiae represented by me are:

Sony Corporation of America; Providence Equity Partners; Texas Pacific Group; Comcast Corporation; DLJ Merchant Banking Partners; Time Warner Inc.; Viacom Inc.; General Electric Company; and Vivendi Universal S.A.

4. There is no such corporation as listed in paragraph 3.

Not applicable.

5. The names of all law firms and the partners or associates who appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Jeffrey M. Olson
Robert A. Holland
Samuel N. Tiu
Matthew S. Jorgenson
SIDLEY AUSTIN LLP
555 West Fifth Street, Suite 4000
Los Angeles, California 90013-1010
(213) 896-6000 (phone)
(213) 896-6600 (fax)

Steven J. Balick
John G. Day
ASHBY & GEDDES
222 Delaware Avenue, 17th Floor
P.O. Box 1150
Wilmington, Delaware 19899

Respectfully submitted,

SIDLEY AUSTIN LLP
Jeffrey M. Olson
Robert A. Holland

Dated: February 3, 2006

By:_____
Robert A. Holland
Counsel for Defendant-Appellee
Movielink, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

RULES

STATEMENT OF RELATED CASES

There has not been a prior appeal in or from the same civil action before this or any other appellate court. *See* Fed. R. App. P. 47.5(a). Counsel is not aware of any case pending before this or any other court that will directly affect, or be directly affected by, this Court's decision. *See id.*

STATEMENT WITH RESPECT TO ORAL ARGUMENT

Movielink, LLC believes oral argument is warranted in light of the issues raised in this appeal.

JURISDICTIONAL STATEMENT

Basis for District Court's jurisdiction: Plaintiff-Appellant USA Video Technology Corporation ("USVO") commenced this action for patent infringement pursuant to 35 U.S.C. §§ 101-307. The District Court thus had original subject matter jurisdiction pursuant to 28 U.S.C. § 1338(a).

Basis for Court of Appeals' jurisdiction: Because the District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1338, this Court has exclusive subject matter jurisdiction over any final decision pursuant to 28 U.S.C. § 1295(a)(1).

Timeliness of appeal: USVO filed a notice of appeal on June 27, 2005 from (1) a January 28, 2005 Memorandum Opinion and Order granting Movielink's motion for summary judgment on the issue of non-infringement, and (2) a May 27, 2005 order denying USVO's motion for reconsideration of the January 28, 2005 Memorandum Opinion and Order.

Final order or judgment: As of February 3, 2006, the District Court has not entered a final judgment on a separate document. Fed. R. Civ. P. 58(a)(1).

STATEMENT OF THE ISSUE

Whether the District Court correctly granted summary judgment in favor of Movielink on the ground that Movielink's "Multi-CDN" online movie rental system does not infringe the patent-in-suit.

STATEMENT OF THE CASE

Movielink, LLC ("Movielink") operates an online movie rental service. A0600-01 at ¶¶ 4, 7-8, 10. Using computers, Movielink customers can request and download movies through the Internet. *See id.* Appellant USVO alleges that a recently introduced version of Movielink's service – the "Multi-CDN" – literally infringes claim 1 of U.S. Patent No. 5,130,792 (the "'792 patent").

After extensive fact and expert discovery, Movielink moved for summary judgment based on noninfringement or, in the alternative, invalidity of the '792 patent. A0563-598. On January 28, 2005, the District Court granted the motion, ruling that there is no genuine issue of material fact that Movielink's Multi-CDN system does not infringe the '792 patent. *See* 354 F. Supp. 2d 507 (D. Del. 2005). Specifically, the District Court ruled that claim 1 requires a central distribution facility to "initiate" the connection for downloading a movie to the user. *Id.* at 514. In contrast, in the Movielink system, the user's computer

"initiates" the connection for movie downloads. *Id.* at 514-520. Thus, there can be no infringement. *Id.* at 520.

USVO sought reconsideration of the noninfringement ruling, but not the claim construction, citing two alleged factual errors. A1811-12. The District Court denied the motion, ruling that USVO "failed to establish any of the three recognized circumstances for granting a motion for reconsideration" – a change in controlling law, previously unavailable evidence, or manifest injustice. 2005 WL 1384773, at *3 (D. Del. May 27, 2005). The District Court nonetheless also considered and rejected USVO's "new" evidence and arguments on the merits. *Id.* at *3-4.

STATEMENT OF THE FACTS

I. THE '792 PATENT

The '792 patent was filed in 1990 and issued in 1992. While the '792 patent has several claims, USVO has asserted only that claim 1 of the '792 patent is being infringed. Claim 1 recites:

> A system for transmitting video programs to remote locations over a switched telephone network, comprising:
>
> a central data facility having means for storing digital compressed versions of video programs;
>
> a request interface connected to said central data facility and to the telephone network, wherein said request interface receives requests for video programs

> made over the telephone network and communicates them to said central data facility;
>
> a distribution interface connected to said central data facility and to the telephone network, wherein said distribution interface *initiates connections* over the telephone network with remote locations in response to requests received by said request interface, and transmits thereto compressed versions of video programs previously requested through said request interface, such compressed versions being transmitted in less time than is required to view the programs in real time;
>
> a receiver at each remote location for connecting to the telephone network and receiving compressed video programs transmitted from said distribution interface at the faster than real time rate, for storing the received programs, and for subsequently playing the video programs at a real time rate on a video display.

A0068 at 7:41-66 (emphasis added); *see also* A0733-34.

As described in the '792 patent, two separate connections are made to request and receive a movie from the system described in the '792 patent.

> A viewer who wishes to down load [sic] a program from the central data facility **10** into his receiving unit **16** calls the central data facility using the normal telephone **14**. After the program has been ordered, the user places the telephone **14** on-hook and switches the receiving unit **16** to standby. The central data facility 10 then returns the call and down loads [sic] the requested program into the receiving unit **16** for viewing at a time selected by the viewer."

A0068 at 2:60-68.

The first connection is initiated by the user calling to request the movie. As part of this connection, any "[d]esired information, such as the availability of a selection, any delay [information], or an indication of charges … can be returned to the viewer …." A0066 at 3:31-37. The second connection is initiated by the central facility in which the "central processor **20** selects an available output channel to distribution interface **30** and requests a telephone switching network connection" and "call[s] an authorized number at a known location corresponding to such user." *Id.* at 3:39-44. "Once the connection is established, the requested program can be transferred from mass storage **22** through the distribution interface **30** to the remote location." *Id.* at 3:44-47.

II. PROSECUTION HISTORY OF '792 PATENT

The prosecution history of the '792 patent is central to the proper resolution of this appeal. As filed, the original claims were broader than the claims in the '792 patent as issued. The original claims did not limit who or what could "initiate" connections or what type of communications network or link would be used for connections. In its original form, claim 1 simply recited:

> A system for displaying stored video programs at a remote location, comprising:
>
> a central storage facility for storing programs in digitized, compressed form;
>
> *a communications link for transmitting stored programs to the remote location;*

> a receiver at the remote location for decompressing the transmitted program and converting it to a signal suitable for display; and
>
> a display connected to said receiver for displaying the transmitted program.

A0693 (emphasis added). The Patent Examiner rejected this original claim 1 for several reasons, including that it was anticipated by U.S. Patent No. 4,949,187 (the "Cohen" reference). A0726-30.

The Cohen reference describes a "video unit, which is connected to the household phone line or any other suitable communications medium, [and which] makes a local call to the central computer system" for downloading a movie. A0657 at 2:7-10. "When the central computer system answers and proper handshaking takes place, the data transfer process may begin." A0657 at 2:10-12. "[W]hen the entire movie has been successfully downloaded, the telephone connection is broken." *Id*. at 2:15-17.

Faced with this rejection, the '792 applicants cancelled all of the original claims. A0733. They amended the application by submitting new claim 25, which ultimately issued as the asserted claim 1 of the '792 Patent. *Id*. This new claim 25 (now claim 1) added a number of limitations, requiring that the central distribution facility "initiate connections" with remote users for transmission of a movie:

> a distribution interface connected to said central data facility and to the telephone network, wherein said distribution interface initiates connections over the telephone network with remote locations in response to requests received by said request interface, and transmits thereto compressed versions of video programs previously requested through said request interface ….

A0733-34; *see also* A0068.

As the District Court correctly pointed out, the applicants relied on this limitation to distinguish the claimed invention from the prior art. 354 F. Supp. 2d at 514. Specifically, the applicants argued that "[t]he Cohen reference describes a system in which a local unit calls a central unit over telephone lines, and initiates a download of a video program such as a movie." A0738. "The telephonic connection and request is made by the local unit itself[,]" and "[t]he same telephone connection is used to request the program and to download it to the receiving unit." *Id*.

In contrast, in the claimed system, "[t]he distribution interface initiates all calls to remote units before transmitting the video programs to them. This provides a security feature, and a convenience feature as well." A0739. The prior art such as Cohen "return[s] the video program over the same link as was used to make the request[,]" and thus "the user in the prior art systems could not call in to request a program from a car phone on the way home from work and have it available in the receiving unit when arriving home[.]" A0739-40.

According to the '792 applicants, "this can easily be done using the claimed system." *Id*.

The '792 applicants also argued that their claimed system was fundamentally different from the prior art because, in their system, the central unit is "in control," rather than the local unit. A0740. As the District Court correctly pointed out, the "control" aspect of the claimed system is directly related to the claim term "initiates" as seen in the applicants' argument to the PTO:

> The differences in the claimed system as described above and the references leads to a system which is constructed on entirely different philosophical lines than in the prior art. In the prior art, the local unit is in charge of the transaction, ordering and receiving a program at its convenience. In the claimed system, the user merely requests a program; the central facility ten [sic] initiates a new connection at its convenience and sends a program to the remote unit identified in the request. Since the central unit is in control rather than the remote unit, it is easier to design the central unit to make it run very efficiently. Given the extremely large amounts of data which are transferred when a large number of remote units are being driven simultaneously, such efficiencies are very important and can determine whether a commercial system makes a profit or a loss.

See A0740. Based on these amendments and arguments, the Patent Examiner allowed claim 25, which issued as claim 1 of the '792 patent.

III. THE UNDISPUTED FACTS REGARDING THE UNDERLYING INTERNET TECHNOLOGY

Because Movielink's Multi-CDN system operates over the Internet, a brief discussion of the underlying Internet technology is needed to understand the context in which the accused system operates. The District Court described the underlying Internet technology in detail, and its description was and is undisputed. 354 F. Supp. 2d at 516 n.7 (noting that USVO "has not alleged any inaccuracies in [the] description of the underlying technology.").

"Movielink operates using the Hypertext Transfer Protocol ('HTTP'), a protocol for communication over the World Wide Web." 354 F. Supp. 2d at 516 (citing A0203-04). "An HTTP connection involves only two HTTP messages: a request and a reply." *Id*. "HTTP defines a set of requests … used by a client computer to communicate with a server" and "a set of replies for those messages." *Id*. "Defined responses include the successful response, which returns a document such as a file or web page, and a variety of non-successful responses, including error messages and informational messages such as a REDIRECT which informs the client of a new address where the desired data can be found." *Id*. "HTTP defines an extensive collection of information to be passed as part of a request or reply, most critical of which is the Uniform Resource Identifier ("URI"), which is HTTP's way of identifying a specific desired document." *Id*.

"HTTP is a 'relatively high-level protocol,' built 'on top of the reliable communications protocol of the Internet,' which includes the Transmission Control Protocol ('TCP') and Internet Protocol ('IP')." *Id*. "IP 'provides addressing of computers on the Internet'" and "of specific ports on each computer." *Id*. It is the "mechanism for addressing a message from a source … to a destination." *Id*. (alteration in original). TCP "is a protocol 'layered on top of IP to provide reliable bidirectional communications.'" *Id*.

"TCP connections are established through a 'three-part handshake,' after which messages may be transmitted." *Id.* "The first message in that handshake is sent from the source to the destination, and serves to initiate the TCP connection." *Id*. "The destination replies, and the source confirms the reply." *Id*. "After that, the data may flow in either or both directions until the TCP connection is terminated."[1] *Id.* "When an HTTP client sends a request to an HTTP server, it first does so by initiating a TCP connection." *Id*. Once the TCP connection is established, the client sends the HTTP request to the server and the server then replies to the HTTP request. *Id*.

In other words, to start a HTTP connection or session, a client must first start the underlying TCP connection by sending the first TCP handshake message to the server. *Id.* Only when the underlying TCP connection has been

[1] *See also* A1926-27 for a similar discussion by USVO's expert of how Internet

established can the client start the higher level HTTP session by sending the HTTP request message to the server. *See id.*; *see also* A0202-04 (describing the underlying Internet connection technology).

IV. THE UNDISPUTED COMPONENTS AND "SEQUENCE OF OPERATIONS" OF THE MOVIELINK MULTI-CDN SYSTEM

The District Court also described in detail the components and "sequence of operations" of the Multi-CDN system. 354 F. Supp. 2d at 516-519. Just as the facts regarding Internet connection technology are undisputed, the underlying facts regarding the components and operation of the Multi-CDN system also are undisputed. *Id.* at 517 & n.8.

The Movielink Multi-CDN system has four components: (1) a web server that offers web pages for the Movielink website; (2) Content Delivery Servers ("CDS") that are responsible for downloading movies to users' personal computers; (3) a Content Delivery Router ("CDR") that receives requests and looks up the appropriate CDS; and (4) the Movielink Manager ("MM") software that resides on customers' computers. 354 F. Supp. 2d at 516-517.

The District Court also chronicled in detail the "sequence of operations for the Movielink Multi-CDN system …." 354 F. Supp. 2d at 517-518 (citing expert report of Dr. Konstan). As the District Court recognized, USVO acknowledges the accuracy of Dr. Konstan's account of the sequence of steps in

---

connections are formed.

the accused Movielink system. *Id*. at 517 (citing A1172 at n.5) ("The sequence of steps is adequately set forth in the rebuttal report of Movielink's infringement expert, Dr. Konstan, in a graph found at page 6 thereof."). The Court laid out the sequence using numbers to "represent TCP connections and HTTP connections in the order in which they occur[,]" and letters to "indicate the sequence of messages …." *Id.* at 517 n.10 (internal alterations omitted):

> 4. Once the MM software is installed and up-to-date, the [customer's] machine ... invoke[s] the [Movielink Manager ("MM")] software, passing to it a set of relevant data including a URL for fetching the movie (see step 5), a token for fetching the license from a known server (see step 7), and other data for display within MM including title, movie length, pointers to cover art, and similar data.
>
> 5. (a) MM uses the passed URL to send an HTTP request to the [Content Delivery Router ("CDR")]; this request includes a download token that can be checked against the authorization to download. CDR uses Movielink's Authentication Service (and in turn, Movielink Databases) to check the token via an HTTP HEAD method that simply returns an indication of validity or invalidity. If the token is valid, the CDR uses the IP address and Domain Name of the requesting site, as well as purchase information, to look up the appropriate [Content Delivery Source ("CDS")] (using the Movielink Databases). If no special mapping is found, the CDR selects a default central CDS. (b) The CDS identifier is returned to the MM through the HTTP REDIRECT response, a response that provides an alternative URL for MM to use to obtain the information. More specifically, the REDIRECT incorporates the same URL with the name of the CDR replaced with that of the appropriate CDS.

Steps 6 through 8 occur in parallel.

6. (a) MM takes the returned URL in the REDIRECT and issues a new HTTP GET request to the CDS; this request includes a download token that can be checked against the authorization to download. CDS uses Movielink's Authentication Service (and in turn Movielink Databases) to check the token via an HTTP HEAD method that simply returns an indication of validity or invalidity. If the token is valid, (b) the CDS transmits the HTTP response, in this case including a digital movie file that is then stored by MM. Note that steps 5 and 6 could be completed using an ordinary web browser instead of MM, however an ordinary web browser would lack the facilities for managing the movies and, more important, for fetching and installing the license.

7. (a) MM sends a request to Website with the license token. If the token is valid, Website gets the license from the appropriate license server (which depends on the media player being used) and (b) returns it to MM.

8. During the process of steps 6 and 7, MM uses the HTTP POST method to send progress data back to Website. Such messages indicate when the download started, when the license was retrieved, etc. They are used to keep the storefront and customer service data up-to-date.

9. The user may commence playing any time after a sufficient portion of the video has been downloaded (in which case, the download continues as the playing commences). When the user plays the video (which occurs completely within the client computer), MM continues to POST progress data to the Website. If the computer is off-line, the progress data is held for later posting.

See 354 F. Supp. 2d at 516-517 (citing and quoting from A0207-08).

The same "sequence of operations" is represented graphically below:

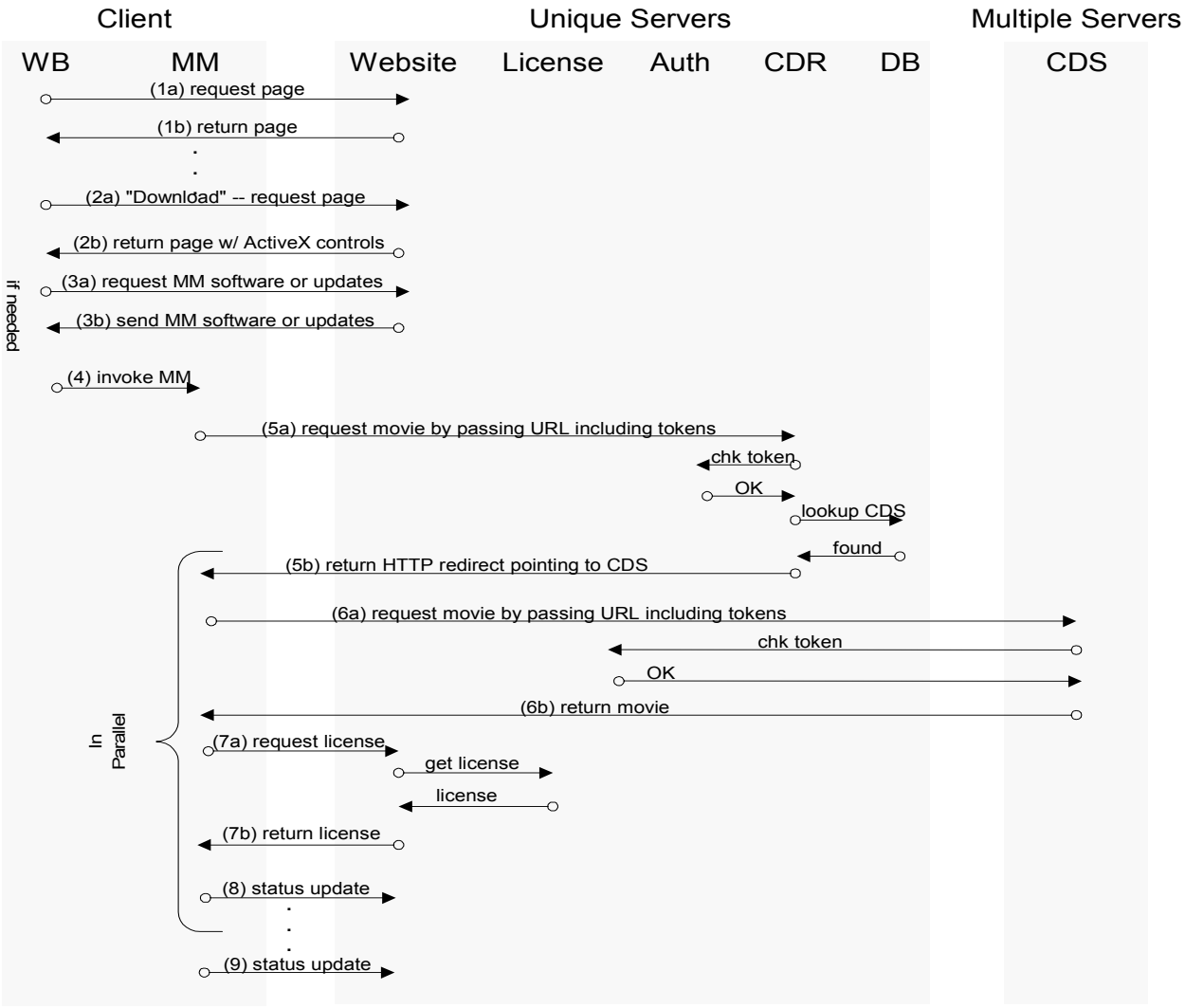

Figure 1. Time Sequence Diagram of Movielink Communications

See A0205, A1213.

V. CHARACTERISTICS OF THE MOVIELINK MULTI-CDN SYSTEM

The Movielink Multi-CDN system has several relevant characteristics, all of which make clear that it is the user's computer, and not the CDR or CDS, that "initiates connections" and is in control of the transaction. The Multi-CDN system cannot send customers movies unless and until they click the "START

DOWNLOAD" button. A0600 at ¶¶ 6-8. At the same time, "[t]here is nothing in the Movielink system that gives the CDS the permission to decide when it would be convenient to send a movie back" in response to the customer clicking the "START DOWNLOAD" button. A1218 at ln:9-11; *see also* 354 F. Supp. 2d at 520. Customers, however, can "pause" and resume movie downloads at their discretion. A0601 at ¶ 11.

Movies ordered through the Multi-CDN system can only be downloaded to the same computer the customer used to click the "START DOWNLOAD" button. A0601 at ¶ 10. There is no way for a customer to click the "download" button from one computer and have the movie transmitted to another computer. *Id*. Customers cannot, for example, send a download request from a computer at work and later find the movie ready for viewing on a computer at home. *Id.*

Furthermore, customers can download movies even if their computers are behind a firewall. To prove this, one of Movielink's experts placed a computer behind a firewall that blocked any packets sent by any other computer attempting to initiate a new TCP connection. A0208-209. Using this computer, Movielink's expert was still able to download a movie from Movielink. *Id*. USVO did not challenge the methodology or results of this experiment.

VI. PROCEDURAL HISTORY

USVO commenced this infringement action in April 2003. During the course of discovery and motion practice, USVO narrowed its infringement action to claim 1 of the '792 patent. *See* A2070.28. USVO also abandoned its infringement claim against Movielink's "Bigfoot" system, which predated the Multi-CDN system. *See* 354 F. Supp. 2d at 515 n.6; A2070.8-2070.9, 2070.13-2070.15.

In October 2004, Movielink moved for summary judgment on the grounds of noninfringement and invalidity, along with the submission of the parties' claim construction briefs on various claim terms. A0525-98. With respect to noninfringement, Movielink argued that the Internet is not a "switched telephone network" and that the Multi-CDN system does not have a "distribution interface" that can "initiate" connections to any "remote location." *See* A0575-576. USVO opposed on the ground that the "issue ultimately is whether" the undisputed "sequence of events satisfies the that [sic] language of claim 1. USVO's expert says that it does. Movielink's expert disagrees. Therefore, a question of fact exists ...." A1173.

The District Court granted summary judgment in favor of Movielink on literal infringement and infringement under the doctrine of equivalents. 354 F. Supp. 2d at 520-21. The District Court first construed the term "initiates" to mean

"begins" and to require an aspect of "control" by the central system to respond to movie requests "at its convenience." *See id.* at 514. It then applied "initiates" as construed to the undisputed "sequence of operations" of the Multi-CDN system. *Id.* at 516-20. Upon comparing the two, it ruled as a matter of law that "it is [Movielink Manager], on the customer's computer, that initiates" connections. *Id.* at 520.

USVO moved for reconsideration. USVO did not challenge the District Court's claim construction, the description of the underlying Internet technology, or the description of the operation of the Movielink system. Rather, it only asserted that the District Court's ruling on literal infringement rested on two alleged "factual errors": (1) that USVO lacked any evidentiary foundation for alleging that a "session" is a "connection"; and (2) that there was no evidence the CDS "initiates" the HTTP session in response to a customer clicking the "START DOWNLOAD" button. A1811-12.

USVO conceded the "first factual error" stemmed from its failure to submit the correct evidence. *Id.* at 1811. The second "error" allegedly resulted from the District Court's decision to construe the term "initiates," which USVO described as "outside the issues presented by the parties." A1812. USVO then submitted new evidence, which had always been available, including source code from software used by the Multi-CDN system, industry documentation, and

deposition testimony by USVO's expert. *See* A1812-13, 1817-20. USVO also suggested that the District Court had erroneously "applied a different and somehow more exacting definition of 'initiates'" in granting summary judgment for Movielink. A1822.

In its order denying reconsideration, the District Court concluded that the parties and the Court had devoted considerable time to construing the term "initiates," and that USVO had no excuse for failing to proffer the newly-submitted evidence earlier. 2005 WL 1384773, at *3. Based on controlling precedent, the District Court denied the motion and held that USVO failed to establish that reconsideration was appropriate; there was no intervening change in law, the new evidence was previously available but not submitted, and there is no manifest injustice in denying reconsideration. *Id*.

Nonetheless, for completeness, the District Court also provided a second ground for denying USVO's reconsideration motion. The District Court found that USVO's new evidence and arguments did not create a triable issue of fact. *Id.* at *3-4. The District Court pointed out that the prosecution history "specifically disclaimed coverage of a system in which the local unit is in control" and found that like the prior art, Movielink's system gives the local unit control. *Id.* at *3. It also reaffirmed its earlier finding that the "Movielink Manager software on the user's computer 'initiates' a TCP connection to the CDR through

an HTTP request which is then redirected to the appropriate CDS. It is the HTTP GET request to the CDS which also 'initiates' the HTTP connection, or 'session.'" *Id*. (footnote omitted). Calling a "session" a "connection" thus could not and did not "create a genuine issue of material fact" as to "which part of the Movielink's system 'initiates connections." *Id.*

Finally, the District Court rejected USVO's argument that it applied "a more exacting definition of the term 'initiates' ...." *Id.* at *4. The District Court reiterated its undisputed findings of fact that the customer's computer sends the HTTP GET request to the CDS, "which then responds to the request by transmitting an HTTP response" containing the digital movie. *Id.* "Thus, the distribution interface in Movielink's system, assuming it indeed has one, does not 'initiate' these connections over the telephone network, rather the connections are initiated by the user's computer." *Id.*

The District Court therefore denied USVO's motion, and this appeal followed.

SUMMARY OF THE ARGUMENT

The dispute here is *not* about the underlying technology or operation of the Movielink Multi-CDN system, but rather is about the legal conclusion to be drawn from the undisputed facts. The District Court correctly construed the claim term "initiates" and properly found that there can be no infringement based on the

undisputed facts regarding the Movielink system. USVO acknowledges that the District Court's claim construction is correct. USVO's Br. at p. 10. USVO's appeal brief also cannot point to any underlying facts that are disputed. Rather, USVO challenges only the ultimate conclusion of noninfringement that the District Court drew from these undisputed facts. Such a conclusion is proper for resolution through summary judgment.

Moreover, the District Court properly resolved this dispositive legal issue on the merits. To start, the District Court properly construed the key term "initiates" in claim 1 of the '792 patent to mean "begins" and to require an element of "control" over when and at whose convenience movies are downloaded. *See* 354 F. Supp. 2d at 514.

The District Court also properly concluded based on the undisputed facts that Movielink's Multi-CDN system does not practice all of the limitations of claim 1. First, the user's computer controls all connections to download movies at its convenience. 2005 WL 1384773, at *3-4. Second, the underlying Internet technology and the "sequence of operations" of the Movielink system independently establish that the Movielink system cannot "initiate" or "begin" connections to download movies. 354 F. Supp. 2d at 520; 2005 WL 1384773, at *3-4.

Accordingly, under the District Court's unchallenged construction of "initiates," only the user's computer "initiates" connections within the meaning of the '792 patent, and thus this Court should affirm summary judgment for Movielink.

I. STANDARD OF REVIEW

The Federal Circuit "review[s] *de novo* the grant of summary judgment." *Lacks Indus. v. McKechnie Vehicle Components USA*, 322 F.3d 1335, 1341 (Fed. Cir. 2003). Denial of a motion for reconsideration is reviewed for abuse of discretion. *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999); *North River Ins. Co. v. Cigna Reinsurance Co.*, 52 F.3d 1194, 1218-20 (3d Cir. 1995) (affirming denial of motion for reconsideration due to failure to raise argument in prior motion); *see also Super. Fireplace Co. v. Majestic Prods. Co.*, 270 F.3d 1358, 1376 (Fed. Cir. 2002) (reviewing denial of motion for reconsideration under standard of review from regional circuit).

Patent infringement analysis involves two steps. First, the court determines the scope and meaning of the asserted claims. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372-74 (1996). This claim construction is an issue of law and is reviewed *de novo*. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1456 (Fed. Cir. 1998) (*en banc*). "Second, the claims as construed by the court are compared to the allegedly infringing device. The determination as to whether the

claims, as properly construed, read on the accused device presents an issue of fact that [the Federal Circuit] review[s] for clear error." *Lacks*, 322 F.3d at 1341.

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT NONINFRINGEMENT CAN BE RESOLVED HERE ON A MOTION FOR SUMMARY JUDGMENT BASED ON THE UNDISPUTED FACTS.

USVO does not challenge the District Court's claim construction and acknowledges that it is correct. USVO's Br. at pp. 10, 14. Instead, USVO asserts that it is challenging the District Court's grant of summary judgment only on the ground that there is a triable issue of material fact regarding whether the Multi-CDN system or the Multi-CDN user "initiates" connections within the meaning of claim 1 of the '792 patent. *Id.* at pp. 14, 20. However, as the District Court correctly ruled, all of the material facts are undisputed. *See* 354 F. Supp. 2d at 516 n.7 ("USVO has not alleged any inaccuracies in [Movielink expert Dr. Konstan's] description of the underlying technology."); *id.* at 517 (describing "[t]he undisputed sequence of operations for the Movielink Multi-CDN system"). This means, by definition, that there is no triable issue of material fact precluding summary judgment on noninfringement. Rather, to use USVO's own words from its opening brief, the "sole issue" is whether the undisputed facts establish that "the distribution interface of the Movielink system 'initiates connections' with the user's computer to download the movie, as recited in claim 1." USVO's Br. at p. 14.

As the District Court properly concluded, this is a legal issue that is appropriate for resolution on a motion for summary judgment. *See, e.g., Karsten Mfg. Corp. v. Cleveland Golf Co.*, 242 F.3d 1376, 1380-81 (Fed. Cir. 2001) (affirming summary judgment on literal infringement in the "absence of dispute as to the structure of the" allegedly infringing product); *Network, LLC v. Centraal Corp.*, 242 F.3d 1347, 1355 (Fed. Cir. 2001) (affirming summary judgment on literal infringement where the parties agreed upon the "technical correctness of" the workings of a system). The District Court also was correct in ruling that, absent a genuine dispute as to an underlying material fact, USVO could not avoid summary judgment simply by contesting the District Court's "ultimate" conclusion that the Multi-CDN system does not "initiate[]" connections within the meaning of the '792 patent. *See, e.g., Dynacore Holdings Corp. v. U.S. Phillips Corp.*, 363 F.3d 1263, 1278 (Fed. Cir. 2004) (affirming summary judgment because plaintiff's proffered expert testimony on the "ultimate issue" of infringement did not create a triable issue of material fact).

Finally, the District Court's resolution of the noninfringement issue was legally correct on the merits, and USVO has identified no triable issue of fact that would justify a remand for a trial.[2]

[2] Movielink, as the prevailing party, reserves all of its alternative arguments, which were not decided by the District Court, and which independently warrant summary judgment in Movielink's favor.

III. THE DISTRICT COURT CORRECTLY RULED ON THE MERITS THAT THE MULTI-CDN SYSTEM DOES NOT INFRINGE THE '792 PATENT.

A. The District Court Properly Construed The Claim Term "Initiates" To Include Control Over When And At Whose Convenience Movies Are Downloaded.

The words of a claim are generally given their ordinary meaning as understood by one of skill in the relevant art when read in the context of the entire patent. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313-1314 (Fed. Cir. 2005) (*en banc*). "[A] court 'should also consider the patent's prosecution history,'" which "provides evidence of how the PTO and the inventor understood the patent" and "whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be." *Id*. at 1317; *see also Kustom Signals, Inc. v. Applied Concepts, Inc.*, 264 F.3d 1326, 1331 (Fed. Cir. 2001) (construing disputed term in light of "amendments and accompanying remarks" made to avoid prior art); *Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1323 (Fed. Cir. 2003) ("The doctrine of prosecution disclaimer is well established in Supreme Court precedent, precluding patentees from recapturing through claim interpretation specific meanings disclaimed during prosecution.")

Based on the plain and ordinary meaning of "initiates," the District Court here construed the term "initiates" to mean "begins." *See* 354 F. Supp. 2d at 514. Both parties agree that this aspect of the definition is correct. *See* USVO's Br. at pp. 10, 14.

Moreover, the term "initiates" was added to the claim in an amendment made during prosecution for the purpose of overcoming a prior art rejection. A0733-34. Based on arguments made by the applicants accompanying that amendment, the District Court further construed the term "initiates" to include an element of control over when, and at whose convenience, a movie is downloaded. *See* 354 F. Supp. 2d at 514; *see also Pause Tech. LLC*, 419 F.3d at 1332, 1335 (relying on prosecution history to confirm construction). In particular, the District Court cited the fact that the "applicants specifically disclaimed coverage of a system in which the local unit is in control" and had argued before the PTO "that, in their claimed system, the central facility initiates the new connection 'at its convenience,' rather than in direct response to a request." *See* 2005 WL 1384773, at *3; *Omega Eng'g*, 334 F.3d at 1323.

The prosecution history of the '792 patent confirms that this construction is correct. As explained by the '792 patent applicants during prosecution, the system of claim 1 reflects an "entirely different philosophical" approach than the prior art because it gives the "central unit ... control rather than the remote unit" over when a video program is delivered. A0740. "In the prior art, the local unit is in charge of the transaction, ordering and receiving a program at its convenience. In the claimed system, the user merely requests a program; the central facility ten [sic] initiates a new connection at its convenience and sends a

program to the remote unit ...." *Id.* For example, the claimed system allows customers to "request a program from anywhere other than the receiving unit" and have it available for viewing by the time they arrive home. A0739-40. This feature is possible because the "distribution interface" "initiates all calls" to remote locations before transmitting video to the pre-authorized locations. A0739-40.

The '792 patent applicants emphasized that this central unit "control" makes movie distribution economically feasible. A0740. Specifically, unlike in the prior art, the "central unit" can be designed to "run very efficiently" because it retains "control rather than the remote unit." A0740. The central unit's control over when to "initiate" connections allows it to cost-effectively deal with "the extremely large amounts of data which are transferred when a large number of remote units are being driven simultaneously ...." A0740.

Finally, the specification for the '792 patent further reinforces the District Court's construction of the term "initiates." For example, the specification describes: (1) a "central data facility [that] returns the call" after a customer requests a program; A0065 at 2:65-66 and (2) a "central data facility" that "sets up a telephone connection with the remote location ...." A0067 at 6:12-13. In both of these examples, the central unit determines when a connection is made and makes the connection "at its convenience."

B. The Multi-CDN System Does Not Control When To Initiate Connections or When Movies Are Downloaded.

The District Court also correctly ruled that the Multi-CDN system does not infringe the '792 patent because the Movielink Manager software residing on the user's computer controls when to "initiate" connections "at its convenience." 2005 WL 1384773, at *3.

USVO has not raised a triable issue of fact about whether the Multi-CDN system "initiates" connections with users' computers "at its convenience." Both below and on appeal, USVO relies on nothing more than conclusory assertions to argue that the "Movielink system … is always in control, determining when and from where the information is downloaded." USVO's Br. at p. 16 (offering no citation to the record). USVO also fails to cite anything in the record that in fact proves that the CDS "initiates a new connection at its convenience between the user's computer and the selected CDS." *Id.* at p. 17. USVO's failure to present admissible or material evidence on these points independently justifies affirming the grant of summary judgment. *See Dynacore*, 363 F.3d at 1277-78.

The undisputed factual evidence in the record affirmatively establishes that "nothing in the Movielink system" enables the server "to decide when it would be convenient to send a movie back." A1218 ln:9-11. As the District Court correctly found, the "connection" to download a movie "does not occur at the 'convenience' of the central facility, but rather is initiated by the

Movielink Manager software residing on the user's computer." 2005 WL 1384773, at *3. Whereas the '792 patent enables the central unit to call the remote location and transmit movies at an indefinite point in time after receiving a request (A0739-40), under the Multi-CDN system, movies can only be downloaded when (and at the time that) the customer clicks "DOWNLOAD NOW." A0207-08; A0600 at ¶¶ 6-7. This means, for example, that unlike the system described in claim 1 of the '792 patent, the Multi-CDN system cannot take advantage of efficiencies from sequencing movie downloads during periods of peak demand. *See* A0740.

The District Court also properly recognized that the Multi-CDN system lacks the essential element of "control" attributed to the term "initiates" in the prosecution history. The '792 patent describes a system where customers can order downloads in advance, including by telephone, and the distribution system controls when to subsequently "initiate" new connections with pre-authorized remote units. *See* A0739-40 (stating "the user in prior art systems could not call in to request a program from a car phone on the way home from work and have it available in the receiving unit when arriving home"). In contrast, like the Cohen prior art that would "request and send in a single session," the user of the Movielink system cannot request downloads in advance nor can the user request

that the Multi-CDN system download movies to another computer. *See* A0600-01 at ¶¶ 7, 10.[3]

C. The Underlying Internet Technology And The "Sequence Of Operation" Also Demonstrate Why The User's Computer "Initiates" All Connections.

The undisputed evidence about the technology at issue here independently proves why the Movielink system does not "initiate" connections to download movies to users' computers. USVO admits that while "both parties to the connection participate in forming the connection," only "one party *starts* or *initiates* the process." USVO's Br. at p. 14 n.1; A0314. In this case, the underlying Internet technology and the sequence of operations of the Movielink Multi-CDN system verify that the *one* party that "starts" or "initiates" the connection is the user's computer.

As discussed above regarding the operation of the Movielink system, there are three relevant parties: the user's computer, the CDR, and the CDS. Before the Movielink Manager can send a HTTP request (at step 5(a) above), the underlying Internet technology requires that a TCP connection be formed between the user's computer and the CDR. 354 F. Supp. 2d at 516. To accomplish this, the

[3] In the Movielink's system, the user's computer is always in control. "For example, after the user clicks download and the movie starts downloading, the user can even pause the download and resume it at a later time of the user's choosing." A0601 ¶11. "Likewise, the user, after paying for the movie, can have the option of downloading the movie at a later time." *Id*.

user's computer sends to the CDR the *first* message in the three-part TCP handshake. *Id.* at 516, 518. Once the TCP connection is formed, Movielink Manager sends the *first* HTTP request to the CDR server. *Id.* The CDR responds with an HTTP REDIRECT (step 5(b)) using the same TCP and HTTP connections started by the user's computer. *Id*. In sum, the user's computer sends the *first* message initiating the TCP connection with the CDR, and the *first* HTTP request initiating the HTTP connection with the CDR.

The user's computer repeats the same process with the CDS. The user's computer has to first initiate a new TCP connection (step 6) with the CDS. *See* 354 F. Supp. 2d at 516, 518; A01807.33 (USVO acknowledging that "there must be a break" between the connections to the CDR and CDS "because you are talking to two different pieces of equipment"). Once this TCP connection with the CDS is formed, the Movielink Manager on the user's computer "issues a new HTTP GET request to the CDS," and the CDS sends back the digital movie via that same TCP and HTTP connection or session. 354 F. Supp. 2d at 518.

Therefore, the District Court correctly found that "it is [Movielink Manager,] on the customer's computer, that initiates the TCP connection[s]" and HTTP connections regardless of "[w]hether this occurs because the user pushes download, or because the HTTP Redirect instructs the user's computer to do it."

354 F. Supp. 2d at 520. All "TCP and HTTP connections are … initiated by the MM software that resides on the user's computer." *Id*.

IV. USVO'S ARGUMENTS DO NOT CREATE A TRIABLE ISSUE OF FACT REGARDING INFRINGEMENT.

USVO advances two arguments to support remand: (1) the HTTP REDIRECT message, not the HTTP GET request, "initiates" the download connection (USVO's Br. at p. 17); and (2) the District Court improperly ignored evidence (belatedly submitted by USVO for the first time in support of its reconsideration motion) that the CDS server "opens" or "creates" "[a] second connection," "known as an 'HTTP Session'" between the CDS and the user's computer. *See id.* at p. 19. Neither argument, however, raises a material question of fact on the issue of infringement.

As an initial matter, for the reasons discussed above, the undisputed evidence regarding the HTTP and TCP/IP communication protocols shows that the user's computer must initiate connections with the Movielink system. *See supra* § III.C. On the one hand, if the relevant test for "initiates" is who in the causal chain can be said – in a generic sense – to "command" the download (USVO's Br. at p. 17), then the user's original HTTP GET request must be the relevant command for initiating the download. As the District Court correctly noted, "the HTTP Redirect message is actually a *response* from the CDR to the request initiated by MM on the user's computer." 354 F. Supp. 2d at 520. On the other

hand, if the test is who actually initiates the connection over which the download occurs, then the HTTP REDIRECT does not "initiate" that connection. Under this alternative test, the HTTP REDIRECT is not part of the new and separate HTTP and TCP connections – initiated by a second HTTP GET request from the user's computer – over which the movie is downloaded. 354 F. Supp. 2d at 516, 520. Thus, no matter how this Court views the undisputed evidence about the Movielink system, the HTTP REDIRECT message does not "initiate" any connection.

USVO next argues that "there is simply no way for the user's computer" to initiate the connection with the CDS because it "does not know the URL of the CDS selected by the CDR." USVO's Br. at p. 17. This argument is a *non-sequitur*. The fact that the user's computer does not know the URL for the CDS at the outset does not prevent it from initiating the connection with the CDS once it learns of the URL. A simple analogy to telephone calls illustrates why this is true.[4]

In this analogy, the initial HTTP request is like calling a disconnected number and receiving a response that "this number is no longer in service; please call [a different number X]." *See* A1807.35-1807.37. The HTTP REDIRECT

[4] An analogy to telephone calls is appropriate. Even USVO used telephone analogies from a technical treatise to advocate a broad interpretation of "connections." *See* A01317 (USVO arguing about "*Virtual circuit connection.* Making a stream transfer is analogous to making a telephone call…. Conceptually, one machine places a 'call' which must be accepted by the other.").

message that transmits the URL of the selected CDS is the "please call [a different number X]" message that relays the number not previously known by the caller. In the case of the telephone analogy, the caller redials the new number, and in the case of the Movielink system, the Movielink Manager sends a new and different HTTP GET request to the CDS. 354 F. Supp. 2d 516, 518. In both instances, the telephone caller and Movielink user's computer have to initiate the second call to the correct number or URL.

The uncontroverted evidence also confirms that the customer's computer, not the Movielink system, initiates all connections throughout the download process. *See* A0208-09. Specifically, Movielink's expert, Dr. Konstan, placed his computer behind a firewall and configured his system to reject "[a]ny packet coming to" his local network that was not "part of an existing TCP connection ...." A0209. Despite this configuration, Dr. Konstan was able to log on to the Movielink's website and download a movie from Movielink. *Id.* If, as USVO contends, Movielink's system initiated new connections and controlled when to initiate new connections, the download would never have occurred because transmissions from Movielink over any attempted new connection would have been rejected by the firewall. *Id*. Rather, the movie download was successful on Dr. Konstan's firewall-protected network precisely because the Movielink system merely responds to any HTTP GET request sent by his computer.

As to USVO's second argument, it does not matter whether someone might characterize an "HTTP session [as] a connection." USVO's Br. at p. 19. The District Court assumed that a "'session' is a 'connection' within the meaning of the term as used in the '792 patent …." 2005 WL 1384773, at *3 n.7. The dispositive question for purposes of determining infringement, however, is who "*initiates*" that connection. As explained *supra* § III.B-C, the District Court properly concluded based on the undisputed facts that "[i]t is the HTTP GET request to the CDS which [] 'initiates' the HTTP connection, or 'session' [and] [t]his connection does not occur at the 'convenience' of the central facility, but rather is initiated by the Movielink Manager software residing on the user's computer." 2005 WL 1384773, at *3. The HTTP session is a result of, and is created in direct response to, the HTTP GET request sent from the user's computer. 354 F. Supp. 2d at 518, 510; 2005 WL 1384773, at *3-4. This alone establishes that the HTTP session is "initiated" by the user's computer, not the Movielink server.

Moreover, and independently, USVO utterly fails to point to any evidence to support its conclusory assertion that the CDS "initiates" the HTTP session. 354 F. Supp. 2d at 520. To establish infringement, USVO relies exclusively on a conclusory statement by its expert that the CDS "initiates" connections because it is programmed to "open an HTTP Session". USVO's Br. at

p. 19 (citing A01938). But this is not evidence; it is a legal conclusion, and thus is insufficient to defeat summary judgment. *Dynacore Holdings Corp.*, 363 F.3d at 1278. Furthermore, it is based on an incorrect claim construction that the term "initiates" in Claim 1 is the same as and can be used interchangeably with "opens", "creates", or "brings into existence." USVO's Br. at p. 20. USVO cannot defeat the very claim construction it has admitted is "correct" by recharacterizing that construction in a manner inconsistent with the intrinsic evidence. *See supra* § III.A.

Rather, all of the evidence affirmatively establishes that USVO's expert's ultimate conclusion on infringement is wrong. The proper construction of "initiates" precisely points to an identifiable event in the operation of the claimed system. *See supra* § III.A. "Initiates" thus cannot encompass such amorphous terms as "opens", "creates", and "brings into existence." The District Court correctly explained the difference between "initiates" and "opens" by drawing an analogy to telephone calls.

> When A calls B and B picks up the phone and says "hello," B can be considered to have "opened the call," but it is still A who "initiated" the connection. Thus, the [HTTP session is] initiated by the MM software that resides on the user's computer, and not by Movielink's distribution interface, assuming it has one.

354 F. Supp. 2d at 520.

In sum, USVO cannot avoid summary judgment by relying on conclusory assertions about the ultimate issue of infringement. *See Dynacore Holdings Corp.*, 363 F.3d at 1278.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's grant of summary judgment in favor of Defendant-Appellee Movielink.

Respectfully submitted,

SIDLEY AUSTIN LLP
Jeffrey M. Olson
Robert A. Holland
Samuel N. Tiu

Dated: February 3, 2006

By:_____
Robert A. Holland
Counsel for Defendant-Appellee
Movielink, LLC

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Based on the word-count function in Microsoft Word, the brief contains 7,972 words.

Dated: February 3, 2006 By:_____

Robert A. Holland
Counsel for Defendant-Appellee
Movielink, LLC

CERTIFICATE OF SERVICE

On February 3, 2006 an original and 11 copies were served via FEDEX to the United States Court of Appeals, Federal Circuit, 717 Madison Place, N.W., Washington, DC 20439. I served opposing counsel with 2 bound copies via U.S. Mail as follows:

Edward W. Goldstein Corby R. Vowell **GOLDSTEIN & FAUCETT, LLP** 1177 West Loop South, Suite 400 Houston, Texas 77027 Phone: (713) 877-1515 Fax: (713) 877-1737	2 copies
J. William Koegel, Jr. David A. Clark **STEPTOE & JOHNSON LLP** 1330 Connecticut Avenue NW Washington, DC 20036	2 copies
Richard D. Kirk 222 Delaware Avenue, Suite 900 P.O. Box 25130 Wilmington, Delaware 19899 Phone: (302) 655-5000	2 copies

Executed on February 3, 2006, at Los Angeles, California.

Elizabeth Hernandez