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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

<p>UNITED STATES OF AMERICA</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>ELCOM LTD., a/k/a ELCOMSOFT CO., LTD.,</p> <p style="text-align: center;">Defendant.</p>	<p>Case No.: CR 01-20138 RMW</p> <p>REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS INDICTMENT FOR VIOLATION OF DUE PROCESS</p> <p>Date: April 1, 2002 Time: 9:00 a.m. Judge: The Honorable Ronald M. Whyte</p>

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I. INTRODUCTION.

Elcomsoft has filed two distinctly different Motions seeking dismissal of the indictment against it. The first of these Motions is a motion to dismiss on the grounds that Section 1201(b) of the Digital Millennium Copyright Act (“DMCA”) is unconstitutionally vague in violation of the Due Process provisions of the Fifth Amendment. Elcomsoft’s second Motion seeks dismissal of the indictment on the grounds that Section 1201 of the Digital Millennium Copyright Act violates the First Amendment of the Constitution.

The government’s combined Opposition blends these motions together and thereby attempts to obfuscate their substantial differences. Elcomsoft’s Fifth Amendment vagueness motion is not derived from, dependent upon, nor boot strapped onto its separate First Amendment challenge. The analytical framework for considering the vagueness challenge is totally different from that used in analyzing its First Amendment challenge. This Reply discusses the vagueness motion, while a separate Reply considers the issues related to Elcomsoft’s First Amendment challenge.

The government’s Opposition provides absolutely no insight into the significant questions presented by Elcomsoft’s Motion to Dismiss the Indictment for Violation of Due Process. The most serious of these questions – how does the maker of a circumvention device know when he or she is designing or marketing a prohibited tool – is ignored altogether. This is troubling given that the government apparently concedes that Congress did not forbid circumvention devices altogether; and that Congress intended to permit the circumvention of usage control technologies for the purpose of fair use or other non-infringing uses once a copyrighted work had been lawfully obtained and accessed.

Although the government refuses to address the ambiguities of the DMCA, this Court must. Elcomsoft produced a product – AEBPR – for the purpose of allowing legitimate non-infringing uses of works that have been lawfully accessed. Based on the government’s interpretation of Section 1201(b), (Opp. Mem. at 32:11-24), *any* person who makes *any* circumvention technology is subject

to criminal prosecution because the government believes that there is no constitutional requirement that the technology be designed or marketed for an *unlawful* purpose -- specifically, infringement of a copyright. In fact, under the government's view, password recovery tools that Elcomsoft has manufactured for years – and that heretofore have been applauded by law enforcement and others – could subject Elcomsoft and manufacturers of similar products to prosecution because such products could circumvent copy controls placed on word processor and PDF files containing copyrighted works. *See* section II.B., below.

Simply stated, Section 1201(b) is impermissibly vague because there are *no* standards by which legitimate manufacturers of technologies which can circumvent copyright usage controls are able to determine if their product is lawful or unlawful. There are *no* standards to guard against the arbitrary enforcement of the DMCA. The government becomes the arbiter of lawfulness *after* the conduct occurs. Section 1201(b) cannot and does not provide the kind of advance notice that will protect an individual from being prosecuted. For these reasons, Elcomsoft respectfully requests that the Court grant its motion to dismiss.

II. DISCUSSION.

A. THE GOVERNMENT FAILS TO ADDRESS THE HEART OF ELCOMSOFT'S MOTION.

The government apparently concedes, or at least does not seriously contest, critical aspects of Elcomsoft's vagueness motion. Nowhere in its Opposition does the government contest the key points of Elcomsoft's motion, which are as follows:

- Congress intended to permit the circumvention of usage control technologies to allow for fair use and other non-infringing uses once a copyrighted work had been *lawfully*

obtained and accessed. Congress did not intend to prohibit tools that allow such circumvention. (Elcomsoft Mem. at pp. 8-13);

- The AEBPR was not sold by Elcomsoft to allow *unlawful* distribution of copyrighted works. Rather, Elcomsoft sold the product to allow *a lawful* owner to have more freedom to read the book how and/or where the owner wanted. Consistent with its advertising of the AEBPR, Elcomsoft is aware of no *unlawful* use of the AEBPR. Nor has any such evidence been produced to date. (Elcomsoft Mem. at pp. 3-8);

- There are *no* guidelines or objective criteria for assessing whether a circumvention tool is lawful or unlawful. No guidelines are provided regarding the manufacture and/or marketing of devices which allow circumvention of copy controls for non-infringing purposes. For example, no objective criteria are provided for those seeking to create tools that will allow lawful owners of copyrighted material to exercise their rights to fair use. Thus, contrary to Congress' intent, *all* circumvention tools are apparently prohibited. (Elcomsoft Mem. at p. 22);

- Under the government's reading of Section 1201(b), *any* person who makes *any* circumvention tool is subject to criminal prosecution because the government believes that it is irrelevant that the person has made the device for a non-infringing purpose. (Elcomsoft Mem. at pp. 15-17).

Indeed, as the government does not contest, Elcomsoft and other software manufacturers face the ultimate "Catch 22." Consistent with clear and abundant legislative history, Elcomsoft manufactured and marketed a device that circumvents protection afforded by a technological measure in order to allow lawful uses. Notwithstanding, after Adobe complained about a "Russian hacker company" and its product, the government was able to take advantage of the broad language of Section 1201(b) and press charges without regard to Elcomsoft's purpose, as the statute makes no distinction between devices made or marketed for lawful purposes and those made or marketed for

unlawful purposes.¹ The government became the arbiter of lawfulness *after* the conduct had already occurred.

Plainly, the DMCA does not provide the kind of advance notice that will protect an individual from being prosecuted; retroactive notice in the form of an indictment is no notice at all. *Cf. City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (“Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law”).

B. SECTION 1201(b) PROVIDES NO GUIDANCE TO SOFTWARE MANUFACTURERS AND PERMITS ARBITRARY ENFORCEMENT.

Beginning from the unchallenged premise that devices and technologies which effectuate circumvention for non-infringing purposes are lawful, Elcomsoft’s vagueness challenge requires this Court to determine whether it is possible to tell if Section 1201(b) encompasses lawful as well as unlawful uses of circumvention devices and technologies. Elcomsoft asserts that it is not possible to determine if the lawful circumvention devices which it makes are prohibited by the statute. Elcomsoft’s opening memorandum makes abundantly clear that the principle reason for the statute’s vagueness in this regard is that, unlike other statutes which outlaw devices, the DMCA fails to clearly define the unlawful purposes to which the prohibited devices could be put. This defect is apparent when Section 1201(b) is compared to similar statutes which have often been subject to vagueness challenges.

One class of statutes are those regulating drug paraphernalia. These statutes seek to outlaw or otherwise regulate items which may be used with *illegal* drugs. See *Hoffman Estates v. Flipside*,

¹ The government’s view that the statute is saved by the “primarily designed” and “wilful” elements is irrelevant. (Opp. Mem. at 34-35). These elements do nothing to clearly define prohibited conduct, *i.e.*, when is a circumvention device unlawful. In any event the net effect of these requirements is that a defendant will not be convicted if he or she develops a product that circumvents technological protections by mistake or involuntarily. See section II.C.3, below.

Hoffman Estates, Inc., 455 U.S. 489 (1982); *Posters ‘N’ Things v. United States*, 511 U.S.513 (1994). For example in *Hoffman v. Flipside, supra*, the ordinance involved regulated “any items, affect, paraphernalia, accessory or thing which is designed or marketed for use with *illegal cannabis or drugs* as defined by the Illinois defined statutes.” *Id.* at 500 (emphasis added).

While the statute in the *Flipside* case was challenged for vagueness on other grounds, it did not lack language setting forth the underlying unlawful purpose as does Section 1201(b). If the *Flipside* statute were rewritten to reflect the same defect as exists in Section 1201(b), it would read as follows: “any items, affect, paraphernalia, accessory or thing which is designed or marketed for use with *drugs*.” The vagueness of a drug paraphernalia statute written in this fashion is manifest. The makers of apparently lawful instruments such as the manufacturers of syringes for the injection of insulin would no doubt have a challenge for vagueness on the grounds that they could not tell if the statute’s prohibitions encompassed their instruments.

More analogous to Section 1201(b) are the burglary tools statutes which, as discussed in Elcomsoft’s moving papers, and ignored by the government, *all* define an unlawful purpose. *See, e.g.*, California Penal Code section 466 (defining the unlawful purpose as either *felonious* breaking and entering or as *unauthorized* opening of a lock). There can be little doubt that a burglary tools statute phrased in the same manner as Section 1201(b) clearly would be seen as impermissibly vague. For example a statute which tracked the language of Section 1201(b) and prohibited “any device designed or marketed for the purpose of circumventing a lock securing any valuable items located in an unoccupied building” would not permit legitimate manufacturers of otherwise lawful tools such as lock picks, master keys, or even bolt cutters to determine if their products were covered by the statute, and would convert those manufacturers into criminals merely for making and selling items with lawful uses. Elcomsoft and other makers of lawful circumvention tools are in an identical position under Section 1201(b).

In its opposition papers, the government sets forth what it believes to be the elements of a violation of 17 U.S.C. §§ 1201(b)(1)(A) and 1201(b)(1)(C). (Opp. Mem. at 32:11-24). The government describes the elements as follows:

1. the defendant trafficked in a technology, product, or device;
2. the defendant acted wilfully; and
3. the defendant acted for purposes of commercial advantage or private financial gain.

For purposes of 1201(b)(1)(A), the fourth element that the government must prove is:

4. The device being trafficked in was “primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner.”

For purposes of 1201(b)(1)(C), the fourth element that the government must prove is:

5. The device being trafficked in was “marketed [by the defendant] for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner.”

The government’s recitation of the above elements confirms that Section 1201(b) is fundamentally flawed. The government is not required to prove any unlawful purpose, merely circumvention of a technological measure, thereby ensnaring products – like AEBPR – that were designed to enable non-infringing uses. Lest there be any doubt, the following example – based on evidence submitted by the government in opposition to Elcomsoft’s motion – demonstrates this fact.

Adobe’s product line for electronic publishing is not limited to software related to the Adobe eBook, but also includes other products that allow a user to disseminate documents in electronic format. “Adobe’s Acrobat family of products is designed to produce printed content in a digital master form that can be accurately viewed on a screen. . . . The file format for Adobe Acrobat files is described as the Portable Document Format or “PDF” format.” Diaz Decl., ¶ 3 [filed with government’s Opposition]. Through the use of an “owner” password, the owner of a PDF file using Adobe Acrobat may restrict copying and/or printing of a file upon dissemination – not unlike the restrictions that may be placed upon an eBook upon dissemination. *Cf.* Diaz Decl., ¶ 8. Due to the fact that the Adobe Acrobat “owner” password allows such restrictions, publishers may make their copyrighted information available electronically and use the password restrictions to prevent copying and/or printing. As explained by the evidence submitted by the government in opposition to Elcomsoft’s motion:

Elizabeth Rather, the attorney for Forth, Inc., informed [the FBI] that Forth publishes software and accompanying manuals, and that Forth does not publish eBooks. Rather stated that the manuals that Forth publishes to accompany its software are available online as PDF files. According to Rather, Forth customers who purchase the software can download the manual and accompanying documentation as a PDF file upon which certain restrictions have been placed. Rather stated that in some cases, Forth places restrictions on the PDF files as protecting Forth’s copyright rights.

O’Connell Decl., ¶ 6 [filed with government’s opposition]; *see also* O’Connell Declaration, ¶ 5 (describing Sybex’s publication of books in PDF format “with certain digital rights management protections that prevent printing, copying, or moving the contents of the CD-ROM to more than one computer”).

In such a case, examining the elements of Section 1201(b) as set forth by the government, one may conclude that *any* tool runs afoul of Section 1201(b) if it allows a user to circumvent the publisher's password (a protection afforded by a technological measure) and remove restrictions on printing, copying, or moving the contents of the PDF file (a right of a copyright owner). If that is true, however, then many legitimate products subject those involved in their manufacture and distribution to criminal sanction.

Indeed, as explained in the moving papers, one line of software in which Elcomsoft has specialized is password recovery software. Elcomsoft has a password recovery product that decrypts protected Adobe Acrobat PDF files which have an "owner" password set, preventing the file from being edited and/or printed. Katalov Decl., ¶ 5. Under the government's view of Section 1201(b) – which does not measure the unlawful purpose of a product – it appears that Elcomsoft's password recovery software for Adobe Acrobat PDF files violates Section 1201(b) because through "the use of Elcomsoft's product, the protected file may be opened in any PDF viewer without restrictions." Katalov Decl., ¶ 5.

This result, of course, is absurd and flies in the face of Congress' desire to outlaw "black boxes" and not "products that are capable of significant non-infringing uses." Burton Decl., Ex. O, H.R. Rep. No. 105-551, Part II, at 39-40. Not only is password recovery software useful,² but its illegality is determined by circumstances wholly outside of Elcomsoft's control and without regard to Elcomsoft's intended purpose.³ It is roughly analogous to prosecuting Stanley Tools for making a screwdriver that years later is used to commit a burglary, or Zippo being subject to criminal sanction because a cigarette lighter is used to smoke marijuana.

² For instance, a corporation may use the software when a former employee has left the corporation without un-protecting his or her files. Likewise, a government may use the software in the investigation of a crime. Katalov Decl., ¶ 5.

³ Elcomsoft's software allows recovery of passwords for files created in most popular applications, including Corel WordPerfect Office, Lotus SmartSuite, and Microsoft Office. Katalov Decl., ¶ 5. In theory, any one of these password recovery programs would violate Section 1201(b) if a person chose to "publish" copyrighted work in these applications and restricted rights through the use of a password.

In sum, the government’s recitation of the elements supporting a violation of Section 1201(b) demonstrates that manufacturers and distributors of legitimate and lawful products have no guidance as to whether or not their products are legal or illegal. More importantly, these manufacturers and distributors arbitrarily may be subject to governmental prosecution after the fact and without regard to criminal intent, just as is now occurring with the prosecution of Elcomsoft.

C. THE GOVERNMENT’S ARGUMENTS REGARDING DUE PROCESS ARE MISGUIDED.

Notwithstanding the government’s efforts to duck the notice issues presented by Elcomsoft’s moving papers, the government makes several arguments that ostensibly are in response to Elcomsoft’s motion. As explained below, these arguments are of little value.

1. Elcomsoft’s Challenge In This Case Is Not Like the Challenges in *Flipside* and *Posters ‘N’ Things*.

The government states that the provisions of Section 1201(b) relating to the design and marketing of a circumvention device “are very similar to the provisions analyzed by the Supreme Court in *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982).” (Opp. Mem. at 32:27-28). In addition to *Flipside*, the government also cites *Posters ‘N’ Things v. United States*, 511 U.S. 513 (1994) in support of its argument that Section 1201(b) is not unconstitutionally vague as applied to Elcomsoft. (Opp. Mem. at 33:14-17).⁴ The government’s reliance on these cases is misplaced,

⁴ The government also cites *Richmond Boro Gun Club v. City of New York*, 97 F.3d 681 (2nd Cr. 1996). In *Richmond Boro Gun Club*, the Court addressed an argument that a local law was impermissibly vague in defining as an assault weapon “[a]ny part, or combination of parts, designed or redesigned or intended to readily convert a rifle or shotgun into an assault weapon.” *Richmond Boro Gun Club*, 97 F.3d at 685. The vagueness challenge in that case concerned the ability to discern a manufacturer’s intent. *Id.* That question is not presented here.

however, because in each instance the statute construed tied the design or marketing of a product to an unlawful purpose – something that Section 1201(b) fails to do altogether.⁵

In *Flipside*, the Supreme Court upheld a village ordinance requiring an individual or a business to obtain a license if it sells “an items, effect, paraphernalia, accessory or thing which is designed or marketed for use *with illegal cannabis or drugs.*” *Flipside, supra*, 45 U.S. at 499 (emphasis added). Likewise, in *Posters ‘N’ Things*, the Supreme Court analyzed the definition of drug paraphernalia in the context of a vagueness challenge to the Mail Order Drug Paraphernalia Control Act. *Posters ‘N’ Things, supra*, 511 U.S. at 517. That definition provided that the “term ‘drug paraphernalia’ means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, ingesting, inhaling, or otherwise introducing into the human body *a controlled substance, possession of which is unlawful . . .*” *Id.* at fn. 6 (emphasis added).

Flipside is one of the leading Supreme Court cases in the area of over breadth and vagueness. Elcomsoft cited to the *Flipside* opinion in its memorandum, and encourages the Court to study it because it is essential to understanding the nuance of the void for vagueness doctrine. However, the government’s cavalier assertion that, because Section 1201(b) contains similar “designed” and “marketed” language, and therefore this Court should “follow the reasoning adopted by the Supreme court in that case,” (Opp. Mem at, 33:1), is misplaced because the basis for the vagueness challenge in *Flipside* and this case are entirely different. First, *Flipside* was a pre-enforcement facial challenge to the ordinance at issue on the grounds of overbreadth and vagueness. “A ‘facial’ challenge, in this context, means a claim that the law is ‘invalid in *toto* – and therefore incapable of any valid application,’” *Id.* fn. 5 (citation omitted). That is that the law is “impermissibly vague in all of its

⁵ The government cites the *Flipside* Court’s determination that “designed for use” refers to the “design of the manufacturer, not the intent of the retailer or customer” and that “marketed for use” encompasses “a retailers intentional display of marketing and merchandise.” (Opp. Mem. at 33). This holding is of no relevance in the context of this motion. Elcomsoft does not assert that the statute is ambiguous regarding whether the manufacturer’s or consumer’s intent is at issue; Elcomsoft asserts that the statute does not provide adequate notice of which circumvention devices are prohibited by the statute.

applications.” *Id.* at 497. Elcomsoft makes no such broad facial challenge, but rather as set forth in its moving papers asserts that Section 1201(b) is vague as applied to it and other producers of lawful circumvention tools.

Most importantly, the vagueness challenge in *Flipside* focused on the “designed or marketed” language *because* the Illinois ordinance, unlike Section 1201(b), contained language describing the underlying unlawful purpose. The *Flipside* court recognized and commented upon this fact:

The ordinance requires Flipside to obtain a license if it sells “any items, affect, paraphernalia, accessory or thing which is designed or marketed for use with *illegal* cannabis or drugs, as defined by the Illinois revised statutes.” *Flipside express no uncertainty about which drug this description encompasses.* The District court noted, Illinois law clearly defined cannabis and numerous other controlled drugs including cocaine. Ill. Rev. Stat., ch. 56 __, ¶¶ 703 and 1102(g) (1980). On the other hand, the words “items, affect, paraphernalia, accessory or thing” do not identify the type of merchandise that the village desires to regulate. *Flipside’s challenge thus appropriately focuses on the language “designed or marketed for use.”*

Id. at 500 (citation and footnote omitted) (emphasis added). Unlike *Flipside*, the essence of the vagueness challenge here is the substantial uncertainty about which circumventions are encompassed by Section 1201(b).

Similarly, the statute in *Posters ‘N’ Things*, *supra*, clearly defined the unlawful purpose, thus requiring the court to interpret the subjective intent element only.⁶ The statute at issue in that case provided in part:

The term ‘drug paraphernalia’ means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a *controlled* substance, possession of which is *unlawful* under the Controlled Substances Act (title II of Public Law 91-513) [21 U.S.C. § 801 et seq.].

Id. at 517 (emphasis added).

⁶ Moreover, unlike Section 1201(b), the statutes at issue in *Flipside* and *Posters ‘N’ Things* provided guidelines for enforcement which eliminated the likelihood of arbitrary enforcement. *Flipside*, 455 U.S. at 501, fn. 18; *Posters ‘N’ Things*, 511 U.S. at 519, fn. 7. No such guidelines are provided in Section 1201(b).

Section 1201(b) is unlike the statutes at issue in *Flipside* and *Posters 'N' Things* because the design or marketing of a circumvention devices regulated by Section 1201(b) is not tied to an unlawful purpose, *i.e.*, copyright infringement. Under Section 1201(b) design or marketing must simply circumvent “. . . protection afforded by a technological measure that effectively protects a right of a copyright owner. . .” Indeed, for this same reason, Section 1201(b) is unlike the burglary tools and federal statutes which were cited in Elcomsoft’s moving papers, and which do tie conduct to an *unlawful* purpose. (Elcomsoft Mem. at pp. 18-21).

In sum, Section 1201(b) is flawed because it does not connect the manufacturer’s actions and intent with the relevant unlawful purpose. Consequently, the statute “does not enable the ordinary citizen to conform his or her conduct to the law” and *any* person who makes a circumvention tool may be subject to criminal prosecution. *See, City of Chicago v. Morales, supra*, 527 U.S. at 58.

2. Elcomsoft Is Not Making A Substantive Due Process Argument.

The government claims that Elcomsoft’s challenge “misses the point” and is more appropriately one of substantive due process. (Opp. Mem. at 34). The government’s argument rests on a discussion in *Flipside* regarding an objection that the ordinance at issue “would inhibit innocent uses of items *found to be covered* by the ordinance.” *Flipside*, 455 U.S. at 497, fn. 9. The *Flipside* court rejected this argument, noting that the legislature could rationally prohibit devices with both lawful and unlawful uses. *Id.*

With due respect, the government has “missed the point.” As stated *ad nauseam*, Elcomsoft’s challenge is that Section 1201(b) does not adequately define the circumvention technologies covered under the statute, and therefore does not permit one to know if lawful tools are prohibited. This argument is a classic procedural due process challenge based on vagueness. *See City of Chicago v. Morales, supra*, 527 U.S. at 56 (“Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable

ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement”). Elcomsoft does not argue that it would be impermissible to ban all circumvention technologies, even those enabling lawful circumvention. However, Elcomsoft does argue that Congress did not intend to do so, and that Section 1201(b) is impermissibly vague in describing which technologies are prohibited.

3. The “Wilful” Requirement Does Nothing to Alleviate Notice Concerns.

The government argues that Section 1201(b) contains an adequate scienter provision because the government must “prove that Elcomsoft acted ‘wilfully,’ which in this circuit, requires the government to prove that the company acted ‘voluntarily and intentionally, and not through ignorance, mistake or accident.’” (Opp. Mem. at 34-35) (citations omitted).

Contrary to the government’s fixation on this issue in its Opposition, Elcomsoft’s vagueness argument is not premised on the alleged absence or insufficiency of any subjective intent language. Rather, as clearly set forth in its opening memorandum of law, it is based upon the absence of language setting forth an unlawful purpose.

While subjective intent and unlawful purpose are related, they are different. Both are necessary in a properly constructed statute. Subjective intent language establishes a measure of the defendant’s state of mind. It may be a general intent, or as in the case of Sections 1201(b) and 1204, a specific intent. In contrast, language describing the unlawful purpose identifies to what actions or objects the subjective intent element must be applied. It is that element that is absent from Section 1201(b).

Without an unlawful purpose the inclusion of a “wilful” element can do nothing to eliminate Section 1201(b)'s uncertainty regarding which circumvention devices are prohibited. Indeed, all that the “wilfulness” element guarantees is that Elcomsoft will not be convicted if it designed and marketed the AEBPR involuntarily or by mistake. A matter of little comfort or consequence. The

fact that certain conduct is wilful does not answer the question of whether or not that conduct is unlawful. Consequently, the presence of the “wilful” element does not eliminate “the concern that [the] statute will trap those who act in good faith.” (Opp. Mem. at 35:5-6).

III. CONCLUSION.

For all of the foregoing reasons, defendant Elcomsoft requests that the indictment be dismissed with prejudice in its entirety.

Dated: March 18, 2002

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By: _____
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SF-29612

PROOF OF SERVICE

I am a resident of the state of California, I am over the age of 18 years, and I am not a party to this lawsuit. My business address is Duane Morris LLP, 100 Spear Street, Suite 1500, San Francisco, California 94105. On the date listed below, I served the following document(s):

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS INDICTMENT FOR VIOLATION OF DUE PROCESS

_____ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date during normal business hours. Our facsimile machine reported the "send" as successful.

_____ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as set forth below.

I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. According to that practice, items are deposited with the United States mail on that same day with postage thereon fully prepaid. I am aware that, on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing stated in the affidavit.

John Keker
Keker & Van Nest
710 Sansome Street
San Francisco, CA 94111

_____ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, deposited with Federal Express Corporation on the same date set out below in the ordinary course of business; to the person at the address set forth below, I caused to be served a true copy of the attached document(s).

Scott H. Frewing
Assistant United States Attorney
United States District Court
Northern District of California
280 South First Street
San Jose, CA 95113

_____ by causing personal delivery of the document(s) listed above to the person at the address set forth below.

_____ by personally delivering the document(s) listed above to the person at the address set forth below.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Dated: March 18, 2002
SF-29612

Lea A. Chase