

R. Scott Jerger (*pro hac vice*) (Oregon State Bar #02337)  
Field Jerger LLP  
610 SW Alder Street, Suite 910  
Portland, OR 97205  
Tel: (503) 228-9115  
Fax: (503) 225-0276  
Email: [scott@fieldjerger.com](mailto:scott@fieldjerger.com)

John C. Gorman (CA State Bar #91515)  
Gorman & Miller, P.C.  
210 N 4th Street, Suite 200  
San Jose, CA 95112  
Tel: (408) 297-2222  
Fax: (408) 297-2224  
Email: [jgorman@gormanmiller.com](mailto:jgorman@gormanmiller.com)

Attorneys for Defendants  
Matthew Katzer and Kamind Associates, Inc.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

ROBERT JACOBSEN, an individual, )  
 )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MATTHEW KATZER, an individual, and )  
 KAMIND ASSOCIATES, INC., an Oregon )  
 corporation dba KAM Industries, )  
 )  
 Defendants. )

Case Number C06-1905-JSW

Hon. Jeffrey S. White

**DEFENDANTS MATTHEW  
KATZER AND KAMIND  
ASSOCIATES, INC.'S ANSWER  
TO PLAINTIFF'S SECOND  
AMENDED COMPLAINT,  
AFFIRMATIVE DEFENSES AND  
COUNTERCLAIM FOR  
COPYRIGHT INFRINGEMENT  
(damages in excess of \$6,000,000)**

1 Pursuant to Fed. R. Civ. P. 8(b), Defendants Matthew Katzer and KAMIND Associates,  
2 Inc. hereby respond to the allegations in the Plaintiff's Second Amended Complaint.

- 3 1. Paragraphs 1 through 6 constitute Plaintiff's characterization of this action to which no  
4 response is required. To the extent a response is required, Defendants deny the  
5 allegations in Paragraphs 1 through 6.
- 6 2. Footnotes 1 through 14 are citations to web sites and other secondary sources to which  
7 no response is required. To the extent a response is required, Defendants deny the  
8 allegations in footnotes 1 through 14.
- 9 3. In response to Paragraph 7, the Defendants admit that Plaintiff is an individual, who  
10 works for the University of California, Berkeley and the Lawrence Berkeley National  
11 Laboratory of the University of California, teaches physics at the university, is a  
12 developer with others of software for the JMRI Project, is a model train hobbyist, is a  
13 member of the National Model Railroad Association, and is a member of the DCC  
14 Working Group, a group who work to develop standards for the industry. Except as so  
15 admitted, Defendants deny each and every allegation contained in the said paragraph.
- 16 4. In response to Paragraph 8, the Defendants admit that Matthew Katzer ("Katzer") is an  
17 individual living in Oregon, that he is a model train hobbyist who has written software  
18 code for controlling model train hardware on a layout, that he has obtained several  
19 utility patents and has several patent applications pending, that his experience with  
20 model train control systems is such that he is an expert in the field, that he is involved  
21 in the National Model Railroad Association and Katzer a member of its DCC Working  
22 Group. Except as so admitted, Defendants deny each and every allegation contained in  
23 the said paragraph.
- 24 5. In response to paragraph 9, Defendants admit that KAMIND Associates, Inc. ("KAM")  
25 is an Oregon corporation, that KAM does business as KAM Industries, that KAM is  
26 owned by Matthew A. Katzer and Barbara Dawson, that KAM is in the business of

1 selling products Katzer invented, covered by patents issued to him and that KAM's  
2 products cost up to \$249. Except as so admitted, Defendants deny each and every  
3 allegation contained in the said paragraph.

4 6. The first sentence of Paragraph 10 comprises legal conclusions to which no response is  
5 required. Defendants deny each and every allegation contained in the remainder of  
6 Paragraph 10.

7 7. The first sentence of Paragraph 11 comprises a legal conclusion to which no response is  
8 required. Defendants are without knowledge or information sufficient to form a belief  
9 as to the truth of the allegations contained in the second clause of the second sentence  
10 of Paragraph 11 and therefore deny all allegations set forth therein. Defendants deny  
11 each and every allegation contained in the remainder of Paragraph 11.

12 8. Paragraphs 12 and 13 comprise legal conclusions to which no response is required.

13 9. Paragraph 14 comprises legal conclusions to which no response is required.

14 10. Defendants deny each and every allegation in Paragraph 15.

15 11. Defendants admit the allegations of Paragraph 16.

16 12. Defendants deny each and every allegation in Paragraphs 17 to 26 and the heading  
17 above Paragraph 22.

18 13. In response to paragraph 27, the Defendants admit that Dr. Bruce Chubb has published  
19 a number of articles in a magazine devoted to model railroading. Defendants are  
20 without knowledge or information sufficient to form a belief as to the truth of the  
21 remainder of the allegations contained in Paragraph 27 and therefore deny all  
22 allegations set forth therein.

23 14. In response to paragraph 28, Defendants admit that Dr. Roger Webster of Millersville  
24 University, Pa., has used model train layouts to teach his students and that they have  
25 used a Marklin digital command station to control the model train layout. Defendants  
26 are without knowledge or information sufficient to form a belief as to the truth of the

1 remainder of the allegations contained in Paragraph 28 and therefore deny all  
2 allegations set forth therein.

3 15. In response to paragraph 29, Defendants admit that Dr. John McCormick of the State  
4 University of New York at Plattsburgh has given assignments to his students to run  
5 model trains on a model train layout. Defendants are without knowledge or information  
6 sufficient to form a belief as to the truth of the remainder of the allegations contained in  
7 Paragraph 29 and therefore deny all allegations set forth therein.

8 16. Defendants deny each and every allegation in Paragraphs 30 to 31.

9 17. In response to Paragraph 32, Defendants admit that Katzer subscribed to the Marklin  
10 Digital newsletters. Except as so admitted, Defendants deny each and every allegation  
11 contained in the said paragraph.

12 18. In response to Paragraph 33, Defendants admit that manufacturers have used digital  
13 communications packets to control model trains. Defendants further admit that a model  
14 train could receive digital signals and adjust the train's actions accordingly. Except as  
15 so admitted, Defendants deny each and every allegation contained in the said paragraph  
16 and in the heading above Paragraph 33.

17 19. In response to paragraph 34, Defendants admit that the National Model Railroad  
18 Association started a Digital Command Control Working Group, consisting of various  
19 manufacturers, which adopted a digital command control (DCC) standard in 1993.  
20 Except as so admitted, Defendants deny each and every allegation contained in the said  
21 paragraph.

22 20. In response to paragraph 35, Defendants admit that A. J. Ireland, of Digitrax developed  
23 LocoNet, that Katzer signed a nondisclosure agreement with Digitrax, and that Ireland  
24 was an inventor listed on U.S. Provisional Application No. 60/062,100 which was filed  
25 in October 1997. In response to sentences five through nine, U.S. Application No.  
26 60/062,100 speaks for itself and is the best evidence of its contents. Defendants deny

1 any allegation contrary to the plain language and meaning of the documents. Except as  
2 so admitted, Defendants deny each and every allegation contained in the said  
3 paragraph.

4 21. Defendants deny each and every allegation in Paragraphs 36 and 37.

5 22. In response to Paragraph 38, Defendants admit that Mr. Juergen Freiwald of Egmatung,  
6 Germany sold software under the names "Railroad and Co." and "TrainController" and  
7 that Katzer included information about it in his presentations at NMRA conventions in  
8 1997 and 1998. Defendants further admit that the Railroad and Co. model train  
9 software has a library. Except as so admitted, Defendants deny each and every  
10 allegation contained in the said paragraph .

11 23. In response to Paragraph 39, Defendants admit that DigiToys sold WinLok 1.5 and  
12 WinLok 2.0 and that Katzer discussed WinLok in his 1997 and 1998 NMRA  
13 presentations. Defendants deny that Katzer advertised in "Model Railroading"  
14 magazine and aver that KAM has advertised in "Model Railroading" and other  
15 magazines and that KAM distributed CD software in "Model Railroading" magazine as  
16 early as 1998. Except as so admitted, Defendants deny each and every allegation  
17 contained in the said paragraph.

18 24. In response to Paragraph 40, Defendants admit that Hans Tanner sold WinLok 2.1 in  
19 late 1997 and that the manual was available for download from the DigiToys website.  
20 In response to sentences three through nine, the Winlok 2.1 manual speaks for itself and  
21 is the best evidence of its contents. Defendants deny any allegation contrary to the plain  
22 language and meaning of the document. Except as so admitted, Defendants deny each  
23 and every allegation contained in the said paragraph.

24 25. In response to Paragraph 41, Defendants admit that a presentation on ROSA was given  
25 at the July 1997 NMRA convention and further aver that KAM acknowledged the  
26 existence of ROSA in its patent application. Defendants further aver that KAM sold

1 client server software for model trains at the same July 1997 NMRA convention.  
2 Except as so admitted, Defendants deny each and every allegation in the said  
3 paragraph.

4 26. In response to Paragraph 42, Defendants admit that the 1998 publication authored by  
5 Stanley Ames, Rutger Friberg and Edward Loizeaux was offered for sale on KAM's  
6 website and Defendants further admit that Katzer purchased a copy of the first edition  
7 which was signed "To my friend Matt, with regards, Rutger." The allegations set forth  
8 regarding the contents of the book constitute Plaintiff's characterizations of the book,  
9 which speaks for itself and is the best evidence of its contents. Defendants deny any  
10 allegation contrary to the plain language and meaning of the book. Except as so  
11 admitted, Defendants deny each and every allegation contained in the said paragraph.

12 27. Defendants deny each and every allegation in Paragraphs 43 and 44 and in the heading  
13 above Paragraph 43.

14 28. In response to Paragraph 45, Defendants admit that vendors have created software for  
15 "running real trains on real world tracks," including Train Track, of Newport Beach,  
16 California. Except as so admitted, Defendants deny each and every allegation  
17 contained in the said paragraph.

18 29. In response to Paragraph 46, Defendants admit that Train Track has offered for sale  
19 TDPro32, software for use with Windows NT for Managing Class I railroads, i.e. "real  
20 trains" and that the software has been used in New York City, Kansas City and other  
21 cities. Except as so admitted, Defendants deny each and every allegation contained in  
22 the said paragraph.

23 30. Defendants deny each and every allegation in Paragraph 47 and in the heading above  
24 Paragraph 47.

1 31. In response to Paragraph 48, the 461 application and the 406 patent speak for  
2 themselves and are the best evidence of their contents. Defendants deny any allegation  
3 contrary to the plain language and meaning of the documents.

4 32. In response to Paragraph 49 and Appendix A and B to the Complaint, the 329 patent,  
5 the 878 application and the 222 application are the best evidence of their contents.  
6 Defendants deny any allegation contrary to the plain language and meaning of the  
7 documents. Except as so admitted, Defendants deny each and every allegation  
8 contained in the said paragraph.

9 33. In response to paragraph 50, Defendants admit that KAM filed a lawsuit against  
10 DigiToys in September 2002 and aver that this lawsuit was never served on DigiToys.  
11 Except as so admitted, Defendants deny each and every allegation contained in the said  
12 paragraph.

13 34. In response to Paragraph 51, Defendants admit that the '878 application was filed.  
14 Except as so admitted, Defendants deny each and every allegation contained in the said  
15 paragraph.

16 35. Defendants deny each and every allegation in Paragraph 52.

17 36. In response to Paragraph 53, Defendants admit that the Defendants submitted  
18 references to the patent examiner. Except as so admitted, Defendants deny each and  
19 every allegation contained in the said paragraph.

20 37. Defendants deny each and every allegation in Paragraph 54 and 55.

21 38. Defendants deny each and every allegation in Paragraph 56 and the heading above  
22 Paragraph 56.

23 39. In response to Paragraph 57, Defendants admit that Katzer obtained patents while  
24 represented by Kevin Russell and filed several continuations. Except as so admitted,  
25 Defendants deny each and every allegation contained in the said paragraph.  
26

1 40. In response to Paragraph 58, U.S. Application No. 09/104,461 speaks for itself and is  
2 the best evidence of its contents. Defendants deny any allegation contrary to the plain  
3 language and meaning of the documents. Except as so admitted, Defendants deny each  
4 and every allegation contained in the said paragraph.

5 41. Defendants deny each and every allegation in Paragraph 59.

6 42. Defendants deny each and every allegation in Paragraph 60.

7 43. Defendants deny each and every allegation in Paragraph 61.

8 44. In response to Paragraph 62, the '461 application speaks for itself and is the best  
9 evidence of its contents. Defendants deny any allegation contrary to the plain language  
10 and meaning of the documents. Except as so admitted, Defendants deny each and every  
11 allegation contained in the said paragraph.

12 45. Defendants admit the allegations in Paragraph 63.

13 46. In response to Paragraph 64, US Application No. 10/124,878 speaks for itself and is the  
14 best evidence of its contents. Defendants deny any allegation contrary to the plain  
15 language and meaning of the documents. Except as so admitted, Defendants deny each  
16 and every allegation contained in the said paragraph.

17 47. In response to Paragraph 65 and the chart in Paragraph 65, the '406 patent and the '329  
18 patent speak for themselves and are the best evidence of their contents. Defendants  
19 deny any allegation contrary to the plain language and meaning of the documents.  
20 Except as so admitted, Defendants deny each and every allegation contained in the said  
21 paragraph and the chart in Paragraph 65.

22 48. In response to Paragraph 66, the '406 patent and the '878 application speak for  
23 themselves and are the best evidence of their contents. Defendants deny any allegation  
24 contrary to the plain language and meaning of the documents. Except as so admitted,  
25 Defendants deny each and every allegation contained in the said paragraph.  
26



1 49. In response to Paragraphs 67 and 68, the allegations purport to characterize and quote  
2 from the public court file for Katzer and KAMIND Associates, Inc. v. Tanner, Case No.  
3 CV02-1293 (D. Or.) and as such constitute conclusions of law to which no response is  
4 required. The Court is referred to the public court file for a true and complete statement  
5 of its contents. To the extent a response is required, Defendants deny each and every  
6 allegation contained in the said paragraph.

7 50. In response to Paragraph 69, Kevin Russell's Sept. 18, 2002 letter to DigiToys speaks  
8 for itself and is the best evidence of its contents. Defendants deny any allegation  
9 contrary to the plain language and meaning of the documents. Except as so admitted,  
10 Defendants deny each and every allegation contained in the said paragraph.

11 51. Defendants deny each and every allegation in Paragraph 70.

12 52. In response to Paragraph 71, Defendants admit that MultiDrive is part of the WinLok  
13 software. Except as so admitted, Defendants deny each and every allegation contained  
14 in the said paragraph.

15 53. Defendants deny each and every allegation in Paragraph 72.

16 54. Defendants are without knowledge or information sufficient to form a belief as to the  
17 truth of the allegations contained in Paragraphs 73 to 75 and therefore deny the  
18 allegations set forth therein.

19 55. Defendants deny each and every allegation in Paragraphs 76 and 77.

20 56. Defendants admit the allegations in Paragraph 78.

21 57. In response to Paragraphs 79 to 83, Hans Tanner's correspondence and enclosures  
22 included therein speak for themselves and are the best evidence of their contents.  
23 Defendants deny any allegation contrary to the plain language and meaning of the  
24 documents. Except as so admitted, Defendants deny each and every allegation  
25 contained in the said paragraph.  
26

1 58. In response to Paragraph 84, the file wrappers of the '406, '040, and '061 speak for  
2 themselves and are the best evidence of their contents. Defendants deny any allegation  
3 contrary to the plain language and meaning of the documents. Except as so admitted,  
4 Defendants deny each and every allegation contained in the said paragraph.

5 59. Defendants deny each and every allegation in Paragraphs 85 and 86.

6 60. Paragraph 87 comprises legal conclusions to which no response is required.

7 61. In response to Paragraphs 88, the allegations purport to characterize the public court  
8 file for Katzer and KAMIND Associates, Inc. v. Tanner, Case No. CV02-1293 (D. Or.)  
9 and as such constitute conclusions of law to which no response is required. The Court  
10 is referred to the public court file for a true and complete statement of its contents. To  
11 the extent a response is required, Defendants deny each and every allegation contained  
12 in the said paragraph.

13 62. Defendants deny each and every allegation in Paragraph 89, 90 and 91.

14 63. In response to Paragraph 92, claim 27 and claim 10 speak for themselves and are the  
15 best evidence of their contents. Defendants deny any allegation contrary to the plain  
16 language and meaning of the documents. Except as so admitted, Defendants deny each  
17 and every allegation contained in the said paragraph.

18 64. In response to Paragraph 93, the file wrapper for the '878 patent application speaks for  
19 itself and is the best evidence of its contents. Defendants deny any allegation contrary  
20 to the plain language and meaning of the documents. Except as so admitted, Defendants  
21 deny each and every allegation contained in the said paragraph.

22 65. Defendants deny each and every allegation in Paragraph 94.

23 66. Defendants deny each and every allegation in Paragraph 95.

24 67. Defendants admit the allegations in Paragraph 96, however Defendants aver that the  
25 patent claims are no longer part of this lawsuit as of January 5, 2009.

1 68. Defendants deny each and every allegation in Paragraphs 97 to 101 and in the header  
2 before Paragraph 100.

3 69. In response to Paragraph 102, Defendants admit that on July 6, 2007, the patent  
4 examiner noted the application as abandoned. Except as so admitted, Defendants deny  
5 each and every allegation contained in the said paragraph.

6 70. Defendants deny each and every allegation in Paragraph 103.

7 71. Defendants deny each and every allegation in Paragraph 104.

8 72. In response to Paragraph 105, Defendants admit that an agreement was signed with  
9 Digitrax. Except as so admitted, Defendants deny each and every allegation contained  
10 in the said paragraph.

11 73. Defendants deny each and every allegation in Paragraphs 106 and 107.

12 74. Defendants deny each and every allegation of Paragraphs 108.

13 75. Defendants deny each and every allegation in Paragraphs 109 to 111 and in the heading  
14 after Paragraph 111.

15 76. Paragraphs 112 to 221 constitute the Plaintiff's characterization of the applications and  
16 proceedings in the United States Patent Office, the public records of which speak for  
17 themselves and constitute the best evidence of the proceedings in the United States  
18 Patent Office. Defendants deny each and every allegation contrary to the plain language  
19 and meaning of the documents. Except as so admitted, Defendants deny each and every  
20 allegation contained in the said paragraphs and in any and all headings and subheadings  
21 between these paragraphs.

22 77. In response to Paragraph 222, Defendants admit that the Plaintiff is one of the leaders  
23 of the JMRI Project and that the JMRI Project produces software for model trains  
24 which can be installed on one computer to run model trains from that computer.  
25 Defendants further aver that JMRI software can also run from multiple computers to  
26 control model trains using client-server architecture. Defendants are without

1 knowledge or information sufficient to form a belief as to the remainder of the  
2 allegations contained in Paragraph 222 and therefore deny the allegations set forth  
3 therein.

4 78. In response to Paragraph 223, Defendants admit the allegations in sentences one  
5 through five and ten of Paragraph 223. Defendants deny each and every allegation in  
6 sentences six, seven and eleven of Paragraph 223. Defendants are without knowledge  
7 or information sufficient to form a belief as to the truth of remainder of the allegations  
8 in Paragraph 223 and therefore deny the allegations set forth therein.

9 79. In response to Paragraphs 224 to 230, Defendants admit that Katzer and Plaintiff have  
10 exchanged email communications. The email communications speak for themselves  
11 and are the best evidence of their contents. Defendants deny each and every allegation  
12 contrary to the plain language and meaning of the documents. Defendants admit that  
13 Plaintiff joined the NMRA Working Group and aver that Plaintiff was removed from  
14 his leadership position in this Working Group. Defendants are without knowledge or  
15 information sufficient to form a belief as to the truth of the remainder of the allegations  
16 contained in Paragraphs 224 to 230 and therefore deny the allegations set forth therein.  
17 Defendants deny each and every allegation in the header before Paragraph 227.

18 80. Defendants deny each and every allegation in Paragraphs 231 to 239.

19 81. In response to Paragraph 240, Defendants admit that JMRI holds user group meetings  
20 on DecoderPro and workshops on using DecoderPro. Defendants are without  
21 knowledge or information sufficient to form a belief as to the truth of the reminder of  
22 the allegations in Paragraph 240 and therefore deny the allegations set forth therein.

23 82. In response to Paragraph 241, Defendants admit that KAM belongs to internet listservs  
24 where DecoderPro is discussed. Except as so admitted, Defendants deny each and  
25 every allegation contained in the said paragraph.

- 1 83. Defendants are without knowledge or information sufficient to form a belief as to the  
2 truth of the allegations contained in Paragraph 242 and therefore deny the allegations  
3 set forth therein.
- 4 84. In response to Paragraph 243, Defendants admit that Defendants never contacted  
5 Plaintiff to use the JMRI Decoder Definition files.
- 6 85. In response to Paragraph 244, Defendants admit that Defendants downloaded Plaintiff's  
7 Decoder Definition files and extracted data into a format to use with Decoder  
8 Commander and additionally aver that a total of 65 copies of software were shipped for  
9 total gross sales of approximately \$1200. Except as so admitted, Defendants deny each  
10 and every allegation contained in the said paragraph.
- 11 86. Defendants admit the allegations in Paragraph 245.
- 12 87. Defendants deny each and every allegation in Paragraphs 246 and 247.
- 13 88. In response to Paragraph 248, Appendix C, and 249, Defendants are without knowledge  
14 or information sufficient to form a belief as to the truth of the allegations in Paragraph  
15 248, Appendix C and 249 and therefore deny the allegations set forth therein.
- 16 89. In response to Paragraphs 250 to 253, the Artistic License speaks for itself and is the  
17 best evidence of its contents. Defendants deny each and every allegation contrary to the  
18 plain language and meaning of the documents.
- 19 90. In response to Paragraph 254 and Appendix D, Defendants are without knowledge or  
20 information sufficient to form a belief as to the truth of the allegations in Paragraph 254  
21 and Appendix D and therefore deny the allegations set forth therein.
- 22 91. In response to Paragraph 255 and Appendix E, Defendants are without knowledge or  
23 information sufficient to form a belief as to the truth of the allegations in Paragraph 255  
24 and Appendix E and therefore deny the allegations set forth therein.
- 25 92. Defendants deny each and every allegation contained in Paragraph 256.
- 26

1 93. In response to Paragraphs 257 and 258, the referenced emails speak for themselves and  
2 are the best evidence of their contents. Defendants deny each and every allegation  
3 contrary to the plain language and meaning of the documents.

4 94. In response to Paragraph 259 and Appendix F, Defendants are without knowledge or  
5 information sufficient to form a belief as to the truth of the allegations in Paragraph 259  
6 and Appendix F and therefore deny the allegations set forth therein.

7 95. In response to Paragraphs 260 and 261, the referenced emails speak for themselves and  
8 are the best evidence of their contents. Defendants deny each and every allegation  
9 contrary to the plain language and meaning of the documents.

10 96. In response to Paragraph 262 and Appendix G, Defendants are without knowledge or  
11 information sufficient to form a belief as to the truth of the allegations in Paragraph 262  
12 and Appendix G and therefore deny the allegations set forth therein.

13 97. In response to Paragraphs 263, the referenced emails speak for themselves and are the  
14 best evidence of their contents. Defendants deny each and every allegation contrary to  
15 the plain language and meaning of the documents.

16 98. Defendants deny each and every allegation in Paragraph 264.

17 99. Defendants admit the allegations of Paragraph 265.

18 100. In response to Paragraphs 266, the referenced announcement speaks for itself and is the  
19 best evidence of its contents. Defendants deny each and every allegation contrary to the  
20 plain language and meaning of the documents. Except as so admitted, Defendants deny  
21 each and every allegation contained in the said paragraph.

22 101. Defendants deny each and every allegation in Paragraph 267.

23 102. In response to Paragraph 268 and Appendix H, Defendants are without knowledge or  
24 information sufficient to form a belief as to the truth of the allegations in Paragraph 268  
25 and Appendix H and therefore deny the allegations set forth therein.  
26

1 103. In response to Paragraph 269, Defendants are without knowledge or information  
2 sufficient to form a belief as to the truth of the allegations in Paragraph 269 and  
3 therefore deny the allegations set forth therein.

4 104. In response to Paragraph 270 and Appendix I, Defendants are without knowledge or  
5 information sufficient to form a belief as to the truth of the allegations in Paragraph 270  
6 and Appendix I and therefore deny the allegations set forth therein.

7 105. Defendants admit the allegations in Paragraph 271.

8 106. In response to Paragraph 272, Defendants admit that Defendants converted the file  
9 QSI\_Electric.xml and changed the name to QSI\_Electric.tpl.xml. Except as so  
10 admitted, Defendants deny each and every allegation contained in the said paragraph.

11 107. In response to Paragraphs 273-275, Defendants admit that the template verifier did not  
12 convert the author's names, the copyright notices or the license references from the  
13 Decoder Definition files. Except as so admitted, Defendants deny each and every  
14 allegation contained in the said paragraph.

15 108. Defendants admit the allegations in Paragraph 277, 278 and 279.

16 109. Defendants deny each and every allegation in Paragraphs 280 to 282

17 110. Defendants admit the allegations in Paragraph 283, 284, 285, 286 and 287.

18 111. Defendants deny each and every allegation in Paragraphs 288 and 289.

19 112. In response to Paragraph 290, the Decoder Commander manual speaks for itself and is  
20 the best evidence of its contents. Defendants deny each and every allegation contrary to  
21 the plain language and meaning of the documents.

22 113. In response to Paragraph 291, the KAM website announcement speaks for itself and is  
23 the best evidence of its contents. Defendants deny each and every allegation contrary to  
24 the plain language and meaning of the documents.

25 114. In response to Paragraph 292, Defendants admit that Defendants released a tool called  
26 the "template verifier" to extract various information from JMRI Decoder Definition

1 files and convert it to a form that Defendants could use in Decoder Commander.  
2 Except as so admitted, Defendants deny each and every allegation contained in the said  
3 paragraph.

4 115. Defendants deny each and every allegation in Paragraph 293.

5 116. Defendants deny each and every allegation in Paragraphs 294-297.

6 117. Defendants admit the allegations in Paragraphs 297 to 299 except Defendants deny the  
7 characterization of the template verifier as an “infringing tool.”

8 118. Defendants admit the allegations in Paragraph 300 except Defendants deny the  
9 characterization of the template verifier as an “infringing tool.”

10 119. In response to Paragraphs 301-304, Defendants are without knowledge or information  
11 sufficient to form a belief as to the truth of the allegations in Paragraphs 301-304 and  
12 therefore deny the allegations set forth therein

13 120. Defendants deny each and every allegation in Paragraph 305.

14 121. In response to Paragraphs 306 and 307, Defendants are without knowledge or  
15 information sufficient to form a belief as to the truth of the allegations in Paragraphs  
16 306 and 307 and therefore deny the allegations set forth therein.

17 122. In response to Paragraph 308, Defendants admit that they promoted Decoder  
18 Commander, which included a giveaway at the National Model Railroad Association  
19 Convention on July 5, 2005.

20 123. Defendants admit the allegations in Paragraph 309.

21 124. Defendants deny each and every allegation in Paragraphs 310 and 311.

22 125. In response to Paragraph 312 and Appendix J, Defendants are without knowledge or  
23 information sufficient to form a belief as to the truth of the allegations in Paragraph 312  
24 and Appendix J and therefore deny the allegations set forth therein.



1 126. In response to Paragraph 313, Defendants are without knowledge or information  
2 sufficient to form a belief as to the truth of the allegations in Paragraph 313 and  
3 therefore deny the allegations set forth therein.

4 127. In response to Paragraph 314, Defendants admit that Plaintiff ordered a copy of  
5 Decoder Commander from Southern Digital, a KAM dealer. Except as so admitted,  
6 Defendants deny each and every allegation contained in the said paragraph.

7 128. Defendants deny each and every allegation of Paragraph 315.

8 129. In response to Paragraph 316, Defendants are without knowledge or information  
9 sufficient to form a belief as to the truth of the allegations in Paragraph 316 and  
10 therefore deny the allegations set forth therein.

11 130. In response to Paragraph 317 and 318, Defendants are without knowledge or  
12 information sufficient to form a belief as to the truth of the allegations in Paragraph 317  
13 and 318 and therefore deny the allegations set forth therein.

14 131. In response to Paragraph 319, Defendants admit that the Plaintiff ordered KAM  
15 Decoder Commander from DCC Train, a KAM dealer. Defendants are without  
16 knowledge or information sufficient to form a belief as to the truth of the allegations in  
17 Paragraph 319 not specifically admitted herein and therefore deny the allegations set  
18 forth therein not specifically admitted.

19 132. In response to Paragraph 320 through 325, Defendants are without knowledge or  
20 information sufficient to form a belief as to the truth of the allegations in Paragraph 320  
21 through 325 and therefore deny the allegations set forth therein.

22 133. Defendants admit the allegations in Paragraph 326.

23 134. Defendants deny each and every allegation in Paragraphs 327 to 330.

24 135. In response to Paragraph 331, Defendants admit they received a letter from the Plaintiff  
25 dated September 21, 2006, which speaks for itself and is the best evidence of its  
26

1 contents. Defendants deny each and every allegation contrary to the plain language and  
2 meaning of the documents

3 136. Defendants are without knowledge or information sufficient to form a belief as to the  
4 truth of the allegations in Paragraph 332 and therefore deny the allegations set forth  
5 therein.

6 137. Defendants deny each and every allegation in Paragraph 333.

7 138. In response to Paragraph 334, Defendants admit that Plaintiff filed a Motion for  
8 Preliminary Injunction on Oct. 25, 2006. Except as so admitted, Defendants deny each  
9 and every allegation contained in the said paragraph.

10 139. Defendants are without knowledge or information sufficient to form a belief as to the  
11 truth of the allegations in the first sentence of Paragraph 335 and therefore deny the  
12 allegations set forth therein. Defendants deny each and every allegation in the  
13 remainder of Paragraph 335.

14 140. In response to Paragraph 336, Defendants are without knowledge or information  
15 sufficient to form a belief as to the truth of the allegations in Paragraph 336 and  
16 therefore deny the allegations set forth therein.

17 141. In response to Paragraph 337, Defendants are without knowledge or information  
18 sufficient to form a belief as to the truth of the allegations in Paragraph 337 and  
19 therefore deny the allegations set forth therein.

20 142. In response to Paragraph 338, JMRI's announcement speaks for itself and is the best  
21 evidence of its contents. Defendants deny each and every allegation contrary to the  
22 plain language and meaning of the documents

23 143. Defendants deny each and every allegation in Paragraphs 339 to 341.

24 144. Defendants admit the allegations in Paragraph 342 that unregistered copies of Decoder  
25 Commander cease to operate and deny the characterization of Decoder Commander as  
26 an "infringing product."

1 145. Defendants deny each and every allegation in Paragraphs 343.

2 146. Defendants deny each and every allegation in Paragraph 344.

3 147. Defendants deny each and every allegation in Paragraph 345.

4 148. Defendants admit the allegations in Paragraph 346 except Defendants deny the  
5 characterization of the template verifier as an “infringing tool.”

6 149. Defendants deny each and every allegation in Paragraph 347.

7 150. Defendants deny each and every allegation in Paragraphs 348 to 356.

8 151. Defendants deny each and every allegation in Paragraph 357.

9 152. Defendants admit the allegations in Paragraph 358.

10 153. In response to Paragraph 359, the referenced settlement speaks for itself and is the best  
11 evidence of its contents. Defendants deny each and every allegation contrary to the  
12 plain language and meaning of the documents.

13 154. Defendants deny each and every allegation in Paragraphs 360 to 362.

14 155. In response to Paragraph 363, Defendants admit that on April 14, 2002, the JMRI  
15 Project released software with client-server capabilities. Except as so admitted,  
16 Defendants deny each and every allegation contained in the said paragraph.

17 156. Defendants deny each and every allegation in Paragraphs 364 and 365 and in the  
18 heading before Paragraph 364.

19 157. In response to Paragraph 366, the public court file for the DigiToys lawsuit and the  
20 referenced letters speaks for themselves and are the best evidence of their contents.  
21 Defendants deny each and every allegation contrary to the plain language and meaning  
22 of the documents.

23 158. In response to Paragraph 367, Defendants admit that Dr. Hans Tanner responded to the  
24 referenced letter. Except as so admitted, Defendants deny each and every allegation  
25 contained in the said paragraph.

1 159. In response to Paragraph 368, the referenced letter speaks for itself and is the best  
2 evidence of its contents. Defendants deny each and every allegation contrary to the  
3 plain language and meaning of the documents. Except as so admitted, Defendants deny  
4 each and every allegation contained in the said paragraph.

5 160. Defendants deny each and every allegation of Paragraph 369.

6 161. Defendants admit the allegations of Paragraph 370.

7 162. Defendants deny each and every allegation of Paragraph 371 to 376.

8 163. In response to Paragraph 377, Defendants admit that Russell sent the Plaintiff a letter,  
9 which speaks for itself and is the best evidence of its contents. Defendants deny each  
10 and every allegation contrary to the plain language and meaning of the documents.  
11 Defendants are without knowledge or information sufficient to form a belief as to the  
12 truth of the allegations regarding the Plaintiff's knowledge or concerns with regard to  
13 the letter and therefore deny the allegations set forth therein. Except as so admitted,  
14 Defendants deny each and every allegation contained in the said paragraph.

15 164. In response to Paragraphs 378 to 382, the referenced letters speak for themselves and  
16 are the best evidence of their contents. Defendants deny each and every allegation  
17 contrary to the plain language and meaning of the documents. Except as so admitted,  
18 Defendants deny each and every allegation contained in the said paragraphs.

19 165. In response to Paragraphs 383, the referenced FOIA request speaks for itself and is the  
20 best evidence of its contents. Defendants deny each and every allegation contrary to the  
21 plain language and meaning of the documents. Defendants are without knowledge or  
22 information sufficient to form a belief as to the allegations in Paragraph 383 not  
23 specifically admitted herein and therefore deny the allegations set forth therein not  
24 specifically admitted.

25 166. Defendants deny each and every allegation in Paragraph 384.  
26

1 167. Defendants are without knowledge or information sufficient to form a belief as to the  
2 allegations in Paragraphs 385 and therefore deny the allegations set forth therein.

3 168. Paragraph 386 contains statements of Plaintiff's case and require no response.

4 169. Defendants deny each and every allegation in Paragraph 387 and in the header before  
5 Paragraph 387.

6 170. Defendants are without knowledge or information sufficient to form a belief as to the  
7 allegations in Paragraph 388 and on that basis deny the allegations set forth therein.

8 171. In response to Paragraph 389, Defendants admit that JMRI can operate on Windows,  
9 Apple and Linux. Except as so admitted, Defendants deny each and every allegation in  
10 said paragraph..

11 172. Defendants deny each and every allegation in Paragraphs 390 to 394.

12 173. In response to Paragraphs 395 through 397, Defendants are without knowledge or  
13 information sufficient to form a belief as to the allegations in Paragraphs 395 through  
14 397 and therefore deny the allegations set forth therein.

15 174. Defendants deny each and every allegation in Paragraph 398.

16 175. In response to Paragraph 399, Defendants admit that JMRI has a public email listserv.  
17 Defendants are without knowledge or information sufficient to form a belief as to the  
18 truth of the remainder of the allegations in Paragraph 399 and therefore deny the  
19 allegations set forth therein not specifically admitted.

20 176. Defendants admit the allegation in Paragraph 400.

21 177. In response to Paragraphs 400 through 403, Defendants are without knowledge or  
22 information sufficient to form a belief as to the allegations in Paragraphs 400 through  
23 403 and therefore deny the allegations set forth therein.

24 178. The allegations in Paragraphs 404 through 406 are vague and lack specificity and are  
25 therefore denied.

26 179. Paragraphs 407 and 408 comprise legal conclusions to which no response is required.

1 180. Defendants deny each and every allegation in Paragraph 409.

2 181. In response to Paragraphs 410 and 411, the referenced letter speaks for itself and is the  
3 best evidence of its contents. Defendants deny each and every allegation contrary to the  
4 plain language and meaning of the documents.

5 182. Defendants are without knowledge or information sufficient to form a belief as to the  
6 allegations in Paragraph 412 and therefore deny the allegations set forth therein.

7 183. Defendants deny each and every allegation in Paragraphs 413 to 415.

8 184. In response to Paragraph 416, the referenced letter speaks for itself and is the best  
9 evidence of its contents. Defendants deny each and every allegation contrary to the  
10 plain language and meaning of the documents.

11 185. Defendants deny each and every allegation in Paragraphs 417 and 418.

12 186. In response to Paragraphs 419 to 421, the referenced letter speaks for itself and is the  
13 best evidence of its contents. Defendants deny each and every allegation contrary to the  
14 plain language and meaning of the documents.

15 187. Defendants are without knowledge or information sufficient to form a belief as to the  
16 allegations in Paragraph 422 and therefore deny the allegations set forth therein.

17 188. Defendants deny each and every allegation in Paragraph 423.

18 189. Defendants admit the allegations in Paragraph 424.

19 190. In response to Paragraphs 425 and 426, the referenced letter speaks for itself and is the  
20 best evidence of its contents. Defendants deny each and every allegation contrary to the  
21 plain language and meaning of the documents.

22 191. Defendants deny each and every allegation in Paragraph 427.

23 192. In response to Paragraphs 428 to 433, Kevin Russell's Aug. 24, 2005 letter speaks for  
24 itself and is the best evidence of its contents. Defendants deny each and every  
25 allegation contrary to the plain language and meaning of the documents.

26 193. Defendants deny each and every allegation in Paragraph 433.

1 194. In response to Paragraphs 434 to 435, the referenced letter speaks for itself and is the  
2 best evidence of its contents. Defendants deny each and every allegation contrary to the  
3 plain language and meaning of the documents. Except as so admitted, Defendants deny  
4 each and every allegation contained in the said paragraph.

5 195. Defendants deny each and every allegation in Paragraphs 436 and 437.

6 196. In response to Paragraph 438, Defendants admit that Kevin Russell made a demand for  
7 \$203,000 for infringing JMRI software that had been downloaded 7,000 times. Except  
8 as so admitted, Defendants deny each and every allegation contained in the said  
9 paragraph.

10 197. In response to Paragraph 439, Defendants admit that Kevin Russell's letter included an  
11 invoice. Except as so admitted, Defendants deny each and every allegation contained  
12 in the said paragraph.

13 198. Defendants deny each and every allegation in Paragraphs 440 to 449.

14 199. In response to Paragraph 450, Defendants reincorporate their admissions, denials and  
15 statements made herein and aver that this claim for relief has been dismissed by this  
16 Court in its Order dated January 5, 2009 [Dkt.#284].

17 200. Paragraphs 451 to 453 comprise legal conclusions to which no response is required.

18 201. In response to Paragraph 454, Defendants reincorporate their admissions, denials and  
19 statements made herein and aver that this claim for relief has been dismissed by this  
20 Court in its Order dated January 5, 2009 [Dkt.#284].

21 202. Paragraphs 455 to 457 comprise legal conclusions to which no response is required.

22 203. In response to Paragraph 458, Defendants reincorporate their admissions, denials and  
23 statements made herein and aver that this claim for relief has been dismissed by this  
24 Court in its Order dated January 5, 2009 [Dkt.#284].

25 204. Paragraphs 459 to 461 comprise legal conclusions to which no response is required.  
26

1 205. In response to Paragraph 462, Defendants reincorporate their admissions, denials and  
2 statements made herein.

3 206. Paragraphs 463 to 472 comprise legal conclusions to which no response is required, to  
4 the extent a response may be required, Defendants deny each and every allegation in  
5 Paragraphs 463 through 472.

6 207. Paragraphs 473 to 476 contain statements of Plaintiff's case and request for relief and  
7 require no response.

8 208. In response to Paragraph 477 Defendants reincorporate their admissions, denials and  
9 statements made herein.

10 209. Paragraph 478 comprises legal conclusions to which no response is required.

11 210. Defendants deny the allegations in Paragraphs 479 to 485.

12 211. In response to Paragraph 486 Defendants reincorporate their admissions, denials and  
13 statements made herein and aver that this claim for relief has been dismissed by this  
14 Court in its Order dated January 5, 2009 [Dkt.#284].

15 212. Defendants admit the allegations in Paragraph 487.

16 213. Defendants deny each and every allegation in Paragraphs 488 to 491.

17 214. Paragraph 492 contains Jacobsen's request for relief and requires no response.

18 215. In response to Paragraph 493 Defendants reincorporate their admissions, denials and  
19 statements made herein.

20 216. Paragraph 494 comprises legal conclusions to which no response is required.

21 217. Defendants deny each and every allegation in Paragraphs 495 to 499.

22 218. Paragraph 500 contains Jacobsen's request for relief and requires no response.

23 **PRAYER FOR RELIEF**

24 The remaining paragraphs of the Complaint numbered A-V constitute Plaintiff's prayer  
25 for relief to which no response is required, but to the extent that a response is required,  
26 Defendants deny that Plaintiffs are entitled to any of the requested relief. Additionally,



1 Defendants aver that Prayer requests A, B, C, D, E, F, G, S and portions of T have been  
2 dismissed by this Court in its Order dated January 5, 2009 [Dkt.#284].

3 **GENERAL DENIAL**

4 Defendants deny each and every allegation in the Complaint not otherwise specifically  
5 and expressly admitted to in this Answer, whether specifically responded to or not in the  
6 preceding paragraphs. This includes all allegations in numbered paragraphs as well as headings,  
7 appendices and footnotes in the Complaint. Moreover, to the extent that any of the allegations in  
8 the Complaint that do not require a response, as Defendants have noted above, may eventually be  
9 determined to require a response, all such allegations are hereby denied in their entirety.

10 **AFFIRMATIVE DEFENSES**

- 11 1. Plaintiff has failed to allege facts that constitute a violation of law or otherwise to state  
12 a claim upon which relief may be granted.
- 13 2. Plaintiff lacks the right to seek judicial review with respect to some or all of his claims.

14 **COUNTERCLAIM**

15 **(Copyright Infringement under the Copyright Act § 501(a))**

16 **BACKGROUND FACTS**

- 17 1. Kamind Associates, Inc. (KAM) is an Oregon corporation with a principal place of  
18 business in Portland, Oregon.
- 19 2. Upon information and belief, plaintiff/counterdefendant Robert Jacobsen is an  
20 individual resident of Berkeley, California.
- 21 3. The following counterclaim arises under the copyright laws of the United States, and  
22 under the common law. This Court has original jurisdiction of the subject matter of the  
23 statutory counterclaim pursuant to 28 U.S.C. §§ 1331 and 1338.
- 24 4. Venue for defendants' counterclaims is proper in this District pursuant to 28 U.S.C.  
25 § 1391(b) because plaintiff-counterdefendant resides in this District.  
26

- 1 5. KAM is a small startup company that has invested years of development, substantial  
2 financial resources in order to provide digitally controlled model train software at a  
3 reasonable price to the model train community.
- 4 6. KAM sold the world's first client server software product for digitally command  
5 controlled model trains in July 1997.
- 6 7. Plaintiff's JMRI software was first developed in 2001.
- 7 8. The National Model Railroad Association (NMRA) Digital Command Control (DCC)  
8 Reference Manual for QSI Quantum HO Equipped Locomotives-Version 3.0 (QSI  
9 Manual) includes a set of commands used to program QSI digital command control  
10 hardware. The manual contains unique expressions and descriptions of decoder  
11 variables and features used to configure locomotive functions as well as expressions of  
12 code, structure, sequence and/or organization. For example, the QSI manual contains  
13 commands that control the headlight functions on model train locomotives.
- 14 9. In the model train world, QSI hardware, such as the QSI Quantum Equipped  
15 Locomotive, is widely used.
- 16 10. The QSI Manual was developed by QS Industries, Inc.
- 17 11. KAM's software products incorporated portions of the QSI manual in 2003 to facilitate  
18 the ability of users to control and program model trains containing QSI decoders.
- 19 12. Version 3.0 of the QSI Manual was released on February 16, 2005.
- 20 13. In June 2005, Plaintiff's JMRI software package known as Decoder Pro included  
21 verbatim, portions of version 3.0 of the QSI Manual.
- 22 14. In 2006, KAM purchased from QS Industries, Inc. all right, title and interest in and to  
23 the QSI Manual.
- 24 15. Plaintiff's use of portions of the QSI Manual was without the permission of QS  
25 Industries, Inc or KAM.  
26

**CAUSE OF ACTION**

- 1  
2 16. This claim arises under 17 U.S.C. § 501(a). Defendant KAM realleges all allegations  
3 in paragraphs 1 through 15 above as though fully set forth herein.
- 4 17. KAM is the owner by signed written assignment of all copyright rights in and to the  
5 NMRA DCC Reference Manual for QSI Quantum HO Equipped Locomotives-Version  
6 3.0. KAM registered its copyright rights with the United States Copyright Office and  
7 obtained Copyright Registration Number TX 6-445-094, effective November 13, 2006  
8 (“Copyrighted Materials”).
- 9 18. Pursuant to 17 U.S.C. § 410(c) this certificate of copyright registration identified above  
10 constitutes *prima facie* evidence of the validity of the copyrights and of the facts stated  
11 in the certificate. KAM’s registered copyright in the Copyrighted Materials as  
12 embodied in the Copyright Registration is entitled to this statutory presumption.
- 13 19. KAM and its predecessors in interest created the Copyright Materials as original works  
14 of authorship, and, as such, the Copyrighted Materials constitute copyrightable subject  
15 matter under the copyright laws of the United States. The Copyrighted Materials were  
16 automatically subject to copyright protection under 17 U.S.C. § 102(a) when such  
17 materials were fixed in a tangible medium of expression. Copyright protection under  
18 17 U.S.C. §§ 102 and 103 extends to derivative works. Derivative works are defined in  
19 17 U.S.C. § 101 to included works based on the original work or any other form in  
20 which the original work may be recast, transformed modified, or adapted.
- 21 20. The Copyrighted Materials include protected expressions of code, structure, sequence  
22 and/or organization.
- 23 21. On information and belief, parts or all of the Copyrighted Material have been, and are  
24 continuing to be, copied or otherwise improperly used by Plaintiff as the basis for the  
25 JMRI software without the permission of KAM.
- 26 22. Plaintiff has infringed and will continue to infringe KAM’s copyright in and relating to  
the Copyrighted Materials by using, copying, modifying, and/or distributing parts of the

1 Copyrighted Materials, or derivative works based on the Copyrighted Materials in  
2 connection with its distribution of the JMRI software, inconsistent with KAM's  
3 exclusive rights under the Copyright Act.

4 23. Plaintiff does not own the copyright to the Copyrighted Materials nor does it have  
5 permission or proper license from KAM to use any part of the Copyrighted Materials.

6 24. Upon information and belief, Plaintiff's conduct was and is willfully done with  
7 knowledge of KAM's, and its predecessor in interest's, copyrights.

8 25. Defendant KAM has no adequate remedy at law. Plaintiff's conduct has caused, and if  
9 not enjoined, will continue to cause, irreparable harm to KAM.

10 26. As a result of Plaintiff's wrongful conduct, KAM is entitled to the following relief:

11 1. Injunctive relief pursuant to 17 U.S.C. § 502 against Plaintiff's further use or  
12 copying of any part of the Copyrighted Materials; and

13 2. KAM's actual damages in an amount to be proven at trial and in excess of  
14 \$6,000,000 and any additional profits of the infringer as a result of Plaintiff's  
15 infringement; and

16 3. KAM's costs pursuant to 17 U.S.C. § 505.  
17

18 **PRAYER**

19 **On Plaintiff's Claims:**

20 1. That plaintiff's claims be dismissed in their entirety with prejudice and that plaintiff  
21 takes nothing thereby; and that defendants be awarded their reasonable attorney fees  
22 and court costs for successfully defending plaintiff's Copyright Infringement Claim  
23 per 17 U.S.C. § 505.

24 **On Defendant KAM's Counterclaim:**

25 1. Injunctive relief pursuant to 17 U.S.C. § 502 against Plaintiff's further use or  
26 copying of any part of the Copyrighted Materials;

- 1 2. KAM's actual damages in an amount to be proven at trial and in excess of
- 2 \$6,000,000 and any additional profits of the infringer as a result of Plaintiff's
- 3 infringement and;
- 4 3. KAM's costs pursuant to 17 U.S.C. § 505;
- 5 4. Pre and Post-judgment interest; and
- 6 5. Any other legal and equitable relief deemed just and proper by this Court.

7  
8 Dated February 11, 2009.

9 Respectfully submitted,

10 /s/ Scott Jerger  
11 R. Scott Jerger (*pro hac vice*)  
12 Field Jerger LLP  
13 610 SW Alder Street, Suite 910  
14 Portland, OR 97205  
15 Tel: (503) 228-9115  
16 Fax: (503) 225-0276  
17 Email: [scott@fieldjerger.com](mailto:scott@fieldjerger.com)

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**CERTIFICATE OF SERVICE**

I certify that on February 11, 2009, I served Matthew Katzer's and KAM's Answer, Affirmative Defenses and Counterclaim on the Plaintiff through his attorney via the Court's ECF filing system:

Victoria K. Hall  
Attorney for Robert Jacobsen  
Law Office of Victoria K. Hall  
3 Bethesda Metro Suite 700  
Bethesda, MD 20814

Dated: February 11, 2009.

/s/ Scott Jerger  
R. Scott Jerger (*pro hac vice*)  
Field Jerger LLP