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HENRY C. BUNSOW (SBN 60707)
bunsowh@howrey.com
K.T. CHERIAN (SBN 133967)
cheriank@howrey.com
SCOTT WALES (SBN 179804)
wales@howrey.com
CONSTANCE F. RAMOS (SBN 203637)
ramosc@howrey.com
RONALD S. WYNN (SBN 105034)
wynn@howrey.com
HOWREY LLP
525 Market Street, Suite 3600
San Francisco, California 94105
Telephone: (415) 848-4900
Facsimile: (415) 848-4999

Attorneys for Plaintiff
ALLFLEX USA, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

ALLFLEX USA, INC., a Delaware
corporation,

Plaintiff,

vs.

AVID IDENTIFICATION SYSTEMS,
INC., a California corporation,

Defendant.

AND RELATED COUNTERCLAIMS

Case No. EDCV 06-1109 SGL (OPx)

THIRD AMENDED COMPLAINT

Plaintiff ALLFLEX USA, INC. alleges:

PARTIES

1. Allflex USA, Inc. ("Allflex") is a Delaware corporation, with principal places of business in Dallas, Texas, and Boulder, Colorado. Allflex designs, develops, manufactures, and sells animal identification products for livestock and other production animals, for wildlife and other small animal species, and for pets. Allflex

1 products include visual and electronic animal identification products.

2 2. Defendant AVID Identification Systems, Inc. ("AVID") is a California
3 corporation, with its principal place of business in Norco, California. AVID markets
4 and sells animal identification products for the "companion pet" market.

5 **JURISDICTION AND VENUE**

6 3. Jurisdiction exists pursuant to 28 U.S.C. §§1331, 1332, 1337, 1338, 1367
7 and 2201-2202. Jurisdiction over the patent claims exists pursuant to 28 U.S.C. §1331,
8 1338, and 2201-2202. Declaratory judgment jurisdiction exists over the patent claims
9 because AVID's Second Amended Counterclaim asserts Allflex's infringement of U.S.
10 Patent Nos. 5,235,326, 5,214,409, and 5,499,017. Jurisdiction over the Sherman Act
11 claims exists pursuant to 28 U.S.C. §§1331 and 1337, and 15 U.S.C. §15. The Court
12 has jurisdiction over the state law claims pursuant to 28 U.S.C. §§1332 and 1367. On
13 the state law claims, Allflex's damages exceed \$75,000, exclusive of interest and costs.

14 4. Venue is proper under 28 U.S.C. § 1391(b) and 15 U.S.C. §15 because
15 defendant AVID maintains its corporate headquarters in this District, does substantial
16 business in this District, and has engaged in certain of the acts complained of in and
17 from this District.

18 **FACTS APPLICABLE TO ALL COUNTS**

19 **Nature of the Action**

20 5. Allflex specializes in the design, development, marketing, and distribution
21 of animal identification products, including electronic radio frequency identification
22 ("RFID") products. Allflex concentrates its business on products for identification,
23 traceability, and recordkeeping for livestock and other food-stock animals. Allflex also
24 sells RFID products for use by pet owners, veterinary clinics, humane societies, animal
25 shelters, animal control agencies, and insurance providers to identify companion pets.

26 6. AVID is the alter-ego of Dr. Hannis Stoddard, a veterinarian based in
27 Norco, California. AVID's business focuses on the "companion pet" market. It sells
28 RFID products used to locate lost dogs, cats, and pet birds. AVID was one of the first

1 companies to commercialize RFID technology in the companion pet market. As a
2 result, AVID gained—and, through the unlawful anticompetitive conduct alleged in this
3 Complaint, AVID has maintained and extended—a dominant share of the companion
4 pet RFID market in the United States. On information and belief, only a small
5 percentage of American pet owners currently utilize any type of electronic identification
6 for their pets, the market for RFID pet identification products holds potential for
7 significant growth, and AVID fears that competition from Allflex and others will cut
8 significantly into its market share and its ability to grow as a business.

9 7. In an effort to obtain, maintain, and extend its market dominance and to
10 exclude competition from Allflex and other suppliers of companion animal RFID
11 identification products in the U.S. market, AVID has conducted a multifaceted
12 campaign of unfair competition. To accomplish its anticompetitive objectives, AVID:

13 (a) Obtained multiple patents through knowing and willful fraud on the
14 United States Patent and Trademark Office (“Patent Office”);

15 (b) Asserted multiple patents against Allflex and other competitors that
16 AVID obtained through knowing and willful fraud on the Patent Office;

17 (c) Asserted patents against Allflex and others that AVID knew were
18 invalid and unenforceable;

19 (d) Threatened to assert and asserted claims of patent infringement
20 against Allflex that were objectively baseless and specifically intended to exclude
21 competition and to interfere with Allflex’s business;

22 (e) Sought to obtain third-party patents specifically to assert against
23 Allflex;

24 (f) Used fraudulently procured patents and other deceptive means to
25 prevent implementation and use in the United States of a “standard” RFID technology
26 adopted by the International Standards Organization, and approved by the American
27 National Standards Institute (ISO 11784 and ISO 11785)— with specific intent that
28 AVID’s proprietary system remain the sole or dominant system in the U.S. market, and

1 even though AVID sells RFID pet identification products compliant with these ISO
2 standards in numerous other countries throughout the world;

3 (g) Entered into and/or coerced agreements with competitors that
4 prevent and/or restrict the sale of ISO-compliant RFID products in the United States;

5 (h) Employed encryption technology to render its RFID products
6 incompatible with ISO-compliant and other non-AVID RFID products, specifically to
7 prevent non-AVID scanners from reading AVID tags, and, thereby, to exclude
8 competition from competitive RFID tags and readers;

9 (i) Publicly threatened to commence patent infringement actions, based
10 on fraudulently procured and knowingly invalid patents, against users of ISO-compliant
11 companion pet RFID products, and against Allflex and other competitors of AVID, to
12 create marketplace fear, uncertainty, and doubt;

13 (j) Falsely asserted that ISO-compliant RFID products necessarily
14 infringe AVID patents to create marketplace fear, uncertainty, and doubt;

15 (k) Used its market power and encryption means to tie and unlawfully
16 coerce the purchase of AVID RFID readers and AVID RFID tags, and to lock-out
17 competitive products, in the companion pet RFID market; and

18 (l) Promoted and maintained an AVID-only national database for
19 companion pet RFID identification data that, combined with AVID's tag encryption and
20 bad faith patent enforcement, had the purpose and effect of maintaining and extending
21 AVID's dominance of the companion pet RFID market.

22 8. AVID has conducted this campaign of unfair competition with the specific
23 intent and purpose of injuring Allflex and destroying competition; inducing, promoting,
24 and coercing the purchase of AVID RFID products; misleading and deceiving the
25 market; maintaining artificially high prices; dividing markets; diverting business from
26 Allflex; and excluding Allflex and other competitors from the companion pet RFID
27 market.

28 9. On information and belief, Dr. Stoddard and Peter Troesch dominate,

1 control, and direct all actions of AVID. Stoddard and/or Troesch were the corporate
2 officers through whom AVID planned, developed, orchestrated, and implemented the
3 patent misuse, inequitable conduct, antitrust violations, unfair competition, and other
4 unlawful conduct alleged in this Complaint.

5 **RFID Tags and RFID Readers**

6 10. RFID products used for identification of pets and other animals consist of
7 two separate products: RFID tags and RFID readers. As used for pet identification,
8 RFID tags are tiny radio frequency transponders implanted with a syringe under the
9 skin of the animal. These transponders—sometimes called “microchips”—contain an
10 identification number that can be detected and “read” by RFID readers. For pet
11 identification, RFID readers are sold to veterinarians, pet hospitals, animal shelters,
12 animal control agencies, and other places where lost pets are brought. Lost pets are
13 scanned with the RFID readers. If the reader detects a microchip—and is not prevented
14 by encryption from reading it—the identification number is extracted and matched to
15 information stored in a database that links the identification number to the pet owner.

16 11. The RFID reader can detect and read an RFID chip only if the RFID reader
17 operates compatibly with the RFID chip. An RFID reader is only capable of detecting
18 an RFID chip if it is designed to receive and decode the frequency and protocol of a
19 particular RFID chip. In 1996, specifically to insure compatibility between RFID
20 transponder chips and RFID readers used for animal identification purposes, the
21 International Standards Organization (“ISO”) established ISO 11784 and ISO 11785 as
22 the technology standards for animal identification RFID chips worldwide. The ISO
23 standard has been adopted, approved, or supported in more than 40 countries
24 worldwide, including Canada, Australia, New Zealand, Japan, and the European Union.
25 The American National Standards Institute supports these ISO standards for RFID
26 products sold in the United States, as does the United States Department of Agriculture,
27 the American Society for the Prevention of Cruelty to Animals (ASPCA), the American
28 Veterinary Medical Association, and numerous other animal welfare organizations.

1 **International Market**

2 12. On information and belief, substantially all RFID tags and RFID readers
3 sold outside the United States for pet identification—including RFID tags and readers
4 sold by AVID—conform to the ISO standards. As a result, Allflex RFID readers can
5 read AVID tags and the tags of other competitive RFID suppliers, and the readers of
6 competitive RFID suppliers (including AVID readers) can read Allflex RFID tags. As a
7 result, there exists outside the United States a substantially universal reader/scanner
8 product capable of identifying all animal-embedded microchips, regardless of
9 manufacturer. This maximizes the likelihood that pet owners will be reunited with their
10 lost pets, and enables suppliers of RFID animal identification products—AVID, Allflex,
11 and numerous others—to compete for business through improved product performance,
12 reliability, ease-of-use, lower prices, and similar pro-competitive factors that ultimately
13 benefit the consumer.

14 **U.S. Market**

15 13. On information and belief, the majority of RFID pet identification tags and
16 readers distributed in the United States are AVID tags and readers. AVID's tags and
17 readers sold in the United States are not ISO-compliant. AVID programs AVID readers
18 distributed in the United States specifically so that they will not detect or read ISO-
19 compliant tags sold by Allflex or other suppliers. In addition, AVID encrypts its tags
20 with a proprietary code so that the identification information in the AVID tag cannot be
21 read by non-AVID readers. As a result, AVID tags can be read only by AVID readers
22 or other readers that incorporate the necessary AVID decryption code.

23 14. There is no technical, cost, performance, or other legitimate commercial
24 benefit from AVID's use of this encryption technology, or from AVID's use of non-
25 ISO-compliant microchips. AVID RFID products sold in Canada, Europe, and
26 elsewhere outside the United States are ISO-compliant and not encrypted. AVID
27 encrypts its RFID chips in the U.S. market so that competitive scanners cannot read
28 them. AVID programs its RFID readers in the U.S. market to prevent them from

1 reading ISO-compliant tags. The purpose and effect of this business practice is to
2 exclude and stifle competition for companion pet RFID tags and readers in the United
3 States, to create substantial and artificial barriers to entry into this market, and to
4 preserve and extend AVID's market share.

5 15. AVID's blanket use of encryption in the United States far exceeds AVID's
6 stated justification for it—to protect particularly valuable animals from theft through
7 cloned identification numbers. AVID's asserted justification for its use of encryption is
8 a pretext and sham justification for a practice specifically intended to maintain and
9 extend AVID's market dominance. AVID uses the market power conferred by its
10 patents and dominant installed base of encrypted, non-ISO microchips to coerce the
11 purchase of AVID readers. AVID uses encryption together with its patents and
12 installed base of non-ISO readers to coerce the purchase of AVID tags. AVID's
13 specific intent is to exploit its market dominance to force California and other
14 consumers of these products to purchase AVID RFID products—not based on technical
15 superiority, better price, or other pro-competitive, pro-consumer factors—but based on
16 AVID-caused fear that a lost pet's tag will not be read by a non-AVID reader.

17 **Conspiracy**

18 16. On information and belief, Digital Angel Corporation ("Digital Angel") is
19 the second most-dominant supplier of RFID tags and RFID readers in the companion
20 pet market in the United States, and is a direct competitor of AVID. As alleged more
21 fully in Count 6, AVID entered into agreements with Digital Angel and other AVID
22 competitors by which:

23 (a) AVID provided its decryption code to Digital Angel and other of its
24 direct competitors in exchange for those competitors' agreements not to produce, sell or
25 distribute ISO-compliant RFID products in the United States;

26 (b) AVID licensed Digital Angel under AVID patents in exchange for
27 Digital Angel's agreement not to produce, sell or distribute ISO-compliant RFID
28 products in the United States; and

1 (c) AVID and Digital Angel conspired to assert their patents and to
2 commence objectively baseless patent infringement lawsuits against new entrant
3 competitors in the companion pet market in the United States, including Allflex.

4 **Relevant Markets**

5 17. The relevant product markets are the markets for RFID tags and RFID
6 readers used to identify companion pets, comprised of RFID tags and RFID readers sold
7 to veterinarians, veterinary clinics, humane societies, animal shelters, animal rescue
8 organizations, pet insurers, and similar agencies and entities for use in identifying dogs,
9 cats, birds, and similar companion pets. The products, distribution channels, customers,
10 pricing, pricing sensitivities, and marketing focus for companion pet RFID are separate
11 and distinct from the markets for other animal RFID products, and the companion pet
12 RFID market constitutes a separate and distinct economic market from the broader,
13 alternative relevant market for animal RFID products (collectively, the “Relevant
14 Market(s)”). The physical products, read-ranges and other product requirements,
15 customers, distribution channels, sales methods, pricing, and marketing focus for
16 livestock (such as beef cattle, dairy cattle, sheep, and swine), and other non-companion
17 animal RFID products are different from those applicable to companion animal RFID
18 products. Among other things, livestock RFID ear tags are not functional, cost-
19 effective, or efficient substitutes for companion pet RFID injectable implants, and
20 visual identification devices (such as dog, cat, or livestock collars) and branding are not
21 reasonably acceptable substitutes for RFID tags.

22 18. The relevant geographic market is the United States because, among other
23 reasons (1) AVID has used United States patents to preclude foreign suppliers from
24 selling RFID products in the United States, and (2) foreign suppliers are not viable or
25 reasonably accessible sources of RFID products for United States-based veterinarians,
26 humane societies, and other such customers of companion animal RFID products.

27 19. Barriers to entry into the companion pet RFID and animal RFID markets in
28 the United States are substantial, and AVID created and has maintained many of these

1 barriers through the anticompetitive strategy, acts, and practices alleged in Paragraph 7,
2 above. In particular, AVID's fraudulently procured Patents-In-Suit have provided
3 AVID exclusionary power sufficient to maintain and extend AVID's market power in
4 the Relevant Markets, based on (1) AVID's marketplace assertions that adherence to the
5 ISO standards infringes the AVID Patents-In-Suit, and (2) AVID's attempted
6 enforcement of these fraudulently procured and knowingly invalid patents through
7 threatened and actual litigation against Allflex, Allflex customers, and other potential
8 competitors.

9 20. On information and belief, AVID's share of the companion pet RFID
10 market in the United States exceeded 65 percent from 1995 through at least the declared
11 unenforceability of the '326 patent, and—according to AVID—AVID's share of the
12 animal RFID market in the United States exceeded 60 percent from 1995 through at
13 least the end of 2005. On information and belief, the relevant market shares of AVID
14 and Digital Angel combined during the same periods exceeded 80 percent.

15 **AVID Patent Claims**

16 21. On information and belief, AVID acquired and owns the following United
17 States Patents (individually and collectively, the "Patents-In-Suit"):

18 No. 5,235,326 ("the '326 Patent")

19 No. 5,214,409 ("the '409 Patent")

20 No. 5,499,017 ("the '017 Patent")

21 22. The inventions claimed in the Patents-In-Suit resulted from certain
22 development work undertaken by AVID, certain AVID contractors, Eurosil Electronics
23 GmbH, Deister Electronics, and others. This development work resulted in AVID's
24 Standard Reader and e5500B tag products that AVID offered for sale and sold in the
25 United States more than one year before AVID filed applications for the Patents-In-
26 Suit.

27 23. The '326 patent claims inventions related to RFID readers and RFID tags.
28 During prosecution of the '326 patent, AVID knew but misrepresented and/or

1 intentionally withheld from the Patent Office the facts that:

2 (a) AVID's Standard Reader and e5500B tag were on sale in the United
3 States before August 15, 1990, more than one year before the filing date of the '326
4 patent;

5 (b) AVID's e5500B tag included the features claimed as inventions in
6 one or more claims of the '326 patent;

7 (c) AVID's Standard Reader was a "multi-mode" reader that included
8 the features claimed as inventions in one or more claims of the '326 patent; and

9 (d) Inventors other than the inventors named in the application
10 contributed materially to inventions claimed in the '326 patent, including Anatoli
11 Stobbe of Deister Electronics, and Gerold Klotzig and other personnel of Eurosil
12 Electronic GmbH.

13 24. The '409 and '017 patents claim inventions in certain memory devices for
14 RFID tags. During prosecution of the '409 and '017 patents, AVID knew but
15 misrepresented and/or intentionally withheld from the Patent Office the facts that:

16 (a) AVID's e5500B tag was on sale in the United States before
17 December 3, 1990, more than one year before the filing date of the '409 and '017
18 patents;

19 (b) AVID's e5500B tags included the memory device features claimed
20 as inventions in one or more claims of both the '409 and '017 patents;

21 (c) AVID's e5500B tags included the "permanent disablement" feature
22 that AVID misrepresented to the Patent Office was not taught or suggested by the prior
23 art;

24 (d) Before filing for the Patents-In-Suit, AVID possessed and provided
25 to its patent prosecutor a Eurosil specification for the e5500B tags that taught the
26 "permanent disablement" feature that AVID misrepresented to the Patent Office was not
27 taught or suggested by the prior art;

28 (e) Inventors other than the inventors named in AVID's applications

1 invented or contributed materially to inventions claimed in the '409 and '017 patents,
2 including Gerold Klotzig and other personnel of Eurosil Electronic GmbH;

3 (f) Eurosil had directed that AVID not seek patent protection for e5500-
4 related inventions without naming the Eurosil contributors as co-inventors;

5 (g) United States Patent No. 4,691,202 issued to Denne discloses (1) an
6 identification tag with memory components for permanently storing data in an
7 unalterable fashion in unalterable memory, and storing data in an alterable fashion in
8 alterable memory, and (2) means for detecting an interrogation signal and
9 communicating data from both ROM and RAM to an electronic identification reader
10 upon detection of a non-modulated signal; and

11 (h) Claim 18 of the '017 patent is identical to Claim 5 of the '409 patent.

12 25. These facts that AVID misrepresented and withheld from the Patent Office
13 were highly material to patentability of the claimed inventions, and AVID withheld
14 them specifically to conceal facts that AVID knew or feared would jeopardize the
15 patentability of the claimed inventions, and specifically to obtain allowance of patents
16 on one or more claimed inventions that AVID knew were not patentable. Specifically
17 to cover-up and conceal the on-sale activity that invalidates the Patents-In-Suit, Dr.
18 Stoddard directed AVID personnel to destroy pre-filing date sales records for AVID's
19 Standard Reader and e5500 tag products.

20 26. By a Request dated July 24, 2003—as AVID was preparing to commence
21 litigation—AVID requested and obtained a Certificate of Correction that changed the
22 language of Claim 56 of the '326 patent in two places based on alleged “clerical errors.”
23 In the Request, AVID represented to the PTO that: “Neither correction has any
24 substantive effect on the claim except for removing the confusion resulting from the
25 clerical errors.”

26 27. This representation was materially false, and made with intent to deceive
27 the Patent Office because:

28 (a) AVID's specific intent was to change and materially broaden the

1 claim language to encompass the half-duplex (“HDX”) mode of operation.

2 (b) The 2003 Certificate of Correction changed two references in
3 Claim 56 from “power absorption”—which is a defining attribute of the full-duplex
4 mode of operation (“FDX”)—to “magnetic field variation,” which distinguishes the
5 HDX from the FDX mode of operation.

6 (c) Original Claim 56 sought coverage for both FDX and HDX, and
7 attempted to claim the HDX mode by claiming “means for obtaining a measure of
8 magnetic field variations ... either before or after said generating means has stopped.”

9 (d) But the Examiner rejected original Claim 56 based specifically on
10 this element of the claim. According to the Examiner: “Claim 56 includes the
11 alternative statement of measuring ‘before or after stopping’ without specifying how or
12 by what means one is selected. Further, it is unclear how the variation in the field could
13 be measured before start of the field because there would clearly be no field to
14 measure.”

15 (e) Rather than challenge the Patent Office’s rejection of the HDX
16 element of Claim 56, AVID withdrew and abandoned it, and agreed to narrow Claim 56
17 by deleting the HDX element as follows: “Claim 56 is amended to remove the phrase
18 ‘either before or after said generating means is stopped.’”

19 (f) Claim 56 then issued in 1993 with specific references to the “power
20 absorption” (FDX) element, and with the reference to data communication “after the
21 generating means is stopped” (HDX) omitted and abandoned.

22 (g) Despite knowledge that prosecution history estoppel limited Claim
23 56 to FDX readers—and despite knowledge of an industry controversy over this aspect
24 of Claim 56 of the ‘326 patent—AVID concealed from the Patent Office the
25 significance of the changes sought by the Certificate of Correction.

26 (h) Far from having no “substantive effect on the claim” as AVID
27 represented to the Patent Office, AVID specifically intended that the Correction would
28 secure claim coverage for an element expressly abandoned during the patent’s

1 prosecution.

2 (i) AVID fraudulently procured the Certificate as a prelude to litigation
3 enforcement of the '326 patent. Within two months of obtaining the Certificate, AVID
4 overtly threatened Allflex with patent infringement—knowing that significant Allflex
5 tag products operate in HDX mode—then sued another new-entrant supplier in the
6 companion pet RFID market specifically for infringement of Claim 56 of the '326
7 patent as newly “corrected.”

8 28. In May, 2004, AVID commenced suit against other AVID competitors in
9 the United States District Court, Eastern District of Texas, for alleged infringement of
10 the '326, '409, and '017 Patents (“the Texas litigation”). During the Texas litigation,
11 AVID granted a license under the '326, '409, and '017 Patents to Philips
12 Semiconductors B.V. and its Affiliates (“Philips”) that authorizes Philips to sell its
13 accused RFID transponder products to customers for “any applications for animals
14 raised for human consumption,” including livestock, dairy animals, and fish. Despite its
15 knowledge that Allflex uses a licensed Philips RFID transponder exclusively within the
16 use-restriction of the Philips license grant—which itself has the purpose and effect of
17 maintaining and extending AVID’s monopoly power in the companion pet market—
18 AVID asserted Allflex’s infringement of the '326, '409, and '017 Patents based
19 specifically on Allflex’s use of the licensed Philip’s transponder in Allflex tag products.
20 This infringement charge is knowingly false, made in bad faith, is objectively baseless,
21 and is intended to interfere directly with Allflex’s business.

22 29. During the Texas litigation, as well, AVID’s Stoddard threatened publicly
23 that if AVID “succeeds in this lawsuit, which it expects to do, then any user of these
24 ISO scanners or microchips, including breeders, research facilities, and exhibitors,
25 would also be infringing these very patents.” By a post-trial Memorandum Opinion
26 And Order dated September 28, 2007 (the “Inequitable Conduct Order”), the Texas
27 court held that AVID obtained the '326 Patent through inequitable conduct in the Patent
28 Office, and declared the '326 Patent unenforceable. As found in the Texas court’s

1 Order based on “clear and convincing evidence”:

- 2 • “Avid’s Standard Reader and e5500B tag were on sale prior to the critical
3 date of the ‘326 patent;”
- 4 • “Stoddard had demonstrated the Avid reader and e5500B chip well in
5 advance of August 15, 1990;”
- 6 • “the Standard Reader and e5500B integrated circuit and tag are 102(b)
7 prior art;”
- 8 • “Avid’s Standard Reader and e5500B tag were highly material to
9 patentability;”
- 10 • “Avid was aware of the consequences of selling or offering to sell its
11 reader and tag before filing the ‘326 patent application, ... Avid attempted
12 to file the ‘326 patent application in advance of the 102(b) date, i.e. within
13 one year after its first sales, but failed, and ... Avid intentionally withheld
14 evidence of such sales from the PTO in an effort to deceive the PTO and
15 secure allowance of the ‘326 patent;”
- 16 • “Dr. Hannis Stoddard’s trial and deposition testimony is simply not
17 credible on key issues,” reflects “conspicuous inability to recall facts while
18 testifying, combined with [a] refusal to acknowledge incontrovertible
19 events,” “is not dependable,” and “conflicts with sworn testimony he gave
20 in another lawsuit;”
- 21 • Stoddard “was substantively involved in the prosecution of the ‘326
22 patent;”
- 23 • “Avid acted with deceptive intent during the prosecution of the ‘326
24 patent;”
- 25 • “Avid intentionally withheld information from the PTO in an effort to
26 deceive the PTO and obtain allowance of the ‘326 patent;” and
- 27 • “Avid committed inequitable conduct” during prosecution of the ‘326
28 patent.”

30. In July 2007, the United States Department of Agriculture reported to the

1 United States Senate, in its Report On Regulation Of Pet Microchipping, that "AVID
2 markets an encrypted chip; only AVID scanners can read the encrypted information.
3 However, AVID's patents will soon expire, potentially resulting in more competition
4 among chip producers, lower prices to consumers, and accelerated innovation among
5 microchip manufacturers." The Relevant Market should not be forced to wait for the
6 expiration of AVID's patents to achieve these benefits of fair competition. As alleged
7 above and below, these AVID patents were procured by fraud on the Patent Office, are
8 invalid and unenforceable, and have been used by AVID to violate federal and state
9 antitrust and unfair competition laws. AVID's claims against Allflex for alleged
10 infringement of the Patents-In-Suit, and its anticompetitive misuse of these patents both
11 in litigation and in the market, have undermined competition in the relevant market,
12 substantially restricted growth of the relevant market, and unlawfully disrupted and
13 interfered with Allflex' business, and will continue to so disrupt Allflex's business and
14 the relevant market until the Court issues its declaratory judgment that the Patents-In-
15 Suit are invalid, unenforceable, and not infringed.

16 **COUNT 1**

17 **(The '409 and '017 Patents)**

18 31. Allflex realleges Paragraphs 1 through 30.

19 32. An immediate, real, and substantial controversy exists between Allflex and
20 AVID regarding their respective rights in relation to the '409 and '017 Patents.

21 33. Allflex does not directly or indirectly infringe any valid and enforceable
22 claim of the '409 or '017 Patents, either literally or under the doctrine of equivalents.

23 34. The '409 and '017 Patents are invalid and unenforceable for failure to
24 comply with 35 U.S.C. §§102, 103, 112, 116 and/or other statutory requirements for
25 patentability.

26 35. The '409 and '017 Patents are unenforceable based on AVID's inequitable
27 conduct during prosecution of the '409 and '017 Patents. During prosecution of the
28 '409 and '017 Patents, AVID knew but misrepresented and/or intentionally withheld

1 from the Patent Office the highly material facts that:

2 (a) AVID's e5500B tag was on sale in the United States before
3 December 3, 1990, more than one year before the filing date of the '409 and '017
4 Patents;

5 (b) AVID's e5500B tags included the memory device features claimed
6 as inventions in one or more claims of the '409 and '017 Patents;

7 (c) AVID's e5500B tags included the "permanent disablement" feature
8 that AVID misrepresented to the Patent Office was not taught or suggested by the prior
9 art;

10 (d) Before filing for the Patents-In-Suit, AVID possessed and provided
11 to its patent prosecutor a Eurosil specification for the e5500B tags that taught the
12 "permanent disablement" feature that AVID misrepresented to the Patent Office was not
13 taught or suggested by the prior art;

14 (e) Inventors other than the inventors named in AVID's applications
15 invented exclusively or contributed materially to inventions claimed in the '409 and
16 '017 Patents, including Gerold Klotzig and other personnel of Eurosil Electronic
17 GmbH;

18 (f) Eurosil had directed that AVID not seek patent protection for e5500-
19 related inventions without naming the Eurosil contributors as co-inventors;

20 (g) United States Patent No. 4,691,202 issued to Denne discloses (1) an
21 identification tag with memory components for permanently storing data in an
22 unalterable fashion in unalterable memory, and storing data in an alterable fashion in
23 alterable memory, and (2) means for detecting an interrogation signal and
24 communicating data from both ROM and RAM to an electronic identification reader
25 upon detection of a non-modulated signal, which AVID knew because Denne '202 was
26 cited in the '326 patent prosecution before issuance of the '409 and '017 patents; and

27 (h) Claim 18 of the '017 Patent is identical to Claim 5 of the '409
28 Patent, which double patenting cannot be cured by terminal disclaimer.

COUNT 2

(Sherman Act §2—*Walker Process*)

36. Allflex realleges Paragraphs 1 through 35.

37. AVID has monopoly power sufficient to exclude and restrict competition for RFID tags and RFID readers in the Relevant Market(s).

38. AVID obtained the Patents-In-Suit and Certificate Of Correction through knowing and willful concealment, withholding, and misrepresentation of highly material facts in the Patent Office.

39. AVID intended to deceive the Patent Office because it knew and understood that (a) AVID's Standard Reader and e5500B tags were on sale in the United States more than one year before AVID filed applications for the Patents-In-Suit; (b) AVID's Standard Reader and e5500B tags incorporated inventions and features claimed in the Patents-In-Suit; (c) AVID's sales of the Standard Reader and e5500B would preclude or jeopardize AVID's patent rights, by making them prior art to the features that AVID claimed were novel and non-obvious; (d) joining Stobbe, Klotzig and others as co-inventors would give Deister and/or Eurosil exclusive or joint ownership of some or all of the Patents-In-Suit, (e) the Denne reference was prior art that would preclude patent protection for the inventions claimed in the '409 and '017 Patents; (f) Claim 56 of the '326 Patent was limited to RFID readers that operate in the FDX mode; and (g) the language change that AVID requested and obtained through the Certificate Of Correction was intended to expand the claim coverage from FDX-only to include HDX.

40. The Patent Office would not have issued the Patents-In-Suit or the Certificate Of Correction but for AVID's concealment, withholding, and misrepresentation of material facts as herein alleged.

41. AVID asserted the Patents-In-Suit against Allflex with full knowledge that AVID had obtained the Patents-In-Suit and Certificate Of Correction through such concealment, withholding, and misrepresentation of highly material facts.

1 42. AVID has used the fraudulently procured Patents-In-Suit to acquire,
2 maintain, and extend its monopoly power in the Relevant Market(s), with the specific
3 intent of damaging Allflex and lessening competition, inducing, promoting, and
4 coercing the purchase of AVID RFID products, and excluding Allflex and other
5 competitors from the Relevant Market(s).

6 43. AVID's use of the Patents-In-Suit as alleged violates the Sherman Act, and
7 has substantially injured and lessened competition.

8 44. Allflex has suffered substantial injury from the anticompetitive effects of
9 AVID's antitrust violations.

10 **COUNT 3**

11 **(Sherman Act §2—Monopolization)**

12 45. Allflex realleges Paragraphs 1 through 44.

13 46. AVID has monopoly power sufficient to exclude and restrict competition
14 for RFID tags and RFID readers in the Relevant Market(s).

15 47. AVID asserted the Patents-In-Suit and has maintained and prosecuted
16 objectively baseless claims for infringement of the Patents-In-Suit against Allflex in bad
17 faith, despite knowledge that these Patents-In-Suit are invalid, unenforceable, and not
18 infringed.

19 48. AVID has used the Patents-In-Suit to acquire, maintain, and extend its
20 monopoly power in the Relevant Market(s), with the specific intent of damaging Allflex
21 and lessening competition; inducing, promoting, and coercing the purchase of AVID
22 RFID products; and excluding Allflex and other competitors from the Relevant
23 Market(s).

24 49. AVID's bad faith enforcement of the Patents-In-Suit as alleged violates the
25 Sherman Act, and has substantially injured and lessened competition.

26 50. Allflex has suffered substantial injury from the anticompetitive effects of
27 AVID's antitrust violations.

COUNT 4

(Sherman Act §2—Scheme to Monopolize)

51. Allflex realleges Paragraphs 1 through 50.

52. AVID has monopoly power sufficient to exclude and restrict competition for RFID tags and RFID readers in the Relevant Market(s).

53. AVID planned and implemented an overall scheme to monopolize the companion pet RFID market, and has engaged in pattern and practice of exclusionary conduct in furtherance of this scheme. Among other anticompetitive acts, AVID:

(a) Obtained multiple patents through knowing and willful fraud on the Patent Office;

(b) Asserted patents against Allflex and others that AVID obtained through knowing and willful fraud on the Patent Office;

(c) Asserted patents against Allflex and others that AVID knew were invalid and unenforceable;

(d) Threatened to assert and asserted claims of patent infringement against Allflex that were objectively baseless, and specifically intended to exclude competition and to interfere with Allflex's business;

(e) Sought to obtain third-party patents specifically to assert against Allflex;

(f) Used fraudulently procured patents and other deceptive means to prevent implementation and use in the United States of a "standard" RFID technology adopted by the International Standards Organization, and approved by the American National Standards Institute (ISO 11784 and ISO 11785)— with specific intent that AVID's proprietary system remain the sole or dominant system in the U.S. market, and even though AVID sells RFID pet identification products compliant with these ISO standards in numerous other countries throughout the world;

(g) Entered into and/or coerced agreements with competitors that prevent and/or restrict the sale of ISO-compliant RFID products in the United States;

1 (h) Employed encryption technology to render its RFID products
2 incompatible with ISO-compliant and other non-AVID RFID products, specifically to
3 prevent non-AVID scanners from reading AVID chips and, thereby, to exclude
4 competition from competitive RFID tags and readers;

5 (i) Publicly threatened to commence patent infringement actions, based
6 on fraudulently procured and knowingly invalid patents, against users of ISO-compliant
7 companion pet RFID products, and against Allflex and other competitors of AVID, to
8 create marketplace fear, uncertainty, and doubt;

9 (j) Falsely asserted that ISO-compliant RFID products necessarily
10 infringe AVID patents to create marketplace fear, uncertainty, and doubt;

11 (k) Used its market power and encryption means to tie and unlawfully
12 coerce the purchase of AVID RFID readers and AVID RFID chips, and to lock-out
13 competitive products, in the companion pet RFID market; and

14 (l) Promoted and maintained an AVID-only national database for
15 companion animal RFID identification data that, combined with AVID's tag encryption
16 and bad faith patent enforcement, had the purpose and effect of maintaining and
17 extending AVID's dominance of the companion pet RFID market and jeopardizing the
18 lives of lost companion pets nationwide.

19 54. AVID's overall scheme as alleged violates the Sherman Act, and has
20 substantially injured and lessened competition in the Relevant Market(s).

21 55. Allflex has suffered substantial injury from the anticompetitive effects of
22 AVID's antitrust violations.

23 COUNT 5

24 **(Sherman Act §2—Attempted Monopolization)**

25 56. Allflex realleges Paragraphs 1 through 55.

26 57. AVID has attempted to monopolize the companion pet RFID and animal
27 RFID markets in the United States, and has engaged in pattern and practice of
28 exclusionary conduct specifically intended to establish monopoly power in the

1 companion pet RFID and animal RFID markets in the United States. Among other
2 anticompetitive acts, AVID:

3 (a) Obtained multiple patents through knowing and willful fraud on the
4 Patent Office;

5 (b) Asserted patents against Allflex and others that AVID obtained
6 through knowing and willful fraud on the Patent Office;

7 (c) Asserted patents against Allflex and others that AVID knew were
8 invalid and unenforceable;

9 (d) Threatened to assert and asserted claims of patent infringement
10 against Allflex that were objectively baseless and specifically intended to exclude
11 competition and to interfere with Allflex's business;

12 (e) Sought to obtain third-party patents specifically to assert against
13 Allflex;

14 (f) Used fraudulently procured patents and other deceptive means to
15 prevent implementation and use in the United States of a "standard" RFID technology
16 adopted by the International Standards Organization, and approved by the American
17 National Standards Institute (ISO 11784 and ISO 11785)— with specific intent that
18 AVID's proprietary system remain the sole or dominant system in the U.S. market, and
19 even though AVID sells RFID pet and other animal RFID products compliant with these
20 ISO standards in numerous other countries throughout the world;

21 (g) Entered into and/or coerced agreements with competitors that
22 prevent and/or restrict the sale of ISO-compliant RFID products in the United States;

23 (h) Employed encryption technology to render its RFID products
24 incompatible with ISO-compliant and other non-AVID RFID products, specifically to
25 prevent non-AVID scanners from reading AVID chips and thereby eliminating
26 competition from non-AVID scanners and tags and, thereby, to exclude competition
27 from competitive RFID tags and readers;

28 (i) Publicly threatened to commence patent infringement actions, based

1 on fraudulently procured and knowingly invalid patents, against users of ISO-compliant
2 companion pet RFID products, and against Allflex and other competitors of AVID, to
3 create marketplace fear, uncertainty, and doubt;

4 (j) Falsely asserted that ISO-compliant RFID products necessarily
5 infringe AVID patents to create marketplace fear, uncertainty, and doubt;

6 (k) Attempted through its market power and encryption means to tie and
7 unlawfully coerce the purchase of AVID RFID readers and AVID RFID chips, and to
8 lock-out competitive products, in the companion pet RFID market; and

9 (l) Promoted and maintained an AVID-only national database for
10 companion animal RFID identification data that, combined with AVID's tag encryption
11 and bad faith patent enforcement, had the purpose and effect of maintaining and
12 extending AVID's dominance of the companion pet RFID market and jeopardizing the
13 lives of lost companion pets nationwide.

14 58. AVID's attempt to monopolize the companion pet RFID and animal RFID
15 markets in United States as alleged has a substantial probability of success.

16 59. AVID's attempt to monopolize the companion pet RFID and animal RFID
17 markets as alleged violates the Sherman Act, and has substantially injured and lessened
18 competition in the companion pet RFID market.

19 60. Allflex has suffered substantial injury from the anticompetitive effects of
20 AVID's antitrust violations.

21 COUNT 6

22 (Sherman Act §2—Conspiracy To Monopolize)

23 61. Allflex realleges Paragraphs 1 through 60.

24 62. AVID conspired and entered into agreements with Digital Angel and other
25 RFID tag and reader suppliers, with specific intent to obtain and maintain monopoly
26 power in the companion pet RFID market, to maintain artificially high prices for RFID
27 tags and RFID readers, to divide markets, and to exclude competition. Among other
28 joint activity implemented to obtain and maintain monopoly power, AVID conspired

1 with competitors to:

2 (a) restrict the market for companion pet RFID tags to non-ISO 125kHz
3 tags;

4 (b) provide decryption code for AVID tags only for readers sold or
5 given away to certain users and not others;

6 (c) provide decryption code for AVID tags only to competitors that
7 agreed not to produce, sell or distribute ISO-compliant RFID products in the companion
8 pet market in the United States;

9 (d) exclude competition from ISO-compliant products in the companion
10 pet RFID market in the United States;

11 (e) oppose adoption of the ISO standards for companion pet RFID in the
12 United States; and

13 (f) assert objectively baseless patent infringement claims against Allflex
14 and other suppliers and customers of competitive RFID products.

15 63. In 1996, and continuing through and after commencement of this lawsuit,
16 AVID, Digital Angel (originally through its predecessor Destron-Fearing Corp), and
17 other direct competitors of AVID entered into and acted pursuant to written and oral
18 agreements under which the group members cross-licensed and pooled their patents,
19 with the specific intent of convincing customers (a) that each group member's RFID
20 readers were compatible with and could read the RFID tags sold by every other group
21 member, (b) that each group member's RFID products could be sold and used free of
22 patent or other intellectual property claims by every other group member, and (c) that
23 the RFID products of suppliers outside and excluded from the group could not operate
24 compatibly with the group members' products, were not licensed under the group
25 members' patents, and were not free of patent or other intellectual property claims from
26 the group members.

27 64. In furtherance of this agreement, AVID provided each member of the
28 group the decryption code or other technical capability to decrypt information contained

1 in AVID tags, subject to agreed terms and conditions, including each group member's
2 agreement not to sell or support ISO-compliant tags and readers.

3 65. As AVID and its co-conspirators knew and intended, RFID product
4 competitors excluded from the group cannot compete effectively with those in the group
5 because (1) they are forced to sell readers that cannot effectively read AVID tags, which
6 account for over 65% of tags in the companion pet market, and (2) they are forced to
7 sell under threat of patent litigation, when members' of the conspiracy are not. AVID
8 has refused to grant reasonable patent licenses or to provide its decryption capability to
9 Allflex or to other new-entrant competitors in the companion pet market. As alleged in
10 Paragraphs 13-15, AVID's stated justification for encrypting its companion animal tags
11 is a pretext for its exclusion of Allflex and other competitors from the Relevant Market,
12 and no efficiency justification exists either for the blanket use of encryption in the
13 companion animal market or for denying access to Allflex of the decryption means and
14 licenses provided to Digital Angel and other members the group.

15 66. This AVID-orchestrated conspiracy to monopolize the companion pet
16 RFID market as alleged violates the Sherman Act, and has substantially injured and
17 lessened competition in the Relevant Market(s).

18 67. Allflex has suffered substantial injury from the anticompetitive effects of
19 AVID's antitrust violations.

20 **COUNT 7**

21 **(Sherman Act §1—Conspiracy To Restrain Trade)**

22 68. Allflex realleges Paragraphs 1 through 67.

23 69. AVID conspired and entered into agreements with Digital Angel and other
24 RFID tag and reader suppliers, with specific intent to obtain and maintain monopoly
25 power in the companion pet RFID market, to maintain artificially high prices for RFID
26 tags and RFID readers, to divide markets, and to exclude competition. Among other
27 concerted action implemented to obtain and maintain monopoly power and as alleged
28 more fully in Count 6 and Paragraphs 63-66, AVID conspired with and coerced

competitors to:

(a) restrict the market for companion pet RFID tags to non-ISO 125kHz tags;

(b) provide decryption code for AVID tags only for readers sold or given away to certain users and not others;

(c) provide decryption code for AVID tags only to competitors that agreed not to produce, sell or distribute ISO-compliant RFID products in the companion pet market in the United States;

(d) exclude competition from ISO-compliant products in the companion pet market in the United States; and

(e) oppose adoption of the ISO standards for companion pet RFID in the United States; and

(f) assert objectively baseless patent infringement claims against Allflex and other suppliers and customers of competitive RFID products.

70. This AVID-orchestrated conspiracy to restrain trade in the companion pet RFID market as alleged violates the Sherman Act, and has substantially injured and lessened competition in the Relevant Market(s).

71. Allflex has suffered substantial injury from the anticompetitive effects of AVID's antitrust violations.

COUNT 8

(Sherman Act §1—Tying Arrangement)

72. Allflex realleges Paragraphs 1 through 71.

73. RFID tags and RFID readers are separate products in the companion pet RFID market. Provided that the RFID reader can read the tag of a competitive supplier—and the RFID tag can be read by the reader of a competitive supplier—there is a separate submarket for RFID readers and RFID tags, a separate customer base, and a separate demand, and there is no inherent technical, cost, performance, or other legitimate commercial justification in the companion pet RFID market requiring use or

1 purchase of RFID tags and RFID readers from a single supplier. Allflex and other
2 suppliers sell tags that can be read by competitive readers, and Allflex and other
3 suppliers sell readers that can read competitive tags.

4 74. AVID encrypts AVID RFID tags sold in the companion pet market in the
5 United States specifically so that competitive readers cannot read AVID tags. AVID
6 programs AVID RFID readers sold in the companion pet market in the United States
7 specifically to prevent them from reading ISO-compliant tags. The purpose and effect
8 of this practice is to coerce the consumer to purchase both AVID tags and AVID
9 readers. The purpose and effect of this practice is to prevent consumers from choosing
10 companion pet RFID tags and readers on the merits—on the basis of better
11 performance, better price, or better service—rather than on the AVID-caused fear that a
12 lost pet's tag will not be read by a non-AVID reader.

13 75. AVID uses the market power conferred by its installed base of encrypted,
14 non-ISO tags to coerce the purchase of AVID readers.

15 76. AVID uses encryption together with the market power conferred by its
16 dominant installed base of non-ISO readers to coerce the purchase of AVID encrypted
17 tags.

18 77. There is no technical, cost, performance, or other legitimate commercial
19 justification for AVID's use of encryption in the companion pet RFID market, or from
20 AVID's use of non-ISO-compliant RFID tags and readers. AVID encrypts AVID tags
21 and disables AVID readers from reading ISO-compliant tags specifically to exclude and
22 restrict competition for companion pet RFID tags and readers in the United States, to
23 create substantial and artificial barriers to competition, and preserve and extend AVID's
24 dominant market share.

25 78. AVID's use of encryption has the purpose and effect of a tying
26 arrangement in violation of the Sherman Act, and has substantially injured and lessened
27 competition in the companion pet RFID market for both RFID readers and RFID tags.

28 79. Allflex has suffered substantial injury from the anticompetitive effects of

1 AVID's antitrust violations.

2 **COUNT 9**

3 **(Cartwright Act— Cal. Bus. & Prof. Code §§16720 et seq.—Unlawful Trust)**

4 80. Allflex realleges Paragraphs 1 through 79.

5 81. Through the anticompetitive conduct alleged herein, AVID established a
6 trust specifically intended, without limitation:

7 (a) to create and carry out restrictions in trade and commerce for RFID
8 tags and RFID readers used for companion pet identification;

9 (b) to limit and reduce the production of ISO-compatible RFID tags and
10 readers, and—by excluding competition—to maintain and increase artificially high
11 prices for AVID RFID tags and readers; and

12 (c) to prevent competition in the market for RFID tags and RFID readers
13 used for companion pet identification.

14 82. This AVID-orchestrated trust foreclosed competition and appreciably
15 restrained substantial commerce in the markets for RFID tags and RFID readers used
16 for companion pet identification.

17 83. This unlawful trust caused Allflex substantial damage and pecuniary loss.

18 **COUNT 10**

19 **(Cartwright Act— Cal. Bus. & Prof. Code §§16720, 16727—Tying Arrangement)**

20 84. Allflex realleges Paragraphs 1 through 83.

21 85. As alleged above, AVID uses the market power conferred by its patents
22 and installed base of encrypted, non-ISO tags to coerce the purchase of AVID readers,
23 and uses encryption together with the market power conferred by its patents and
24 dominant installed base of non-ISO readers to coerce the purchase of AVID encrypted
25 tags.

26 86. This AVID-implemented tying arrangement forecloses competition and
27 appreciably restrains substantial commerce in the markets for RFID tags and RFID
28 readers used for companion pet identification.

87. This tying arrangement has caused Allflex substantial damage and pecuniary loss.

COUNT 11

(Cal. Bus. & Prof. Code §17200—Unfair Competition)

88. Allflex realleges Paragraphs 1 through 87.

89. AVID has engaged in unfair competition in violation of Section 17200 et seq. of the California Business & Professions Code through the unlawful, unfair, and fraudulent business acts and practices alleged in this Complaint.

90. AVID's unfair competition has substantially damaged Allflex's business, substantially damaged consumers' interests, and unjustly enriched AVID, and will continue such damage and unjust enrichment unless enjoined by the Court.

91. AVID engaged in such unfair competition with knowledge of its illegality, and with specific intent to extend its market dominance, harm competition, and damage Allflex's business.

COUNT 12

(Unfair Competition)

92. Allflex realleges Paragraphs 1 through 91.

93. Through the anticompetitive conduct alleged herein, AVID engaged in unfair competition in violation of California common law.

94. AVID's unfair competition has substantially damaged Allflex's business, substantially damaged consumers' interests, and unjustly enriched AVID, and will continue such damage and unjust enrichment unless enjoined by the Court.

95. AVID's committed its unfair competition with malice, oppression, and fraud, and justifies imposition of punitive damages.

COUNT 13

(The '326 Patent)

96. Allflex realleges Paragraphs 1 through 95, above, realleges Count 6 of Allflex's First Amended Complaint, and alleges the Court's February 29, 2009, Order

1 insofar as it grants Allflex summary judgment on Count 6 of the First Amended
2 Complaint.

3 97. If the Court's summary judgment on the '326 Patent entered by the
4 February 29 Order is ever vacated for any reason—or is modified such that the '326
5 Patent (or any of its claims) becomes enforceable against Allflex or Allflex products—
6 Allflex reserves the right to pursue these and related claims against the '326 Patent to
7 the full extent allowed by law.

8 **REQUESTED RELIEF**

9 WHEREFORE, Allflex prays:

10 1. For Declaratory Judgments that neither Allflex nor Allflex products
11 infringe, directly or indirectly, the '409 Patent or the '017 Patent;

12 2. For Declaratory Judgments that the '409 Patent and the '017 Patent are
13 invalid and unenforceable;

14 3. For Declaratory Judgments that the '409 Patent and '017 Patent are
15 unenforceable based on AVID's inequitable conduct;

16 4. For Declaratory Judgments, as may be appropriate, that neither Allflex nor
17 Allflex products infringe, directly or indirectly, the '326 Patent, that the '326 Patent is
18 invalid and unenforceable, and that the '326 Patent is unenforceable based on AVID's
19 inequitable conduct;

20 5. For trebled damages according to proof for AVID's antitrust violations;

21 6. For actual damages according to proof;

22 7. For punitive damages;

23 8. For permanent injunctive relief to restrain AVID's antitrust violations and
24 unfair competition;

25 9. For restitution, recovery of AVID's unjust enrichment, and disgorgement
26 of AVID's profits;

27 10. For recovery of its attorneys' fees and costs of suit under 35 U.S.C. § 285,
28 and otherwise as allowed by law;

11. For pre-judgment and post-judgment interest as allowed by law; and
12. For such other and further relief as the Court deems proper.

DATED: February 23, 2009

HOWREY LLP

By: 

K.T. Cherian

Attorneys for Plaintiff
ALLFLEX USA, INC.

PROOF OF SERVICE

I, Kim McIntyre, declare that I am employed in the City and County of San Francisco, California in the office of a member of the bar of this court at whose direction this service was made. I am over the age of eighteen and not a party to this action.

On February 24, 2009, I served the following document exactly entitled:

THIRD AMENDED COMPLAINT

on the interested parties in this action by placing a true and correct copy thereof, on the above date, enclosed in a sealed envelope, following the ordinary business practice of Howrey LLP, as follows:

Marc H. Cohen
Philip T. Chen
Sean O. Christofferson
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017

Tel: 213-680-8341
Fax: 213-680-8500
E-Mail: mcohen@kirkland.com
E-Mail: pchen@kirkland.com
E-Mail: schristofferson@kirkland.com

☐ U.S. Mail: I am personally and readily familiar with the business practice of Howrey LLP for collection and processing of correspondence for mailing with the United States Postal Service, pursuant to which mail placed for collection at designated stations in the ordinary course of business is deposited the same day, proper postage prepaid, with the United States Postal Service. I caused such document[s] to be sent via U.S. Mail according to the practices above.

☐ OVERNIGHT COURIER: I caused such documents[s] to be delivered by an overnight courier service for delivery by the following business day.

☒ ELECTRONIC MAIL: I caused said document[s] to be sent by electronic mail to the e-mail addresses indicated for the parties listed above.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on February 24, 2009 at San Francisco, California.



Kim McIntyre