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3:00-CV-00711 PAQUETTE V. STEELER INC

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

ROBERT F. PAQUETTE, an  
individual, METAL LITE, INC.,  
a California corporation,

Plaintiff,

vs.

STEELE, INC., a Washington  
corporation, and FLORIAN M.  
SUROWIECKI, an individual

Defendants.

ACTION NO.: 00CV0711K

**FIRST AMENDED COMPLAINT FOR:**

- 1) FRAUD;
- 2) NEGLIGENT REPRESENTATION;
- 3) RESCISSION;
- 4) BREACH OF SETTLEMENT AGREEMENT;
- 5) PATENT INFRINGEMENT;
- 6) BREACH OF CONTRACT

**DEMAND FOR JURY TRIAL**

Plaintiffs Robert F. Paquette and Metal Lite, Inc., (hereinafter collectively "Plaintiffs"), for its complaint against Steele, Inc. and Florian M. Surowiecki (hereinafter collectively "Defendants"), avers as follows:

**Jurisdiction**

1. This is an action for patent infringement under the patent laws of the United States, Title 35, United States Code.
2. This Court has jurisdiction over the subject matter of this

ACTION NO.: 00CV0711K

ORIGINAL

29

1 action under Title 28, United States Code, Sections 1331, 1332  
2 and 1338(a), and has jurisdiction over the parties. Venue is  
3 proper in this district because Defendants conduct business  
4 within this judicial district.

5 3. The Court has jurisdiction over the related state claims under  
6 the principles of supplemental jurisdiction pursuant to 28  
7 U.S.C. §1338(b) and 28 U.S.C. §1367(a).

8 4. The Court has personal jurisdiction over Defendant Steeler,  
9 Inc. because Steeler, Inc. has manufactured, used, sold and/or  
10 offered to sell the infringing devices within this judicial  
11 district.

12 5. The Court has personal jurisdiction over Defendant Matt  
13 Surowiecki because Matt Surowiecki has manufactured, used,  
14 sold and/or offered to sell the infringing devices within this  
15 judicial district.

16 6. Venue is proper within this judicial district pursuant to 28  
17 U.S.C. §1400(b) because Defendants are entities with sufficient  
18 minimum contacts within this judicial district. Venue is also  
19 proper within this judicial district because Defendants have  
20 marketed, distributed, manufactured, used and sold the  
21 infringing device within this judicial district.

22 **The Parties**

23 7. Robert F. Paquette is the named inventor and owner of United  
24 States Patent No. 5,127,203 (hereinafter the "'203 Patent").

25 8. Metal-Lite, Inc. is a California corporation having its  
26 principal place of business located at 1160 North Blue Gum,  
27 Anaheim, California. Metal-Lite, Inc. is the exclusive  
28 licensee of the '203 Patent.

- 1 9. Steeler, Inc. is a Washington Corporation having a place of  
2 business at 10735 Prospect Avenue, Santee, California. On  
3 information and belief, Defendant Steeler, Inc. manufactures,  
4 uses, sells and/or offers for sale vertically slotted track  
5 for head of wall construction in this and other judicial  
6 districts which infringes the '203 Patent, and utilizes Metal-  
7 Lite, Inc.'s trademarks on inferior infringing slotted track.
- 8 10. Florian M. Surowiecki, an individual, is the president and  
9 owner of Steeler, Inc. Mr. Surowiecki also goes by the name  
10 Matt Surowiecki. On information and belief, Defendant Matt  
11 Surowiecki personally authorized the manufacture, use, sale  
12 and/or offer for sale of vertically slotted track for head of  
13 wall construction which infringes the '203 Patent, and the  
14 unauthorized use of Metal-Lite, Inc.'s trademarks on inferior  
15 infringing slotted track.

16 **FIRST CAUSE OF ACTION**  
17 **Fraud**  
**(Against All Defendants)**

- 18 11. Plaintiffs hereby incorporate by reference the allegations  
19 contained in paragraphs 1 through 10, inclusive.
- 20 12. On May 19, 1999, Plaintiff Metal-Lite instituted a lawsuit  
21 against Defendants styled as Metal-Lite, Inc. v. Steeler, Inc.  
22 and Matt Surowiecki, Case No. 99cv10264 in this Court for  
23 infringement of the '203 Patent.
- 24 13. On October 1, 1999, the parties reached a settlement  
25 agreement. A true and correct copy of the parties' settlement  
26 agreement is attached hereto as **Exhibit "A."**
- 27 14. The terms of the settlement agreement provided "Steeler, Inc.  
28 shall not further manufacture the product [slotted track

1 defined in the '203 Patent]" and pay Metal-Lite, Inc. monetary  
2 damages in exchange for the dismissal of Metal-Lite, Inc.'s  
3 claims of patent infringement which arose prior to the date of  
4 the settlement agreement. The terms further provided that  
5 Defendants would serve as Metal-Lite's distributor of slotted  
6 track exclusively manufactured by Metal-Lite.

7 15. In or about September 1999, to induce Metal-Lite to execute  
8 the October 1, 1999 Settlement agreement, Defendants  
9 represented to Metal-Lite that they would immediately cease  
10 manufacturing infringing slotted track product and pay the sum  
11 of \$75,000.00. Defendants' further represented that they  
12 would faithfully serve as Metal-Lite's sales representative  
13 for slotted track exclusively manufactured by Metal-Lite.

14 16. When Defendants made these representations, they knew them to  
15 be false, and made these representations with the intent to  
16 deceive and defraud Metal-Lite, and to induce Metal-Lite to  
17 act in reliance upon these representations in the manner  
18 herein alleged, or with the expectation Metal-Lite would act.

19 17. Metal-Lite, at the time of these representations were made by  
20 Defendants, was ignorant of the falsity of Defendants'  
21 representations. As a proximate result of Defendants'  
22 representations, Metal-Lite relied upon these representations  
23 as an inducement to execute the October 1, 1999 Settlement  
24 Agreement.

25 18. Defendants failed to cease the manufacture and sale of  
26 infringing slotted track product manufactured by Defendants  
27 after the execution of the parties' October 1, 1999 Settlement  
28 Agreement.

1 19. Defendants manufacturing and sales of infringing slotted track  
2 continued after October 1, 1999 without interruption under  
3 direct instruction from Defendant Steeler, Inc.'s management,  
4 and Defendant Surowiecki.

5 20. Defendants systematically and continuously manufactured  
6 substantial quantities infringing slotted track after October  
7 1, 1999 without Plaintiffs' authorization.

8 21. As a proximate result of Defendants' fraud, Plaintiff Metal-  
9 Lite entered into a Settlement Agreement it would not have  
10 otherwise executed. Specifically, Metal-Lite would neither  
11 have agreed to provide Defendants with a substantially low  
12 reasonable royalty rate for purposes of settlement, nor  
13 established a distributorship with Defendants to sell Metal-  
14 Lite's slotted track product.

15 22. Metal-Lite has been further injured by the continued sales of  
16 Defendants' infringing inferior slotted track product by the  
17 loss of sales, and the tarnishment of its reputation in the  
18 construction industry by the sale of inferior slotted track  
19 using Metal-Lite's trademarks.

20 **SECOND CAUSE OF ACTION**  
21 **Negligent Misrepresentation**  
**(Against All Defendants)**

22 23. Plaintiffs hereby incorporate by reference the allegations  
23 contained in paragraphs 1 through 22 inclusive.

24 24. When Defendants made the above representations, they had no  
25 reasonable ground for believing them to be true in that  
26 Defendants knew they had no means insure compliance with the  
27 settlement agreement.

28 25. Defendants made these representations with the intention of

1 inducing Metal-Lite to act in reliance on these  
2 representations in the manner hereinafter alleged, or with the  
3 expectation that Plaintiff would so act.

4 **THIRD CAUSE OF ACTION**  
5 **Rescission**  
6 **(Against All Defendants)**

7 26. Plaintiffs hereby incorporate by reference the allegations  
8 contained in paragraphs 1 through 25 inclusive.

9 27. If the Defendants, and each of them, had not fraudulently  
10 represented their intentions, Metal-Lite would not have  
11 entered into the October 1, 1999 Settlement Agreement.

12 28. As a result of the conduct of the Defendants, and each of  
13 them, as described in this complaint, and pursuant to Civil  
14 Code Section 1689(b)(1), Metal-Lite is entitled to rescind the  
15 October 1, 1999 Settlement Agreement which it entered into  
16 with Defendants.

17 **FOURTH CAUSE OF ACTION**  
18 **Breach of Settlement Agreement**  
19 **(Against All Defendants)**

20 29. Plaintiffs hereby incorporate by reference the allegations  
21 contained in paragraphs 1 through 28 inclusive.

22 30. On October 1, 1999, the parties reached a settlement  
23 agreement.

24 31. The terms of the settlement agreement provided "Steeler, Inc.  
25 shall not further manufacture the product [the slotted track  
26 defined in the '203 Patent]" and pay Metal-Lite, Inc. monetary  
27 damages in exchange for the dismissal of Metal-Lite, Inc.'s  
28 claims of patent infringement which arose prior to the date of  
the settlement agreement. The terms further provided that  
Defendants would serve as Metal-Lite's distributor of slotted

1 track exclusively manufactured by Metal-Lite.

2 32. Despite the existence of the October 1, 1999 Settlement  
3 Agreement, Defendants continued to manufacture and sell  
4 infringing slotted track product manufactured by defendants.

5 33. Defendants systematically and continuously manufactured  
6 substantial quantities infringing slotted track after October  
7 1, 1999 without Plaintiffs' authorization under direct  
8 instruction from Defendant Stoeler, Inc.'s management, and  
9 Defendant Surowiecki.

10 34. As a result of the conduct of Defendants, and each of them,  
11 Plaintiffs have been, and will continue, to be injured.

12 **FIFTH CAUSE OF ACTION**  
13 **Patent Infringement**  
**(Against All Defendants)**

14 35. Plaintiffs hereby incorporate by reference the allegations  
15 contained in paragraphs 1 through 10, inclusive.

16 36. On July 7, 1992, the United States Patent and Trademark Office  
17 issued United States Letters Patent No. 5,123,703 (hereinafter  
18 the "'203 Patent") to Robert F. Paquette entitled  
19 "Seismic/Fire Resistant Structure and Method." A true and  
20 correct copy of the '203 Patent is attached hereto as **Exhibit**  
21 **"B."**

22 37. On or about September 28, 1994, Robert F. Paquette assigned  
23 his ownership interest in the '203 Patent to Gene N. Carpenter  
24 and Thomas R. Herren in exchange for valuable consideration.

25 38. On or about May 10, 1999, Gene Carpenter and Thomas R. Herren  
26 assigned the '203 Patent to Metal-Lite, Inc. in exchange for  
27 valuable consideration.

28 39. On or about December 22, 1999, Metal-Lite, Inc. assigned the



1 '203 Patent back to Robert F. Paquette in exchange for an  
2 exclusive license agreement to make, use, sell and offer to  
3 sell products covered by the '203 Patent.

4 40. Plaintiff MLI manufactures and sells a line of products under  
5 the trademark "THE SYSTEM™" which is covered by the '203  
6 Patent.

7 41. MLI has complied with the notice provision of the patent  
8 statutes by making the patented products with the patent  
9 number in accordance with 35 U.S.C. §267.

10 42. Defendants, and each of them, had knowledge of Plaintiffs'  
11 above patent rights prior to formal notice of infringement.

12 43. Defendants, and each of them, have been and are infringing,  
13 contributing to and/or inducing the infringement of at least  
14 claims 1, 5, 8 and 9 of the '203 Patent in violation of §271,  
15 *inter alia*, by making, using, offering to sell and/or selling  
16 within the United States, certain slotted track for head of  
17 wall construction which infringes United States Patent No. 5,  
18 127,203.

19 44. The infringing activities of Defendants, and each of them, are  
20 intentional, willful and deliberate.

21 45. At least since about September 2, 1997, Defendants received  
22 actual notice of its infringement and such infringement  
23 continues to be willful. A true and correct copy of the  
24 notice letter is attached hereto as **Exhibit "C."**

25 46. The metal slotted channel manufactured, used, sold and/or  
26 offered for sale by Defendants comprises a elongated channel  
27 member having a base affixed to a head of wall and a pair of  
28 side flanges protruding from the base thereby defining the

1 channel; the flanges possess one or more vertically slotted  
2 openings at spaced intervals along the length of the channel  
3 to permit the secured head or wall to rise and fall vertically  
4 due to environmental forces applied to the floor and ceiling  
5 of a building.

6 47. Defendants will in the future continue to infringe, contribute  
7 to and/or induce infringement of the '203 Patent unless  
8 enjoined by this Court.

9 48. Upon information and belief, Defendants have unlawfully  
10 derived, and/or is now deriving profits from its acts of  
11 infringement, contributing to and/or inducing infringement of  
12 the '203 Patent.

13 49. Plaintiffs have suffered, and continue to suffer serious and  
14 substantial damages, including lost profits, resulting from  
15 Defendants' infringement, contributing to and/or inducing  
16 infringement of the '203 Patent, including irreparable injury  
17 for which there is no adequate remedy of law.

18 50. By reason of Defendants' acts of infringement of the '203  
19 Patent, Plaintiffs have been and will be continue to be  
20 damaged.

21 **SIXTH CAUSE OF ACTION**  
22 **Breach of Contract**  
**Against Steeler**

23 51. Plaintiffs hereby incorporate by reference the allegations  
24 contained in paragraphs 1 through 10, inclusive.

25 52. Metal-Lite and Steeler entered into a contract on or about  
26 March 20, 2000 by which Metal-Lite agreed to sell to Steeler,  
27 and Steeler agreed to purchase from Metal-Lite, pieces of  
28 steel slotted track. Steeler agreed to pay Metal-Lite the sum

1 of \$20,111.20, within twenty days after the delivery of the  
2 goods. A true and correct copy of Invoice No. 010615 is  
3 attached hereto as Exhibit "D" and made a part hereof.

4 53. On or about March 20, 2000 at Metal-Lite's facility located at  
5 1160 North Blue Gum Street, Anaheim, California, County of  
6 Orange, and in accordance with the terms of the contract,  
7 Metal-Lite delivered the goods to Plaintiff.

8 54. The total price to be paid by Steeler for the goods delivered  
9 was \$20,111.20. In accordance with the terms of the March 20,  
10 2000 contract payment was due within twenty days of delivery.  
11 Although the goods have been delivered to Steeler, and  
12 accepted by Steeler, Steeler has not paid the sums due under  
13 the contract.

14 55. On or about April 15, 2000, Metal-Lite made a verbal demand of  
15 Steeler for payment of the agreed upon price. However Steeler  
16 has not responded to this demand nor has Steeler paid the  
17 agreed price.

18 56. On May 18, 2000, May 23, 2000, and May 24, 2000 Metal-Lite's  
19 counsel made written demands to Steeler's counsel for the  
20 outstanding sums owed Metal-Lite. However Steeler has not  
21 responded to this demand nor has Steeler paid the agreed  
22 price.

23 57. On May 26, 2000, Metal-Lite made another written demand for  
24 payment of the outstanding sums owed in Invoice No. 010615. A  
25 copy of this demand letter is attached hereto as Exhibit "E."  
26 However defendant has not responded to this demand nor has  
27 defendant paid the agreed price.

28 58. Defendant is liable to plaintiff pursuant to section

2709(1)(a) of the California Uniform Commercial Code (Cal. U. Com. Code § 2709(1)(a)(1999)) for the agreed upon price of the goods in the amount of \$20,111.20, as set forth in the contracts between the parties.

59. WHEREFORE, PLAINTIFFS PRAY FOR:

**FIRST AND SECOND CAUSES OF ACTION**  
**Fraud and Negligent Misrepresentation**  
**(Against All Defendants)**

- (a) General damages in an amount to be proven at trial;
- (b) Special damages in an amount to be proven at trial;
- (c) Punitive damages in an amount appropriate to punish Defendants and deter others from engaging in similar misconduct;
- (d) Costs for suit herein; and
- (e) For such other relief as the Court may deem proper.

**THIRD CAUSE OF ACTION**  
**Rescission**  
**(Against All Defendants)**

- (a) Rescinding the October 1, 1999 Settlement Agreement between Metal-Lite and Defendants, Steeler, Inc. and Florian Surowiecki, and each of them.

**FOURTH CAUSE OF ACTION**  
**Breach of Settlement Agreement**  
**(Against All Defendants)**

- (a) Judgment on this Complaint in Plaintiffs' favor and against Defendants for the above breach of the parties' October 1, 1999 Settlement Agreement;
- (b) an accounting for compensatory damages;
- (c) a preliminary and a permanent injunction against Defendants and all those in privity, association, and/or concert with Defendants against further breach of the

1 parties October 1, 1999 settlement agreement;

2 (d) compensatory and consequential damages sustained by  
3 Plaintiffs for Defendants' breach of the parties' October  
4 1, 1999 settlement agreement;

5 (e) punitive damages; and

6 (f) such further relief as this Court deems to be just and  
7 appropriate.

8 **FIFTH CAUSE OF ACTION**  
9 **Patent Infringement**  
**(against All Defendants)**

10 (a) judgment on this Complaint in its favor and against  
11 Defendants for the above-mentioned acts of infringement of the '203  
12 Patent, and for prompt payment of any judgment entered against  
13 Defendants in this action;

14 (b) an accounting for damages;

15 (c) a preliminary and a permanent injunction against  
16 Defendants and all those in privity, association, and/or concert  
17 with Defendants against further infringement of the '203 Patent;

18 (d) damages adequate to compensate Plaintiffs for Defendants'  
19 acts of infringement of the '203 Patent and an increase of said  
20 damages up to three times pursuant to 35 U.S.C. § 284;

21 (e) an assessment against Defendants for Plaintiffs' costs,  
22 attorney's fees, expenses and interest accrued;

23 (f) Defendants be ordered to turn over to Plaintiffs, for  
24 destruction or other disposition, all infringing slotted track  
25 claimed in the '203 Patent in Defendants' and all dyes used to  
26 manufacture the infringing slotted track which are in Defendants'  
27 possession, custody or control; and

28 (g) such further relief as this Court deems to be just and

appropriate.

**SIXTH CAUSE OF ACTION**  
**Breach of Contract**  
**Against Steeler, Inc.**

- (a) Compensatory damages representing the price of the goods in the amount of \$20,111.20;
- (b) Interest on the damages according to law;
- (c) Attorneys' and costs as incurred by Metal-Lite in bringing this action to enforce its contractual rights; and
- (d) Any other and further relief the court may deem proper.

Respectfully submitted,

Dated: November 1, 2000

**LAW OFFICES OF MARK H. PLAGER**

By:



Mark H. Plager

Attorneys for Plaintiffs  
Estate of Robert F. Paquette, and  
Metal-Lite, Inc.

**JURY DEMAND**

Plaintiffs, Robert F. Paquette and Metal Lite, Inc., hereby exercise their right to a jury trial under the Seventh Amendment of the United States Constitution and hereby demands a trial by jury.

Respectfully submitted,

Dated: November 1, 2000

**LAW OFFICES OF MARK H. PLAGER**

By:

  
Mark H. Plager

Attorneys for Plaintiffs  
Estate of Robert F. Paquette and  
Metal-Lite, Inc.





## **EXHIBIT “A”**

The  
United  
States  
of  
America



The Commissioner of Patents  
and Trademarks

*Has received an application for a patent  
for a new and useful invention. The title  
and description of the invention are en-  
closed. The requirements of law have  
been complied with, and it has been de-  
termined that a patent on the invention  
shall be granted under the law.*

*Therefore, this*

United States Patent

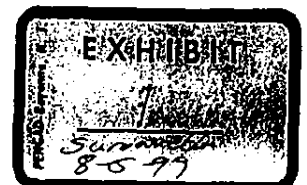
*Grants to the person or persons having  
title to this patent the right to exclude  
others from making, using or selling the  
invention throughout the United States  
of America for the term of seventeen  
years from the date of this patent, sub-  
ject to the payment of maintenance fees  
as provided by law.*

*Douglas B. Long*

Acting Commissioner of Patents and Trademarks

*Linda D. Eggett*

Attest



US005127203A

## United States Patent [19]

[11] Patent Number: 5,127,203

Paquette

[45] Date of Patent: Jul. 7, 1992

[54] SEISMIC/FIRE RESISTANT WALL  
STRUCTURE AND METHOD[76] Inventor Robert F. Paquette, 970 Edmonds  
Way, Sunnyvale, Calif. 94087

[21] Appl. No. 668,760

[22] Filed Mar. 14, 1991

## Related U.S. Application Data

[63] Continuation of Ser. No. 477,620, Feb. 9, 1990, abandoned

[51] Int. Cl.<sup>3</sup> E04H 1/00[52] U.S. Cl. 52/241; 52/290;  
52/481; 52/690[58] Field of Search 52/241, 242, 290, 243,  
52/481, 690, 238 1, 239, 36, 484

## [56] References Cited

## U.S. PATENT DOCUMENTS

1,729,439	9/1929	Gordex	52/241
3,017,672	1/1962	Vaughan	52/241
3,469,302	8/1969	Cooper	52/290 X
4,805,364	2/1989	Smolix	52/241

## OTHER PUBLICATIONS

Sweets Catalog File, 1985, Seebrion 6 6/sim, pp. 23-24  
Fire Resistant Design Manual, Gypsum Association,  
1984, p. 5

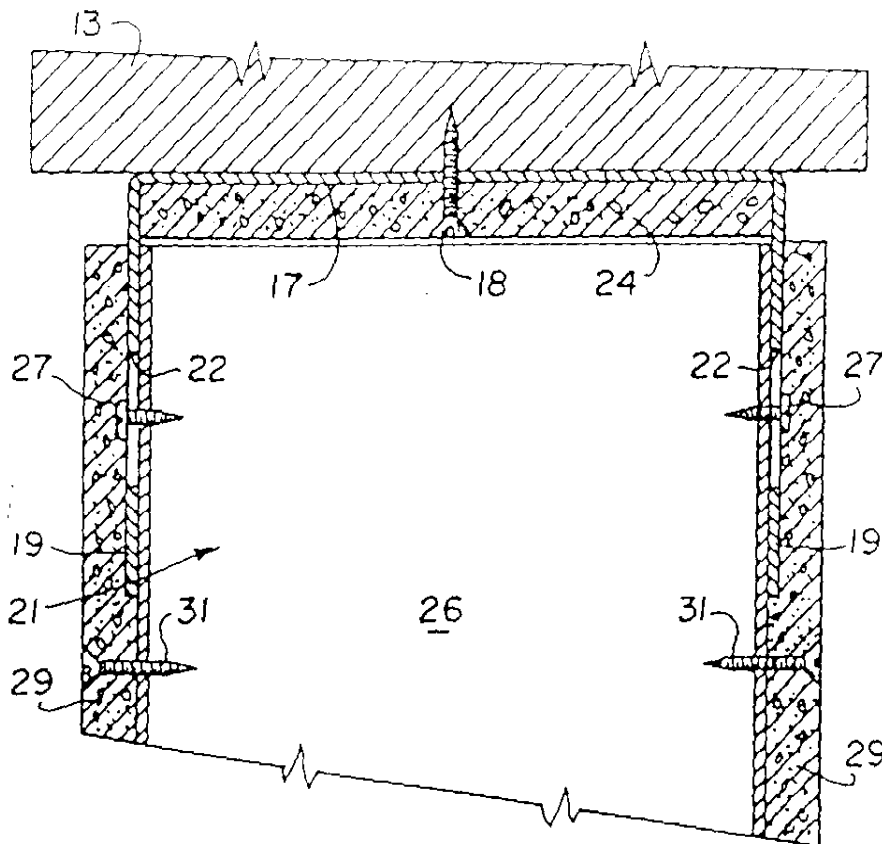
Primary Examiner—Richard E. Chilcot, Jr.

Attorney, Agent, or Firm—Flehr, Hobbach, Test,  
Albritton & Herbert

## [57] ABSTRACT

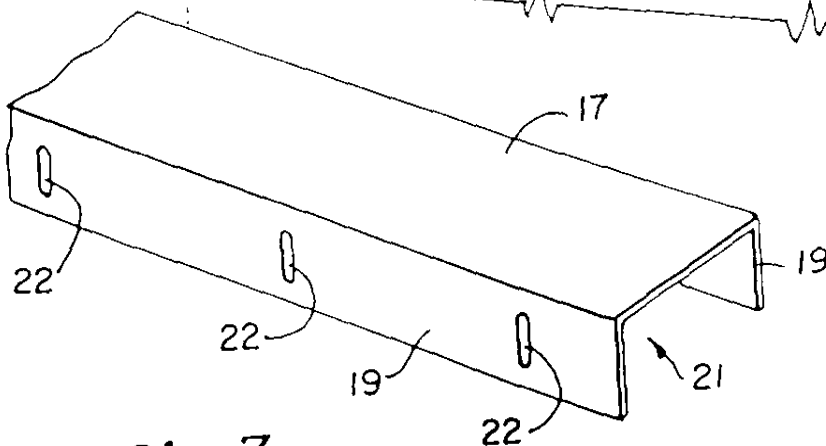
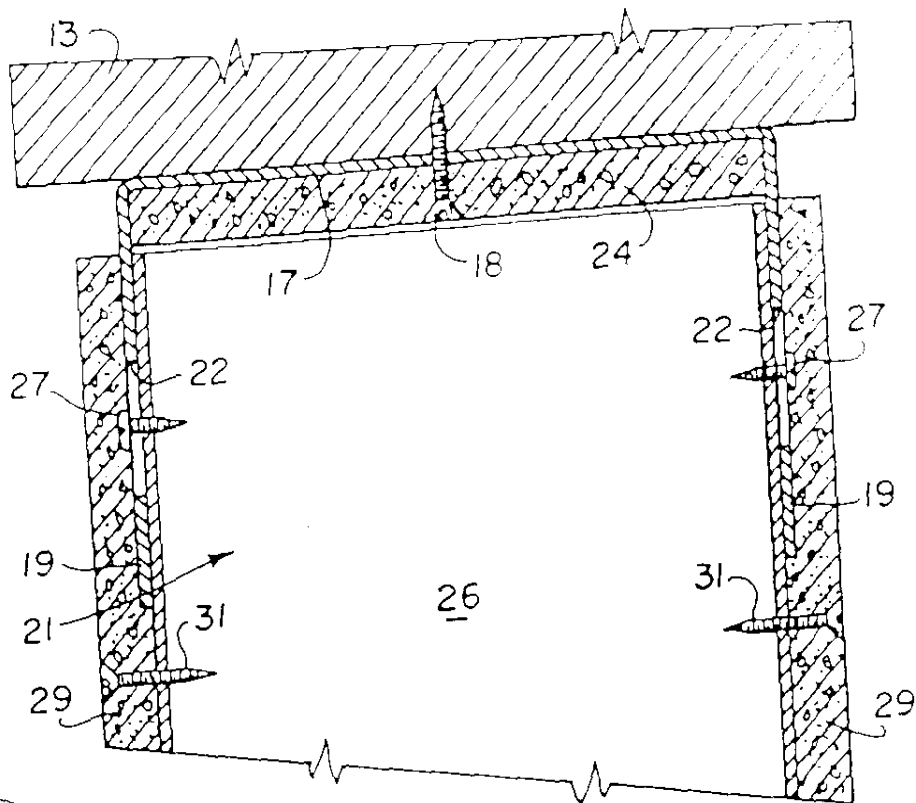
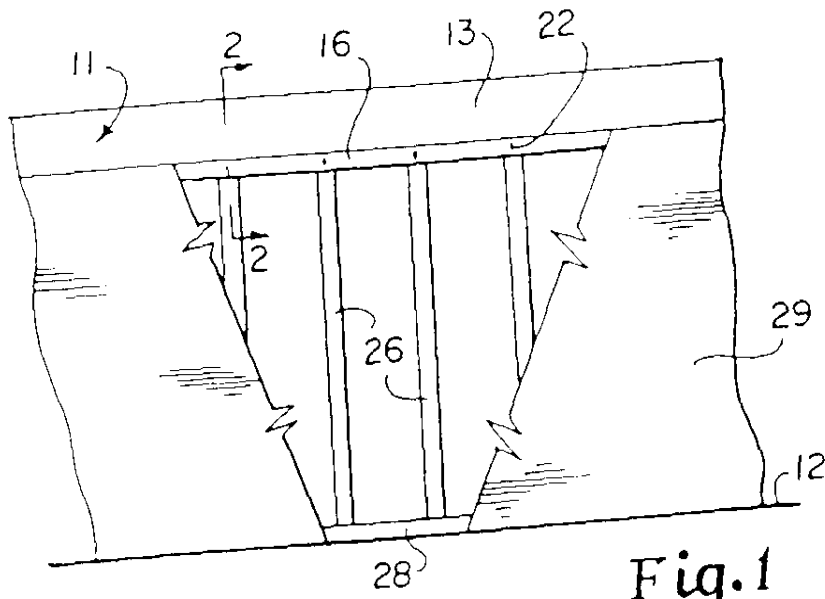
Seismic and fire resistant wall structure and method in which a U-shaped channel member having vertically extending slotted openings in the side flanges thereof is mounted on the underside of a beam or other overhead structural member, with a layer of fire retardant material in the upper portion of the channel. Studs are connected to the channel member with fasteners which pass through the slotted openings and permit relative vertical movement between the channel member and the studs, while holding the studs in place horizontally. Fire retardant wallboard is attached to the opposing side faces of the studs and extends between the floor and the channel member.

9 Claims, 1 Drawing Sheet



July 7, 1992

U.S. Patent



# SEISMIC/FIRE RESISTANT WALL STRUCTURE AND METHOD

This is a continuation of application Ser. No. 07/477,620 filed Feb. 9, 1990, now abandoned.

This invention pertains generally to wall structures and, more particularly, to a seismic and fire resistant wall structure and method.

Full height non-bearing walls are commonly installed beneath overhead structural members such as roof beams, floor beams, and the like. Such members are commonly constructed in a laminated form commonly known as glue-laminated beams or "glue-lams" and provided with an upwardly convex curvature or crown so that the member will straighten out when subjected to normal loading, e.g. static loads, plastic flow and live loads. Even after the member has straightened out, it may still move because temperature changes, rain loads, and the like.

To accommodate movement of an overhead structural member, a flexible connection is employed between the member and the wall beneath the member. One such connection utilizes a so-called compression track in which the flanges which are connected to the wall studs are bent in bellows-like fashion and thus adapted to flex and permit movement between the structural member and the wall. When flexed, however, these tracks tend to fracture at the bends and fail.

Another flexible connection heretofore provided has a downwardly facing channel in which the upper portion of the wall is loosely received. There is no connection between the channel and the wall, and the wall can become dislodged from the channel if the lower portion of the wall is knocked out of position.

It is in general an object of the invention to provide a new and improved wall structure and method which overcome the limitations and disadvantages of wall structures heretofore provided.

Another object of the invention is to provide a wall structure and method of the above character in which the wall structure is resistant to both seismic loading and fire.

Another object of the invention is to provide a wall structure and method which can be employed economically.

These and other objects are achieved in accordance with the invention by providing an elongated channel member with a base, a pair of side flanges extending from the base and defining a channel, and a plurality of slotted openings at longitudinally spaced intervals in the side flanges, providing a layer of fire retardant material on the side of the base facing the channel, mounting the channel member on the under side of the overhead structural member with the channel opening in a downward direction, positioning a plurality of vertically extending studs between the floor and the channel member with the upper portions of the studs extending into the channel in alignment with the slotted openings, attaching the studs to the channel member with fasteners which pass through the slotted openings and into the studs and permit relative vertical movement between the channel member and the studs, and mounting fire retardant wallboard on opposing side faces of the studs between the floor and the channel member.

FIG. 1 is a fragmentary side elevational view of a wall structure incorporating the invention.

FIG. 2 is an enlarged cross-sectional view taken along line 2-2 in FIG. 1.

FIG. 3 is a fragmentary isometric view of the channel member utilizing the wall structure of FIG. 1.

As illustrated in FIG. 1, the wall structure 11 is a full height non-bearing wall which is installed between the floor 12 and an overhead structural member 13 such as a roof beam. A fire retardant ceiling 14 conventional construction extends horizontally at a level below the top of the wall.

The wall structure includes a U-shaped channel member 16 of fire resistant material, such as 18 gauge galvanized steel, which is affixed to the underside of beam 13 in an inverted position. The channel member includes a base 17 which is secured to the under side of the beam by screws 18, and a pair of generally parallel depending side flanges 19 which define a downwardly opening channel 21. For standard dimension walls, the channel typically has a width of 2½, 3½, 6 or 8 inches and a depth of about 1½ inches.

A plurality of vertically elongated slotted openings 22 are formed in the side flanges at spaced intervals along the length of the channel member. These slots typically spaced on 8 inch centers, which accommodates standard stud spacings of 16 and 24 inches.

A layer of fire retardant material 24, such as drywall, is affixed to the under side of base 17 in the upper portion of channel 21. In one presently preferred embodiment, the drywall layer is ½ inch thick, and it is affixed to the base with an adhesive.

A plurality of studs 26 extend between the floor and the channel member, with the upper end portions of the studs being received in channel 21 and the upper ends of the studs being spaced about ½ inch from the lower surface of the fire retardant material 24. The upper end portions of the studs are connected to the channel member by screws 27 which pass through slotted openings 22 and into the studs. The screws are left loose enough to permit them to move freely up and down in the slotted openings thus permit relative vertical movement between the studs and the channel member while anchoring the upper portions of the studs against horizontal movement. The lower ends of the studs are received in and affixed to a U-shaped channel member 28 which is affixed to the floor. In the embodiment illustrated, the studs and the lower channel member are fabricated of a fire resistant material such as metal, and the studs have a generally U-shaped contour in cross-section. If desired, however they can be fabricated of another suitable material, and if, for example, the studs are fabricated of wood, the lower channel can be replaced with a conventional wood floor plate.

Fire retardant wallboard 29 is mounted on the side faces of the studs and extends from the floor to the channel member and over the outside of side flanges 19. The upper edge of the wallboard is spaced about ½ inch below the lower surface of beam 13 to permit vertical movement between the wall structure and the beam. Although the top ends of studs 26 are spaced only about ½ inch below the lower surface of retardant material 24, they do not interfere with the movement between the studs and the channel member because they cut into the retardant material. If solid studs are used, they should terminate about ½ inch below the retardant material since they will not cut into it as readily as the U-shaped metal studs. The wallboard is attached to the studs with screws 31, with no screws from the wallboard going

ment of the studs

The wall is constructed by mounting the channel member 16 on the under side of the beam, with the slotted openings 22 formed in the side flanges and the layer of fire retardant material 24 installed in the channel. The lower channel member 28 is affixed to the floor beneath the beam, and studs 26 are installed between the channel members in alignment with the slotted openings. The lower ends of the studs are secured to the lower channel member, and screws 27 are installed in the upper ends of the studs through the slotted openings, following which the Wallboard 29 is installed.

It is apparent from the foregoing that a new and improved wall structure and method have been provided. While only certain presently preferred embodiments have been described in detail, as will be apparent to those familiar with the art, certain changes and modifications can be made without departing from the scope of the invention as defined by the following claims.

1 claim.

1 In a seismic/fire resistant wall structure installed between a floor and an overhead structural member:

an elongated channel member having a base affixed to the structural member and a pair of side flanges depending from the base and defining a downwardly opening channel;

a layer of fire retardant material extending along the base within the channel;

a plurality of vertically extending slotted openings in the side flanges at spaced intervals along the length of the channel member;

a plurality of studs extending vertically between the floor and the channel member with upper portions of the studs extending into the channel in alignment with the slotted openings;

fasteners passing through the slotted openings and into the studs to anchor the upper portions of the studs against horizontal movement but permitting relative vertical movement between the channel member and the studs; and

fire retardant wallboard mounted on the studs and extending from the floor to the channel member.

2. The wall structure of claim 1 wherein the channel member is fabricated of metal.

3. The wall structure of claim 1 wherein the fire retardant material extending along the base of the channel member is wallboard.

4. The wall structure of claim 1 wherein the studs are fabricated of metal.

5. A U-shaped channel member for use in a seismic/fire resistant wall structure having a plurality of studs extending between a floor and an overhead structural member, with wallboard mounted on opposing side faces of the studs and fasteners connecting upper end portions of the studs to the channel member, said channel member having a base adapted to be fixed to the structural member, a pair of side flanges extending from

the base and defining a channel for receiving the upper end portions of the studs, and a plurality of slotted openings formed at longitudinally spaced intervals in the side flanges for receiving the fasteners and permitting relative vertical movement between the channel member and the studs.

6. The channel member of claim 5 including a layer of fire retardant material extending along the side of the base within the channel.

7. The channel member of claim 5 wherein said channel member is fabricated of metal.

8. In a method of constructing a seismic/fire resistant wall structure between a floor and an overhead structural member, the steps of:

providing an elongated channel member with a base, a pair of side flanges extending from the base and defining a channel, and a plurality of slotted openings at longitudinally spaced intervals in the side flanges;

providing a layer of fire retardant material within the channel;

mounting the channel member on the overhead structural member with the channel opening in a downward direction;

positioning a plurality of vertically extending studs between the floor and the channel member with upper portions of the studs extending into the channel in alignment with the slotted openings;

attaching the studs to the channel member with fasteners which pass through the slotted openings and into the studs and permit relative vertical movement between the channel member and the studs so that the studs will not be affected by movement of the overhead structural member on which the channel member is mounted; and

mounting fire retardant wallboard on the studs between the floor and the channel member.

9. In a seismic wall structure installed between a floor and an overhead structural member:

an elongated channel member having a base affixed to the structural member and a pair of side flanges depending from the base and defining a downwardly opening channel;

a plurality of vertically extending slotted openings in the side flanges at spaced intervals along the length of the channel member;

a plurality of studs extending vertically between the floor and the channel member with upper portions of the studs extending into the channel in alignment with the slotted openings;

fasteners passing through the slotted openings and into the studs to anchor the upper portions of the studs against horizontal movement but permitting relative vertical movement between the channel member and the studs; and

wallboard mounted on the studs and extending from the floor to the channel member.

\* \* \* \* \*



## **EXHIBIT “B”**



**STEELER, INC.**

**Transmitted by FAX and U. S. Mail**

August 28, 1997

Mr. Matt Zwickie  
Steeler, Inc.  
10023 Martin Luther King Jr., South  
Seattle, Washington 98278

**Re: Patent Infringement**

Dear Mr. Zwickie:

You have infringed on **Metal-Lite, Inc.'s** patent with the slotted track at the San Francisco Airport. Tom Herren, owner of **Metal-Lite, Inc.** has talked to you about patent infringement before.

You need to remove the slotted track material you delivered to the San Francisco Airport off the job.

We want a letter from you by 10:30 a.m. this date, stating you will not infringe on **Metal-Lite, Inc.'s** patent again. If we do not have a letter by this time, we are instituting a suit against you and Steeler, Inc.

Sincerely,  
**Metal-Lite, Inc.**

*R. Stephen Bolshazy*

R. Stephen Bolshazy, FHF1

*Letter faxed to  
Mr Zwickie  
9:10  
AM Aug 28*

1160 N. BLUE GUM AVE  
ANAHEIM, CA 92806  
1-800-886-6824  
TEL (714) 632-5736  
FAX (714) 632-5738

14

735 SCHNEIDER DR. #1  
S. ELGIN, IL 60177  
1-800-711-9957  
TEL (847) 931-7665  
FAX (847) 931-4428

**Exhibit B**



## **EXHIBIT “C”**

## SETTLEMENT AGREEMENT

This SETTLEMENT AGREEMENT is entered into by and between Metal Lite, Inc., a California corporation, as plaintiff and Steeler, Inc., a Washington corporation, and Matt Surowiecki, an individual, as defendants.

### WHEREFORE

1. A cause of action has been filed by Plaintiff against Defendants in U.S. District Court, Southern District of California, cause number 99cv1026K in regard to Plaintiff's claim against Defendants for infringement of U.S. Patent No. 5,127,203. Defendants have answered the complaint and asserted certain affirmative defenses.
2. The parties intend by this Settlement Agreement to resolve all outstanding disputes between them.
3. All parties have been and are now represented by attorneys and the parties have been advised that execution of this Settlement Agreement and entry of a notice of settlement and order dismissing the case will fully, completely and forever release and discharge each of the parties to the action of and from any claims, damages, causes of action, counterclaims, or crossclaims asserted, or which could have been asserted, in this action by any party against any other party except actions to enforce this Settlement Agreement.

NOW THEREFORE, the parties stipulate and agree as follows:

4. Plaintiff Metal Lite, Inc. and Defendants Steeler, Inc. and Matt Surowiecki fully, completely, and forever release and discharge each other, with prejudice and without attorney fees or costs awarded to either party, of and from all claims, damages, causes of action, counterclaims asserted, or which could have been asserted, in this action, howsoever denominated, subject only to enforcement of this Settlement Agreement and its terms of payment of sums by Defendant to Plaintiff as hereinafter described.
5. Steeler, Inc. shall pay to Metal Lite, Inc. Seventy-Five Thousand Dollars (\$75,000). Twenty-Five Thousand Dollars of which has been paid, payment and receipt of which is hereby acknowledged, for a balance due of Fifty Thousand Dollars (\$50,000.), which shall be paid in two equal monthly installments of Twenty-Five Thousand Dollars (\$25,000.) the first due upon signing of this Agreement and the second on the same day the following month.
6. Metal Lite, Inc. shall establish Steeler, Inc. as a distributor of its products on terms no less advantageous to Steeler, Inc. as Metal Lite, Inc. provides to any of its other distributors. It is understood that unless otherwise agreed in writing, Steeler, Inc. shall not further manufacture the Product as defined following.
7. Metal Lite, Inc. warrants that it is the owner of Patent No. 5,127,203 for "Seismic Fire-Resistant Wall Structure and Method" and the product and technology described therein ("Product") and thus rightfully empowered to settle claims of infringement pertaining thereto. Metal Lite, Inc. agrees to indemnify and defend Steeler, Inc. against claims of patent infringement arising out of Steeler's manufacture of the Product prior to this Agreement.
8. Metal Lite, Inc.'s liability under paragraph 7 is conditioned on prompt notice by Steeler, Inc. to Metal Lite, Inc. of such claims after Steeler, Inc. receives notice of their existence and, provided further,

SETTLEMENT AGREEMENT

Page 1 of 2

Steeler, Inc. offers Metal Lite, Inc. an opportunity, to the extent permissible by the governing law, to assume their defense. In the event Metal Lite, Inc. assumes the defense of any such claim of patent infringement, Steeler, Inc. (i) shall, at its expense, furnish Metal Lite, Inc. with any information in Steeler, Inc.'s possession or control that Metal Lite, Inc. reasonably may request for such defense, and Steeler, Inc. (ii) reserves the right to continue to participate in the defense of its interests, at its own cost and expense. Metal Lite, Inc. shall not be liable for any portion of any settlement or compromise unless, prior to any such agreement, Steeler, Inc. notifies Metal Lite, Inc. of the proposed settlement or compromise and Metal Lite, Inc. fails to assume the defense of said claim.

9. The terms and conditions of this Settlement Agreement are confidential and shall not be disclosed to any third party except as may be required by court order or rules of court. Notwithstanding the above, disclosures within the Corporate organization shall not be deemed a disclosure for this purpose. The Corporate organization for this purpose shall include retained legal counsel, accountants, and corporate bankers, and other similar professionals who are under a duty of confidentiality to the corporation. Reference to the account receivable created by the Agreement without identifying reference to Steeler, Inc. also shall not be deemed a disclosure for this purpose. This duty of nondisclosure shall terminate upon contract default by Steeler, Inc.
10. By their signature below, each party has designated a person to execute the Agreement and represents and warrants to all other parties that such person signing is authorized to execute this Settlement Agreement on behalf of the respective party, and each such party indemnifies, defends, and holds harmless the other party from any claim that the person was not so authorized.
11. By their signatures below, counsel for each party represents and warrants that he has fully explained the terms, conditions, and legal consequences of this settlement to his client and his client has expressed an understanding thereof.

Effective the date last given below.

Steeler, Inc.

By \_\_\_\_\_  
 Matt Surowiecki  
 President  
 Date: \_\_\_\_\_

\_\_\_\_\_  
 Matt Surowiecki  
 Individually  
 Date: \_\_\_\_\_

David L. Tingey, WSBA 11,545  
 Attorney for Steeler and Surowiecki

Metal Lite, Inc.

By Thomas R. Herren  
 Tom Herren  
 President  
 Date: 10-1-99

Mark Pflager  
 Mark Pflager, SBN 192259  
 Attorney for Metal Lite, Inc.

**COPY**

## SETTLEMENT AGREEMENT

This SETTLEMENT AGREEMENT is entered into by and between Metal Lite, Inc., a California corporation, as plaintiff and Steeler, Inc., a Washington corporation, and Matt Surowiecki, an individual, as defendants.

### WHEREFORE

1. A cause of action has been filed by Plaintiff against Defendants in U.S. District Court, Southern District of California, cause number 99cv1026K in regard to Plaintiff's claim against Defendants for infringement of U.S. Patent No. 5,127,203. Defendants have answered the complaint and asserted certain affirmative defenses.
2. *The parties intend by this Settlement Agreement to resolve all outstanding disputes between them.*
3. All parties have been and are now represented by attorneys and the parties have been advised that execution of this Settlement Agreement and entry of a notice of settlement and order dismissing the case will fully, completely and forever release and discharge each of the parties to the action of and from any claims, damages, causes of action, counterclaims, or crossclaims asserted, or which could have been asserted, in this action by any party against any other party except actions to enforce this Settlement Agreement.

NOW THEREFORE, the parties stipulate and agree as follows:

4. Plaintiff Metal Lite, Inc. and Defendants Steeler, Inc. and Matt Surowiecki fully, completely, and forever release and discharge each other, with prejudice and without attorney fees or costs awarded to either party, of and from all claims, damages, causes of action, counterclaims asserted, or which could have been asserted, in this action, howsoever denominated, subject only to enforcement of this Settlement Agreement and its terms of payment of sums by Defendant to Plaintiff as hereinafter described.
5. Steeler, Inc. shall pay to Metal Lite, Inc. Seventy-Five Thousand Dollars (\$75,000), Twenty-Five Thousand Dollars of which has been paid, payment and receipt of which is hereby acknowledged, for a balance due of Fifty Thousand Dollars (\$50,000.), which shall be paid in two equal monthly installments of Twenty-Five Thousand Dollars (\$25,000.) the first due upon signing of this Agreement and the second on the same day the following month.
6. Metal Lite, Inc. shall establish Steeler, Inc. as a distributor of its products on terms no less advantageous to Steeler, Inc. as Metal Lite, Inc. provides to any of its other distributors. It is understood that unless otherwise agreed in writing, Steeler, Inc. shall not further manufacture the Product as defined following.
7. Metal Lite, Inc. warrants that it is the owner of Patent No. 5,127,203 for "Seismic/Fire-Resistant Wall Structure and Method" and the product and technology described therein ("Product") and thus rightfully empowered to settle claims of infringement pertaining thereto. Metal Lite, Inc. agrees to indemnify and defend Steeler, Inc. against claims of patent infringement arising out of Steeler's manufacture of the Product prior to this Agreement.
8. Metal Lite, Inc.'s liability under paragraph 7 is conditioned on prompt notice by Steeler, Inc. to Metal Lite, Inc. of such claims after Steeler, Inc. receives notice of their existence and, provided further,

SETTLEMENT AGREEMENT

Page 1 of 1

Steeler, Inc. offers Metal Lite, Inc. an opportunity, to the extent permissible by the governing law, to assume their defense. In the event Metal Lite, Inc. assumes the defense of any such claim of patent infringement, Steeler, Inc. (i) shall, at its expense, furnish Metal Lite, Inc. with any information in Steeler, Inc.'s possession or control that Metal Lite, Inc. reasonably may request for such defense, and Steeler, Inc. (ii) reserves the right to continue to participate in the defense of its interests, at its own cost and expense. Metal Lite, Inc. shall not be liable for any portion of any settlement or compromise unless, prior to any such agreement, Steeler, Inc. notifies Metal Lite, Inc. of the proposed settlement or compromise and Metal Lite, Inc. fails to assume the defense of said claim.

9. The terms and conditions of this Settlement Agreement are confidential and shall not be disclosed to any third party except as may be required by court order or rules of court. Notwithstanding the above, disclosures within the Corporate organization shall not be deemed a disclosure for this purpose. The Corporate organization for this purpose shall include retained legal counsel, accountants, and corporate bankers, and other similar professionals who are under a duty of confidentiality to the corporation. Reference to the account receivable created by the Agreement without identifying reference to Steeler, Inc. also shall not be deemed a disclosure for this purpose. This duty of nondisclosure shall terminate upon contract default by Steeler, Inc.
10. By their signature below, each party has designated a person to execute the Agreement and represents and warrants to all other parties that such person signing is authorized to execute this Settlement Agreement on behalf of the respective party, and each such party indemnifies, defends, and holds harmless the other party from any claim that the person was not so authorized.
11. By their signatures below, counsel for each party represents and warrants that he has fully explained the terms, conditions, and legal consequences of this settlement to his client and his client has expressed an understanding thereof.

Effective the date last given below.


Steeler, Inc.

Metal Lite, Inc.

By \_\_\_\_\_  
Matt Surowiecki  
President  
Date: \_\_\_\_\_

By \_\_\_\_\_  
Tom Herren  
President  
Date: \_\_\_\_\_

\_\_\_\_\_  
Matt Surowiecki  
Individually  
Date: \_\_\_\_\_



David L. Tingey, WSBA 11,545  
Attorney for Steeler and Surowiecki

\_\_\_\_\_  
Mark Plager, SBN 192259  
Attorney for Metal Lite, Inc.

Steeler, Inc. offers Metal Lite, Inc. an opportunity, to the extent permissible by the governing law, to assume their defense. In the event Metal Lite, Inc. assumes the defense of any such claim of patent infringement, Steeler, Inc. (i) shall, at its expense, furnish Metal Lite, Inc. with any information in Steeler, Inc.'s possession or control that Metal Lite, Inc. reasonably may request for such defense, and Steeler, Inc. (ii) reserves the right to continue to participate in the defense of its interests, at its own cost and expense. Metal Lite, Inc. shall not be liable for any portion of any settlement or compromise unless, prior to any such agreement, Steeler, Inc. notifies Metal Lite, Inc. of the proposed settlement or compromise and Metal Lite, Inc. fails to assume the defense of said claim.

9. The terms and conditions of this Settlement Agreement are confidential and shall not be disclosed to any third party except as may be required by court order or rules of court. Notwithstanding the above, disclosures within the Corporate organization shall not be deemed a disclosure for this purpose. The Corporate organization for this purpose shall include retained legal counsel, accountants, and corporate bankers, and other similar professionals who are under a duty of confidentiality to the corporation. Reference to the account receivable created by the Agreement without identifying reference to Steeler, Inc. also shall not be deemed a disclosure for this purpose. This duty of nondisclosure shall terminate upon contract default by Steeler, Inc.
10. By their signature below, each party has designated a person to execute the Agreement and represents and warrants to all other parties that such person signing is authorized to execute this Settlement Agreement on behalf of the respective party, and each such party indemnifies, defends, and holds harmless the other party from any claim that the person was not so authorized.
11. By their signatures below, counsel for each party represents and warrants that he has fully explained the terms, conditions, and legal consequences of this settlement to his client and his client has expressed an understanding thereof.

Effective the date last given below,

Steeler, Inc.

Metal Lite, Inc.

By

By

Matt Surowiecki  
President

Tom Herren  
President

Date: 10/1/99

Date:

Matt Surowiecki  
Individually

Date: 10/1/99

David L. Tingey, WSBA 11,545  
Attorney for Steeler and Surowiecki

Mark Plager, SBN 192259  
Attorney for Metal Lite, Inc.





## **EXHIBIT “D”**

**INVOICE****METAL-LITE, INC.**

P.O. BOX 695

PLACENTIA, CA 92871 9918



DATE

INVOICE #

010615

8/20/2000

(714) 632-5736 • FAX (714) 632-5738

**BILL TO:****SHIP TO:**

STEELER, INC.  
10013 MARTIN LUTHER KING JR. SOUTH  
SEATTLE, WA 98278

STEELER, INC.  
6851 SMITH AVE  
NEWARK, CA 94560  
MATHEW

P.O. NUMBER	TERMS	REP	SHIP	VIA	F.O.B.	PROJECT
-------------	-------	-----	------	-----	--------	---------

601499 30 DAY PAYMENT 8/20/2000 RET. ADDRESS METAL-LITE

QUANTITY	ITEM CODE	DESCRIPTION	PRICE EACH	AMOUNT
10000	SL 616	SLOTTED TRACK 6" 16 GAUGE	1.50	15000.00
10000	SL 618	SLOTTED TRACK 3 1/2" 16 GAUGE	1.50	15000.00
10000	SL 619	SLOTTED TRACK 6" 18 GAUGE	1.50	15000.00
10000	SL 620	SLOTTED TRACK 6" 20 GAUGE	1.50	15000.00
10000	SL 621	SLOTTED TRACK 6" 22 GAUGE	1.50	15000.00
10000	SL 622	SLOTTED TRACK 6" 24 GAUGE	1.50	15000.00

ORDERED BY

PRODUCT DISCOUNT AVAILABLE ONLY IF PAID WITHIN 20 DAYS OF THE  
DUE DATE.

**TOTAL****\$20,111.20**



METAL-LITE, INC.

May 26, 2000

Via Facsimile & U.S. Mail  
(206) 722-4000

Matt Surowiecki, President  
Steeler, Inc.  
10023 Martin King, Jr. Way, South  
Seattle, Washington 98178

Re: MLI Invoice No. 010615

Dear Matt,

Metal-Lite, Inc. has not received payment for the above invoice representing \$20,111.20. I previously reminded you of this outstanding invoice during one of our past telephone conversations, and my attorney reminded you of your delinquency on May 18, 2000. Payment is now substantially overdue. If you do not remit payment by **June 2, 2000**, my attorney as been instructed to initiate a collections action against Steeler, Inc. here in Southern California. To avoid the hassle of litigation, I would suggest you pay this outstanding amount immediately.

Very truly yours,

  
Thomas R. Herren  
President



1160 North Blue Gum Avenue  
Anaheim, California 92806  
(800) 886-6824  
TEL (714) 632-5736  
FAX (714) 632-5738

CHICAGO OFFICE  
(800) 711-9957

<http://www.metal-lite.com>

# FAX COVER SHEET

DATE: 5/26/00 TIME: PAGE 1 OF 2

TO: Matt Susnowicki @ Steeles, Inc.

FAX: (206) 722-4000

PHONE:

FROM: Thomas Herren

COMMENTS: Matt.

Please review.

1160 North Blue Gum Avenue  
Anaheim, California 92806

(800) 886-6824  
TEL (714) 632-5736  
FAX (847) 608-6975  
FAX (714) 632-5738



Chicago Office  
735 Schneider Dr. Unit # 1  
South Elgin, IL. 60177  
TEL (800) 711-9957

TRANSMISSION VERIFICATION REPORT

TIME : 05/26/2000 08:16  
NAME :  
FAX :  
TEL :

DATE, TIME	05/26 08:16
FAC. NO./NAME	12867224000
DURATION	00:00:42
PAGE(S)	02
RESULT	OK
MODE	STANDARD ECM

## PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action, my business address is at 1160 North Blue Gum Avenue, Anaheim, California 92806

On **November 1, 2000**, I served the foregoing document described as:

**(1) First Amended Complaint**

☐ by placing ☐ the original ☐ a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

David L. Tingey  
Law Office of David L. Tingey  
321 Burnett Avenue South, Suite 303  
Renton, Washington 98055

☒ **BY MAIL** I deposited such envelope in the mail at Anaheim, California. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

☐ **BY FEDERAL EXPRESS** I am "readily" familiar with the firm's practice of collection and processing correspondence for FEDERAL EXPRESS on that same day at Anaheim, California, with the air bill showing our firm's account number to bill shipper, in the ordinary course of business.

☐ **BY FACSIMILE** I caused the document to be transmitted to (425) 228-3070, by the facsimile machine reported the transmission as complete and without error and properly issued a transmission report, a copy of which is attached hereto. Executed on November 1, 2000 at Anaheim, California

I declare under penalty of perjury under the laws of the United States of America and the State of California the foregoing is true and correct.

Executed on **November 1, 2000** Anaheim, California.

  
Mark H. Pinger