

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

ENGINEERED PRODUCTS CO.,

Plaintiff,

vs.

DONALDSON COMPANY, INC.,

Defendant.

No. C 98-2106-MWB

**PRELIMINARY AND FINAL
INSTRUCTIONS
TO THE JURY**

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VERDICT FORM

**PRELIMINARY INSTRUCTION NO. 1 - PRELIMINARY
INSTRUCTIONS**

Members of the jury, before the lawyers make their opening statements, I give you these preliminary instructions to help you better understand the trial and your role in it. Consider these instructions, together with any oral instructions given to you during the trial and the written final instructions given at the end of the trial, and apply them as a whole to the facts of the case. In considering these instructions, the order in which they are given is not important.

PRELIMINARY INSTRUCTION NO. 2 - DUTY OF JURORS

It will be your duty to decide from the evidence what the facts are on questions submitted for your determination. You, and you alone, are the judges of the facts. You will hear the evidence, decide what the facts are, and then apply those facts to the law, which I will give you in these preliminary instructions, any instructions given during the trial, and in the final instructions at the conclusion of the case. You will then deliberate and reach your verdict. You are the sole judges of the facts; but you must follow the law as stated in my instructions, whether you agree with it or not.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the parties. Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I will give it to you.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. In this case, both parties are corporations. The mere fact that a party is a corporation does not mean that it is entitled to any greater or lesser consideration by you. All persons, including corporations, stand equal before the law, and are entitled to the same fair consideration by you. When a corporation is involved, of course, it may act only through natural persons, such as its employees and administrators, as its agents.

You should not take anything I may say or do during the trial as indicating what I think of the evidence or what I think your verdict should be.

PRELIMINARY INSTRUCTION NO. 3 - QUESTIONS PRESENTED

As I explained during jury selection, EPC filed this patent infringement lawsuit against Donaldson in November 1998. In this lawsuit, EPC alleges that Donaldson has infringed Claims **2** and **3** of the ‘456 patent by selling two products, the original GMT-800, sometimes called the “Air Alert,” and the Next Generation GMT-800, sometimes called the “Next Generation Air Alert” or the “NG Air Alert.” EPC also contends that Donaldson’s infringement of the ‘456 patent by the original GMT-800 was “willful.” However, EPC does not contend that any alleged infringement by the Next Generation GMT-800 was “willful.” EPC seeks damages for Donaldson’s infringement of the ‘456 patent.

Donaldson denies that either the original GMT-800 or the Next Generation GMT-800 infringes Claim **2** or Claim **3** of the ‘456 patent. Donaldson also denies that any infringement of the ‘456 patent by the original GMT-800 was “willful.” However, Donaldson also asserts additional defenses that, if proved, may prevent EPC from recovering damages for any alleged infringement of the ‘456 patent by either the original GMT-800 or the Next Generation GMT-800. Specifically, Donaldson contends that the ‘456 patent is invalid, because the invention embodied in the ‘456 patent was used in public, or offered for sale, or both, more than one year prior to the application for the ‘456 patent. Donaldson also contends that the ‘456 patent is unenforceable, because EPC has “misused” the patent and because EPC “sat on its rights” for too long before suing Donaldson for infringement.

As I also explained during jury selection, some of the questions in this case are for you to decide, and some are for me to decide. However, because there is some overlap in the evidence pertinent to those questions, it is more efficient and economical to try all of the issues in this case in one trial.

THEREFORE,

You will decide the following questions:

(1) whether either the original GMT-800 or the Next Generation GMT-800 infringes Claim 2 or Claim 3 of the ‘456 patent;

(2) whether any infringement of the ‘456 patent by the original GMT-800 was “willful”;

(3) whether the invention embodied in the ‘456 patent was on sale or used in public more than one year before the application for the ‘456 patent, making the patent invalid;

(4) whether EPC “misused” the ‘456 patent; and

(5) if the ‘456 patent is valid and infringed by Donaldson’s original GMT-800 or Next Generation GMT-800, what damages EPC is entitled to recover for that infringement.

I will decide the following questions:

(1) whether EPC “sat on its rights” too long before suing Donaldson for infringing the ‘456 patent, so that the patent is unenforceable;

(2) if you find that EPC “misused” the ‘456 patent, then I will decide what effect, if any, that patent “misuse” should have on EPC’s ability to enforce the ‘456 patent; and

(3) if you find that Donaldson's infringement of the '456 patent by the original GMT-800 was "willful," then I will decide what effect, if any, "willful infringement" should have on EPC's damages.

I will provide you with further instructions on each of the issues that you are to decide. However, I must first explain some preliminary matters, including the burden of proof applicable to the issues in this case and an explanation of some matters unique to patent cases.

PRELIMINARY INSTRUCTION NO. 4 - BURDEN OF PROOF

In these instructions, you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claim or defense depends upon that fact. I will now explain the applicable burdens of proof and which party bears a particular burden of proof on a particular issue.

Greater weight of the evidence

The first standard of proof applicable in this case is proof “by the greater weight of the evidence.” A party with the burden to prove something by the “greater weight of the evidence” must prove that it is more likely true than not true. The “greater weight of the evidence” is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, you find that the evidence is equally balanced, then you cannot find that the issue has been proved.

The “greater weight of the evidence” is not necessarily determined by the greater number of witnesses or exhibits a party has presented. The testimony of a single witness that produces in your mind a belief in the likelihood of truth is sufficient for proof of any fact and would justify a verdict in accordance with such testimony. This is so, even though a number of witnesses may have testified to the contrary, if, after consideration of all of the evidence in the case, you hold a greater belief in the accuracy and reliability of that one witness.

EPC must prove its claims for *infringement* and *damages* by the “greater weight of the evidence.”

Clear and convincing evidence

The second standard of proof applicable in this case is proof “by clear and convincing evidence,” which is a higher burden of proof than “greater weight of the evidence.” A party with the burden to prove something “by clear and convincing evidence” must prove that it is highly probable that what the party seeks to prove is true.

EPC must prove “*willful*” *infringement* by “clear and convincing evidence.” *Donaldson* must prove its defenses of *public use or sale* and “*misuse*” of the patent by “clear and convincing evidence.”

You may have heard of the term “proof beyond a reasonable doubt.” That is a stricter standard, which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

PRELIMINARY INSTRUCTION NO. 5 - PATENTS AND PATENT TERMINOLOGY

I have provided each of you with a separate ***GLOSSARY OF PATENT TERMS***, attached to which is a copy of ***THE '456 PATENT***. You may refer to the ***GLOSSARY*** or ***THE '456 PATENT*** at any time that you think it would be helpful to understand the evidence presented in this case. At this time, I would like you to turn to your copy of ***THE '456 PATENT***, so that I can explain to you the parts of a patent.

A patent includes two basic parts, a ***written description*** of the invention and ***the patent claims***. The written description, which may include drawings, is often referred to as the ***"specification"*** of the patent.

The cover page of the '456 patent provides identifying information, including the ***date the patent issued*** and ***patent number*** along the top, as well as ***the inventor's name, the assignee, the filing date***, and a ***list of the prior art publications*** (called "References Cited") considered in the Patent Office when the patent was applied for.

The ***specification*** of the '456 patent begins with an ***abstract***, found on the cover page. The ***abstract*** is a brief statement about the subject matter of the invention.

Next, are the ***drawings***, which appear as Figures 1 to 5 on the next two pages. The drawings depict various aspects or features of the invention. They are described in words later in the patent specification. The ***written description*** of the invention appears next. In this portion of the patent, each page is divided into two columns,

which are numbered at the top of the page. The lines on each page are also numbered. The written description of the '456 patent begins at Column 1, line 1, and continues to Column 6, line 36. It includes a *background section*, a *summary of the invention*, and a *detailed description of the “preferred embodiment,”* which is a specific example of how to practice the patent.

After the specification, you will see one or more numbered paragraphs. These are called the *claims*. The claims may be divided into a number of parts or steps, referred to as “*claim limitations*.” In the '456 patent, the claims begin at Column 6, line 37 and continue to the end of the patent, at Column 8, line 60. In this case, EPC contends that Donaldson’s original GMT-800 and Next Generation GMT-800 infringe Claims **2** and **3** of the '456 patent. As I will explain in more detail in subsequent instructions, Claims **2** and **3** include the limitations of Claim **1**, that is, they are “dependent” from Claim **1**. Claim **1** begins in the middle of Column 6, at line 37; Claim **2** begins at the bottom of Column 7; and Claim **3** carries over to the top of Column 8. Donaldson denies that either the original GMT-800 or the Next Generation GMT-800 infringes Claim **2** or Claim **3** of the '456 patent. Donaldson also asserts additional defenses to EPC’s claims.

The language of patent claims may not be clear to you, or its meaning may be disputed by the parties. I have determined the meaning of some of the claim language as a matter of law. My construction of the meaning of certain claim language appears in the *GLOSSARY OF PATENT TERMS*. You must use these meanings when you decide the issues of infringement and invalidity, even if you do not agree with them.

PRELIMINARY INSTRUCTION NO. 6 - EPC'S CLAIMS

We can now return to the parties' specific contentions in this lawsuit, beginning with EPC's claims. EPC contends that Donaldson made two products that infringe Claims 2 and 3 of the '456 patent: (1) the original GMT-800, sometimes called the "Air Alert," which Donaldson manufactured and sold from 1998 to 1999; and (2) the Next Generation GMT-800, sometimes called the "NG Air Alert," which Donaldson manufactured and sold from 1999 through May of 2001. Donaldson denies that either the original GMT-800 or the Next Generation GMT-800 infringes Claim 2 or Claim 3 of the '456 patent. Donaldson also denies that any infringement of the '456 patent by the original GMT-800 was "willful." You must give separate consideration to whether each of Donaldson's devices infringes the '456 patent. EPC also contends that Donaldson "willfully infringed" the '456 patent by manufacturing and selling the original GMT-800, which Donaldson denies. However, EPC does not contend that any infringement by the Next Generation GMT-800 was "willful."

Infringement

EPC may prove that the original GMT-800 and the Next Generation GMT-800 (the "accused devices") infringe Claim 2 or Claim 3 of the '456 patent in either of two ways. The first is called "*literal infringement*." To prove "literal" infringement of either accused device, EPC must prove by the greater weight of the evidence that that accused device contains each and every limitation of Claim 2 or

Claim 3 (or both) of the '456 patent just as each limitation is described in the claim language, using the meaning of claim language that I have given you in the **Glossary**, or if I have not given you the meaning of specific claim language, using the plain and ordinary meaning to one of ordinary skill in the art.

The second way that EPC may prove that the original GMT-800 and the Next Generation GMT-800 infringe Claim 2 or 3 of the '456 patent is called *infringement under the “doctrine of equivalents.”* To prove infringement under the doctrine of equivalents by either accused device, EPC must prove by the greater weight of the evidence that each limitation of Claim 2 or Claim 3 (or both) of the '456 patent is either literally present in that accused device, or if it is not literally present, that that accused device contains an equivalent structure. In order for a structure to be “equivalent,” the differences between the missing claim limitation and the original GMT-800 or the Next Generation GMT-800 must be insubstantial. I will explain in my final instructions the various ways in which you can determine whether or not differences, if any, are “insubstantial.”

Claims 2 and 3 are “dependent” claims, as “dependent” claims are explained in the **Glossary**. They are “dependent” on Claim 1, which is the “independent” claim. Therefore, to prove that Claim 2 is infringed, EPC must prove that all of the limitations of Claim 1 *plus* the limitations of Claim 2 are present in the accused device. To prove that Claim 3 is infringed, EPC must prove that all of the limitations of Claims 1 and 2 *plus* the limitations of Claim 3 are present in the accused device. Claim 3 states a specific structure for the “guiding means” stated in means-plus-function form in Claim 2. Donaldson admits that the limitations of

Claim 1 are literally present in the original GMT-800, but denies the additional limitations of either Claim 2 or Claim 3 are present, either literally or equivalently, in the original GMT-800. Donaldson denies that all of the limitations of any of the claims at issue are present, either literally or equivalently, in the Next Generation GMT-800.

Damages

EPC contends that it suffered damages as a result of Donaldson's infringement of the '456 patent by the original GMT-800 and the Next Generation GMT-800. EPC seeks damages based on either (a) lost profits that EPC would have made if Donaldson had not infringed, or (b) a reasonable royalty on each of Donaldson's sales of infringing products. To recover damages, EPC must prove by the greater weight of the evidence (1) that it has suffered damages as a result of Donaldson's infringement, and (2) the amount of those damages.

Willful infringement

EPC contends that Donaldson "willfully infringed" the '456 patent by making and selling the original GMT-800. To prove "willful" infringement, EPC must prove by clear and convincing evidence that Donaldson knew of the '456 patent and did not have a reasonable belief as to any of the following: (1) that the '456 patent was invalid; (2) that the '456 patent was unenforceable; or (3) that the original GMT-800 did not infringe the '456 patent. If you determine that Donaldson "willfully" infringed the '456 patent by making and selling the original GMT-800,

then I will determine what effect, if any, that determination will have on EPC's damages.

This is only a preliminary outline of EPC's claims. At the end of the trial, I will give you further final written instructions explaining these claims. Because the final instructions are more detailed, those instructions govern on EPC's claims.

PRELIMINARY INSTRUCTION NO. 7 - DONALDSON'S DEFENSES

In addition to denying that either the original GMT-800 or the Next Generation GMT-800 infringes the '456 patent, Donaldson asserts various defenses to EPC's patent infringement claims. Donaldson's contentions that are for you to determine are (1) whether the invention embodied in the '456 patent was on sale or used in public more than one year before the application for the '456 patent, making the patent invalid; and (2) whether EPC "misused" the '456 patent.

Invalidity

The public use, sale, or offer for sale of a product containing an invention more than one year before the application for a patent embodying that invention makes the patent subsequently issued invalid. To prove the "*on sale*" *invalidity defense*, Donaldson must prove by clear and convincing evidence that EPC made a commercial offer for sale of a product containing the invention covered by the '456 patent to Mack Trucks on or before June 18, 1977. To prove the "*in use*" *invalidity defense*, Donaldson must prove by clear and convincing evidence that EPC used in public a product or prototype containing the invention covered by the '456 patent on or before June 18, 1977. However, there may be circumstances under which a "use" or "sale" for experimental purposes, rather than commercial purposes, does not make a patent invalid.

"Invalidity" is a complete defense to a claim of patent infringement. Therefore, if you find that Donaldson has proved either the "on sale" or "in use"

invalidity defense by clear and convincing evidence, then you cannot award any damages to EPC on its patent infringement claims.

“Misuse” of the patent

Donaldson also asserts that EPC “misused” the ‘456 patent. To prove the “misuse” defense, Donaldson must prove one or both of the following by clear and convincing evidence: (1) that EPC entered into arrangements or agreements that effectively extended the term of the ‘456 patent beyond its termination on May 1, 2001, by requiring royalties from Delphi for the right to practice the patent; or (2) that EPC marked its products after May 1, 2001, with an expired patent number. If you find that EPC “misused” the ‘456 patent, then I will decide what effect, if any, that patent “misuse” should have on EPC’s ability to enforce the ‘456 patent.

This is only a preliminary outline of Donaldson’s defenses. At the end of the trial, I will give you further final written instructions explaining these defenses. Because the final instructions are more detailed, those instructions govern on Donaldson’s defenses.

PRELIMINARY INSTRUCTION NO. 8 - ORDER OF TRIAL

The trial will proceed as follows:

After these preliminary instructions, the plaintiff's attorney may make an opening statement. Next, the lawyer for the defendant may make an opening statement. An opening statement is not evidence, but simply a summary of what the lawyer expects the evidence to be.

After opening statements, the plaintiff will present evidence and call witnesses and the lawyer for the defendant may cross-examine them. Following the plaintiff's case, the defendant may present evidence and call witnesses and the lawyer for the plaintiff may cross-examine them.

After the evidence is concluded, I will give you most of the final instructions. The lawyers will then make their closing arguments to summarize and interpret the evidence for you. As with opening statements, closing arguments are not evidence. I will then give you the remaining final instruction on deliberations, and you will retire to deliberate on your verdict.

PRELIMINARY INSTRUCTION NO. 9 - DEFINITION OF EVIDENCE

Evidence is:

1. Testimony.
2. Exhibits I admit into evidence.
3. Stipulations, which are agreements between the parties.

Evidence may be “direct” or “circumstantial.” The law makes no distinction between the weight to be given to direct and circumstantial evidence. The weight to be given any evidence is for you to decide.

A particular item of evidence is sometimes admitted only for a limited purpose, and not for any other purpose. I will tell you if that happens, and instruct you on the purposes for which the item can and cannot be used.

The fact that an exhibit may be shown to you does not mean that you must rely on it more than you rely on other evidence.

The following are not evidence:

1. Statements, arguments, questions, and comments by the lawyers.
2. Objections and rulings on objections.
3. Testimony I tell you to disregard.
4. Anything you saw or heard about this case outside the courtroom.

The weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. Also, the weight of the evidence is not necessarily determined merely by the number or volume of documents or exhibits. The weight of evidence depends upon its quality,

which means how convincing it is, and not necessarily upon its quantity. For example, you may choose to believe the testimony of one witness, if you find that witness to be convincing, even if a number of other witnesses contradict that witness's testimony. The quality and weight of the evidence are for you to decide.

PRELIMINARY INSTRUCTION NO. 10 - CREDIBILITY OF WITNESSES

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness says, only part of it, or none of it.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the witness's drug or alcohol use or addiction, if any, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe. In deciding whether or not to believe a witness, keep in mind that people sometimes see or hear things differently and sometimes forget things. You need to consider, therefore, whether a contradiction results from an innocent misrecollection or sincere lapse of memory, or instead from an intentional falsehood or pretended lapse of memory.

Ordinarily, witnesses may only testify to factual matters within their personal knowledge. However, you may hear evidence from persons described as experts. Persons may become qualified as experts in some field by knowledge, skill, training, education, or experience. Such experts may state their opinions on matters in that field and may also state the reasons for their opinions. You should consider expert testimony just like any other testimony. You may believe all of what an expert says,

only part of it, or none of it, considering the expert's qualifications, the soundness of the reasons given for the opinion, the acceptability of the methods used, any reason the expert may be biased, and all of the other evidence in the case.

PRELIMINARY INSTRUCTION NO. 11 - STIPULATED FACTS

The plaintiff and the defendant have agreed or “stipulated” to certain facts and have reduced these facts to a written agreement or stipulation. Either counsel may, throughout the trial, read to you all or a portion of the stipulated facts. You should treat these stipulated facts as having been proved.

PRELIMINARY INSTRUCTION NO. 12 - DEPOSITIONS

Certain testimony from a deposition may be read into evidence. A deposition is testimony taken under oath before the trial and preserved in writing. Consider that testimony as if it had been given in court.

PRELIMINARY INSTRUCTION NO. 13 - INTERROGATORIES

During this trial, you may hear the word “interrogatory.” An interrogatory is a written question asked by one party of another, who must answer it under oath in writing. Consider interrogatories and the answers to them as if the questions had been asked and answered here in court.

PRELIMINARY INSTRUCTION NO. 14 - OBJECTIONS

The lawyers may make objections and motions during the trial that I must rule upon. If I sustain an objection to a question before it is answered, do not draw any inferences or conclusions from the question itself. Also, the lawyers have a duty to object to testimony or other evidence that they believe is not properly admissible. Do not hold it against a lawyer or the party the lawyer represents because the lawyer has made objections.

PRELIMINARY INSTRUCTION NO. 15 - BENCH CONFERENCES

During the trial it may be necessary for me to talk with the lawyers out of your hearing, either by having a bench conference here while you are present in the courtroom, or by calling a recess. Please be patient, because while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence, to avoid confusion and error, and to save your valuable time. We will, of course, do what we can to keep the number and length of these conferences to a minimum.

PRELIMINARY INSTRUCTION NO. 16 - NOTE-TAKING

If you want to take notes during the trial, you may, but be sure that your note-taking does not interfere with listening to and considering all the evidence. If you choose not to take notes, remember that it is your own individual responsibility to listen carefully to the evidence.

Notes you take during the trial are not necessarily more reliable than your memory or another juror's memory. Therefore, you should not be overly influenced by the notes.

If you take notes, do not discuss them with anyone before you begin your deliberations. At the end of each day, please leave your notes on your chair. At the end of the trial, you may take your notes out of the notebook and keep them, or leave them, and we will destroy them. No one will read the notes, either during or after the trial.

You will notice that we have an official court reporter making a record of the trial. However, we will not have typewritten transcripts of this record available for your use in reaching your verdict.

PRELIMINARY INSTRUCTION NO. 17 - CONDUCT OF JURORS DURING TRIAL

You will not be required to remain together while court is in recess. However, to insure fairness, you as jurors must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to decide on your verdict.

Second, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended and you have been discharged as jurors.

Third, when you are outside the courtroom do not let anyone tell you anything about the case, or about anyone involved with it until the trial has ended and your verdict has been accepted by me. If someone should try to talk to you about the case during the trial, please report it to me.

Fourth, during the trial you should not talk with or speak to any of the parties, lawyers, or witnesses involved in this case—you should not even pass the time of day with any of them. It is important that you not only do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the case sees you talking to a person from the other side—even if it is simply to pass the time of day—an unwarranted and unnecessary suspicion about your fairness might be aroused. If any lawyer, party, or witness does not speak to you when you pass in the hall, ride the elevator or the like, it is because they are not supposed to talk or visit with you.

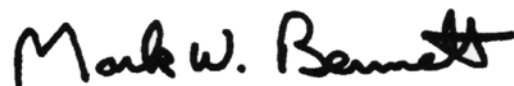
Fifth, do not read any news stories or articles about the case, or about anyone involved with it, or listen to any radio or television reports about the case or about anyone involved with it. If you want, you can have your spouse or a friend clip out any stories and set them aside to give you after the trial is over. I can assure you, however, that by the time you have heard the evidence in this case you will know more about the matter than anyone will learn through the news media.

Sixth, do not do any research—on the Internet, in libraries, in the newspapers, or in any other way—or make any investigation *about this case* on your own. You must decide this case based on the evidence presented in court and the law as I explain it to you in my instructions.

Seventh, do not make up your mind during the trial about what the verdict should be. Keep an open mind until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.

Eighth, if at anytime during the trial you have a problem that you would like to bring to my attention, or if you feel ill or need to go to the restroom, please send a note to the Court Security Officer, who will deliver it to me. I want you to be comfortable, so please do not hesitate to inform me of any problem.

DATED this 26th day of April, 2004.



MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

FINAL INSTRUCTION NO. 1 - INTRODUCTION

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

In considering these instructions, the order in which they are given is not important.

Neither in these instructions nor in any ruling, action, or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

FINAL INSTRUCTION NO. 2 - IMPEACHMENT OF WITNESSES

In Preliminary Instruction No. 10, I instructed you generally on the credibility of witnesses. However, I must now give you some further instructions on how the credibility of witnesses can be “impeached.”

Any witness may be discredited or “impeached” by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and, therefore, whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 3 - EPC'S CLAIMS

EPC contends that Donaldson made two products that infringe Claims **2** and **3** of the '456 patent: (1) the original GMT-800, sometimes called the "Air Alert," which Donaldson manufactured and sold from 1998 to 1999; and (2) the Next Generation GMT-800, sometimes called the "NG Air Alert," which Donaldson manufactured and sold from 1999 through May of 2001. Donaldson denies that either the original GMT-800 or the Next Generation GMT-800 infringes Claim **2** or Claim **3** of the '456 patent. Donaldson also denies that any infringement of the '456 patent by the original GMT-800 was "willful." You must give separate consideration to whether each of Donaldson's devices infringes the '456 patent. EPC also contends that Donaldson "willfully infringed" the '456 patent by manufacturing and selling the original GMT-800, which Donaldson denies. However, EPC does not contend that any infringement by the Next Generation GMT-800 was "willful." I will explain EPC's claims in the following instructions.

FINAL INSTRUCTION NO. 4 - EPC'S CLAIMS— “LITERAL” INFRINGEMENT

The first way that EPC may prove that the original GMT-800 and the Next Generation GMT-800 (the “accused devices”) infringe Claim 2 or Claim 3 of the ‘456 patent is called “*literal*” *infringement*. To prove “literal” infringement by either accused device, EPC must prove by the greater weight of the evidence that that accused device contains each and every limitation of Claim 2 or Claim 3 (or both) of the ‘456 patent. Again, you must give separate consideration to whether each of Donaldson’s devices “literally” infringes the ‘456 patent.

In reaching your decision on infringement, keep in mind that only the claims of a patent can be infringed. You must compare patent Claims 2 and 3, as I have defined them in the **Glossary**, to an accused device, and determine whether or not there is infringement of each claim by that accused device. You should not compare either the original GMT-800 or the Next Generation GMT-800 with any specific example set out in the ‘456 patent or with EPC’s own products. The only correct comparison is with the language of the Claim itself, as I have explained the meaning of that language to you.

A claim limitation is “literally” present in the original GMT-800 or the Next Generation GMT-800 if it exists in that accused device *just as it is described in the claim language*, using the meaning of claim language that I have given you in the **Glossary**, or if I have not given you the meaning of specific claim language, using the plain and ordinary meaning to one of ordinary skill in the art. You may find that

an accused device infringes a claim of the patent if it is reasonably capable of satisfying each claim limitation, even though it may also be capable of non-infringing modes of operation. However, if the accused device is only capable of satisfying each claim limitation after being misadjusted or altered from its original design, then it does not infringe.

Claims **2** and **3** of the '456 patent are "dependent claims," as "dependent" claims are explained in the **Glossary**. They are "dependent" on Claim **1**, which is the "independent" claim. A dependent claim includes each of the limitations of the independent claim to which it refers, plus additional elements. Thus, Claim **2** includes each of the limitations of Claim **1**, and Claim **3** includes each of the limitations of Claim **1** and Claim **2**. Therefore, to prove literal infringement of Claim **2** by one of the accused devices, EPC must prove by the greater weight of the evidence that each limitation of Claim **1** is present in that accused device just as described in the claim language, then prove that each limitation of Claim **2** is also present in that accused device just as described in the claim language. To prove literal infringement of Claim **3** by one of the accused devices, EPC must prove by the greater weight of the evidence that each limitation of Claims **1** and **2** is present in that accused device just as described in the claim language, then prove that each limitation of Claim **3** is also present in that accused device just as described in the claim language. Claim **3** states a specific structure for the "guiding means" stated in means-plus-function form in Claim **2**. Thus, the "additional elements" in Claim **3** are the specific structures that perform the "guiding" function specified in Claim **2**. To put it another way, the "guiding means" limitation of Claim **2** is literally present

in an accused device if the specific structure stated in Claim 3 is literally present in that accused device and that specific structure performs the identical function of the “guiding means” in Claim 2. Donaldson admits that the limitations of Claim 1 are literally present in the original GMT-800, but denies that the additional limitations of either Claim 2 or Claim 3 are literally present in the original GMT-800. Donaldson also denies that all of the limitations of any of the claims at issue are literally present in the Next Generation GMT-800.

Claim 1 includes a means-plus-function limitation at Column 7, line 52 (“means for selectively disengaging. . . .”) and Claim 2, which begins at Column 7, line 56, is a means-plus-function limitation (“means for guiding the indicating member. . . .”). To prove literal infringement of a means-plus-function limitation, EPC must prove the following: (1) that the accused device in question contains a structure that performs the *identical* function to the function recited in the means-plus-function limitation, as I have explained that function to you in the **Glossary**; and (2) that the structure in the accused device in question that performs that function is either *identical or equivalent to* the corresponding structure disclosed in the patent specification. I have explained the *function* and the *corresponding structure* for these means-plus-function limitations in the **Glossary**. There are two ways to determine whether the structure of an accused device is “equivalent” to the structure disclosed in the specification of the ‘456 patent. The first way is to determine whether or not persons of ordinary skill in the art believe that the structure disclosed in the specification and the structure of the accused device are interchangeable. The second way is to determine whether or not the structure of an

accused device performs the identical function in substantially the same way to achieve substantially the same result. In considering equivalents, the individual components of an overall structure are not claim limitations. Therefore, there does not need to be a component-by-component comparison of the corresponding structure and the accused structure, and structures with different numbers of parts may still infringe.

In deciding whether structures in the original GMT-800 or the Next Generation GMT-800 are “equivalent” to corresponding structures for the means-plus-function limitations in the ‘456 patent, you may consider evidence that Donaldson obtained patents of its own for the Next Generation GMT-800 and for the “calibration wheel” structure in both the original GMT-800 and the Next Generation GMT-800. However, evidence that Donaldson obtained its own patents does not necessarily mean that structures in either of the accused devices are not equivalents of corresponding structures for means-plus-function limitations in the ‘456 patent. Rather, you may consider the subject matter of Donaldson’s patents and any other evidence of the differences and similarities between the means-plus-function limitations of the ‘456 patent and Donaldson’s patents to help you determine whether or not the structures in the original GMT-800 or the Next Generation GMT-800 are substantially different from the corresponding structures for the means-plus-function limitations in the ‘456 patent. Such evidence may include the extent to which the ‘456 patent and this litigation were disclosed to the Patent and Trademark Office during the prosecution of Donaldson’s patents and the extent to which the patent examiner considered differences between Donaldson’s inventions and the ‘456 patent

before allowing Donaldson's patents to issue. Donaldson's own patents are only relevant, however, to your consideration of whether structures in the original GMT-800 or Next Generation GMT-800 are "equivalent" to corresponding structures for the means-plus-function limitations in the '456 patent to the extent that Donaldson's own patents cover the Next Generation GMT-800 or the "calibration wheel" structure in both the original GMT-800 and the Next Generation GMT-800.

EPC does not have to prove that Donaldson knew that either the original GMT-800 or the Next Generation GMT-800 infringed the '456 patent. A person may be found to have infringed a patent even if he or she believes in good faith that what he or she is doing is not an infringement of any patent and even if he or she does not even know that the patent exists.

You must consider separately whether or not the original GMT-800 and the Next Generation GMT-800 "literally" infringe the '456 patent. You must also consider separately whether the accused devices "literally" infringe Claim 2 or Claim 3 of the '456 patent. You must reach your decision as to each assertion of "literal" infringement based on my instructions about the meaning and scope of the claims, the legal requirements for "literal" infringement, and the evidence presented to you by the parties. If EPC has proved by the greater weight of the evidence that each and every limitation of Claim 2 or Claim 3 (or both) is literally present in an accused device, then you must find in favor of EPC on its claim of "literal" infringement of that claim of the patent by that accused device. However, if EPC has failed to prove by the greater weight of the evidence that each and every limitation of a particular claim of the patent is literally present in an accused device,

then you must find in favor of Donaldson on EPC's claim of "literal" infringement of that claim of the patent by that accused device.

FINAL INSTRUCTION NO. 5 - EPC'S CLAIMS— “DOCTRINE OF EQUIVALENTS” INFRINGEMENT

The second way that EPC may prove that the original GMT-800 and the Next Generation GMT-800 infringe Claim 2 or 3 of the ‘456 patent is called *infringement under the “doctrine of equivalents.”* To prove infringement under the doctrine of equivalents by either accused device, EPC must prove by the greater weight of the evidence that each limitation of Claim 2 or Claim 3 (or both) of the ‘456 patent is either literally present in that accused device, or if it is not literally present, that that accused device contains an equivalent structure.

Again, you must give separate consideration to whether each of Donaldson’s devices infringes the ‘456 patent under the doctrine of equivalents. Also, just as for “literal” infringement, for “doctrine of equivalents” infringement, only claims of the patent can be infringed, so the only correct comparison is with the language of a claim itself. For infringement under the doctrine of equivalents, you must compare patent Claims 2 and 3, as I have defined them in the **Glossary**, to each accused device, and determine whether or not each limitation of the patent claim in question is present in that accused device.

However, proof that a claim limitation is present for “doctrine of equivalents” infringement is somewhat different from proof that a claim limitation is present for purposes of “literal” infringement. For purposes of “doctrine of equivalents” infringement, a claim limitation may be literally present, but if it is not literally present, it may be present by “equivalence.” A claim limitation is present in an

accused device by equivalence *if the differences between the accused device and the patent claims are insubstantial*. One way to determine whether differences are insubstantial is to look at whether or not an accused device performs substantially the same function, in substantially the same way, to achieve substantially the same result as the claimed invention. Another way is to consider whether or not people of ordinary skill in the field of the invention believe that the structure of the accused device and the structure recited in the claim limitation in the '456 patent are interchangeable.

Dependent claims, such as Claims 2 and 3 of the '456 patent, include each of the limitations of the independent claim to which the dependent claims refer, plus additional elements. Thus, each limitation of the independent claim *and* the dependent claim in question must be present, either literally or equivalently, in an accused device for that accused device to infringe a dependent claim of the '456 patent under the doctrine of equivalents. Donaldson admits that the limitations of Claim 1 are literally present in the original GMT-800, but denies that the additional limitations of either Claim 2 or Claim 3 are present, either literally or equivalently, in the original GMT-800. Donaldson also denies that all of the limitations of any of the claims at issue are present, either literally or equivalently, in the Next Generation GMT-800.

Proof of infringement of a means-plus-function limitation under the doctrine of equivalents is somewhat different from proof of "literal" infringement of a means-plus-function limitation. To prove "doctrine of equivalents" infringement of a means-plus-function limitation, EPC must prove the following: (1) that the Next

Generation GMT-800 contains a structure that performs *substantially* the same function as is recited in the means-plus-function limitation, as I have explained that function to you in the **Glossary**; and (2) that the structure in the Next Generation GMT-800 that performs that function is either *identical or equivalent to* the corresponding structure disclosed in the patent specification.

“Equivalence” is determined at the time of the activities accused of infringement, and not by what was known at the time that the patent application was filed or when the patent issued. Thus, the inventor need not have foreseen, and the patent need not describe, all potential equivalents to the invention covered by the claims. Also, slight changes in technique or improvements made possible by technology developed after the patent application is filed may still be “equivalent” for “doctrine of equivalents” purposes.

In deciding whether structures in the original GMT-800 or the Next Generation GMT-800 are “equivalent” to structures in limitations of the ‘456 patent, you may consider evidence that Donaldson obtained patents of its own for the Next Generation GMT-800 and for the “calibration wheel” structure in both the original GMT-800 and the Next Generation GMT-800. However, evidence that Donaldson obtained its own patents does not necessarily mean that structures in either of the accused devices are not equivalents of structures defined in limitations in the ‘456 patent. Rather, you may consider the subject matter of Donaldson’s patents and any other evidence of the differences and similarities between the limitations of the ‘456 patent and Donaldson’s patents to help you determine whether or not the structures in the original GMT-800 or the Next Generation GMT-800 are substantially different

from structures defined in limitations in the '456 patent. Such evidence may include the extent to which the '456 patent and this litigation were disclosed to the Patent and Trademark Office during the prosecution of Donaldson's patents and the extent to which the patent examiner considered differences between Donaldson's inventions and the '456 patent before allowing Donaldson's patents to issue. Donaldson's own patents are only relevant, however, to your consideration of whether structures in the original GMT-800 or the Next Generation GMT-800 are "equivalent" to corresponding structures for the limitations in the '456 patent to the extent that Donaldson's own patents cover the Next Generation GMT-800 or the "calibration wheel" structure in both the original GMT-800 and the Next Generation GMT-800.

You must give separate consideration to EPC's claims of "doctrine of equivalents" infringement by the original GMT-800 and the Next Generation GMT-800. You must also consider "doctrine of equivalents" infringement of each patent claim separately. You must reach your decision as to each assertion of "doctrine of equivalents" infringement based on my instructions about the meaning and scope of the claims, the legal requirements for "doctrine of equivalents" infringement, and the evidence presented to you by the parties. If EPC has proved by the greater weight of the evidence that each and every limitation of Claim 2 or Claim 3 (or both) is present, either literally or by equivalence, in an accused device, then you must find in favor of EPC on its claim of "doctrine of equivalents" infringement of that claim of the patent by that accused device. However, if EPC has failed to prove by the greater weight of the evidence that each and every limitation of a particular claim of the patent is present, either literally or by equivalence, in an accused device, then

you must find in favor of Donaldson on EPC's claim of "doctrine of equivalents" infringement of that claim of the patent by that accused device.

**FINAL INSTRUCTION NO. 6 - EPC'S CLAIMS—
“WILLFUL” INFRINGEMENT**

EPC contends that Donaldson “willfully infringed” the ‘456 patent by making and selling the original GMT-800. EPC does *not* contend that Donaldson “willfully infringed” the ‘456 patent by making and selling the Next Generation GMT-800. The issue of “willful” infringement is relevant to the amount of damages to which EPC may be entitled for Donaldson’s infringement of the ‘456 patent by the original GMT-800, if the ‘456 patent is also valid and enforceable. A finding of “willful” infringement may, in certain circumstances, entitle the patent owner to increased damages. However, if you decide that Donaldson “willfully” infringed the ‘456 patent by making and selling the original GMT-800, then it is my job to decide whether or not to award increased damages to EPC.

EPC must prove “willful” infringement by clear and convincing evidence. As I explained in Preliminary Jury Instruction No. 4, “clear and convincing evidence” is a higher standard of proof than the “greater weight of the evidence” standard applicable to proof of “literal” or “doctrine of equivalents” infringement.

You must decide if infringement by the original GMT-800 was “willful,” even if you actually found that the original GMT-800 did not infringe. Therefore, to prove that Donaldson “willfully” infringed the ‘456 patent by making and selling the original GMT-800, EPC must prove the following elements by clear and convincing evidence:

One, Donaldson knew of the ‘456 patent; and

Two, Donaldson did not have a good faith, reasonable belief as to any of the following: (a) that the ‘456 patent was invalid; (b) that the ‘456 patent was unenforceable; or (c) that the original GMT-800 did not infringe the ‘456 patent.

When a person becomes aware that a patent may have relevance to his or her activities, that person has a duty to exercise due care and investigate whether or not his or her activities or proposed activities infringe any valid, enforceable claim of the patent. If that person did not do this and is found to have infringed the patent claims, then the infringement was willful.

In determining whether or not Donaldson acted in good faith, you should consider all of the circumstances, including whether or not Donaldson obtained and followed the advice of a competent lawyer. Although the absence of a lawyer’s opinion does not require you to find willfulness, the fact that an alleged infringer obtained and followed a lawyer’s advice may be evidence that infringement was not willful.

Another factor that you should consider in determining willfulness is whether or not, in designing the original GMT-800, Donaldson copied the disclosures of the ‘456 patent, or whether Donaldson instead tried to “design around” the patent by designing the original GMT-800 so that Donaldson believed it did not infringe the claims of the ‘456 patent. Evidence of copying a patent is evidence of willful infringement, as is evidence that the infringer made no attempt to “design around” the patent. On the other hand, evidence, if any, that the infringer attempted to avoid infringement by “designing around” the patent claims, even if that attempt was unsuccessful, is evidence that infringement was not willful.

Although it is my job to determine whether EPC “sat on its rights” for too long, so that the ‘456 patent is unenforceable, you may also consider evidence, if any, that Donaldson believed in good faith that EPC “sat on its rights” for too long to enforce the ‘456 patent as evidence that infringement by the original GMT-800 was not willful.

The fact that Donaldson now admits that the limitations of Claim 1 are literally present in the original GMT-800 does not necessarily mean that Donaldson’s infringement of Claim 2 or 3 was willful. All that is required to avoid a finding of willful infringement is that Donaldson had a good faith, reasonable belief, under all of the circumstances at the time it was making and selling the original GMT-800, that the original GMT-800 did not infringe the ‘456 patent, or that the ‘456 patent was unenforceable, or that the ‘456 patent was invalid.

If EPC has proved *both* of these elements by clear and convincing evidence, then you must find in favor of EPC on its claim that Donaldson “willfully infringed” the ‘456 patent by making and selling the original GMT-800. However, if EPC has failed to prove either of these elements, then you must find in favor of Donaldson on EPC’s claim of “willful infringement.”

FINAL INSTRUCTION NO. 7 - DONALDSON'S DEFENSES

In addition to denying that either the original GMT-800 or the Next Generation GMT-800 infringes the '456 patent, Donaldson asserts various defenses to EPC's patent infringement claims. These defenses, if proved, may prevent EPC from recovering damages for any alleged infringement of the '456 patent by either the original GMT-800 or the Next Generation GMT-800. Specifically, Donaldson contends (1) that the '456 patent is invalid, because the invention embodied in the '456 patent was used in public, or offered for sale, or both, more than one year prior to the application for the '456 patent; and (2) that the '456 patent is unenforceable, because EPC has "misused" the patent. I will explain these defenses in the following instructions.

FINAL INSTRUCTION NO. 8 - DONALDSON'S DEFENSES— INVALIDITY

Only a valid patent can be infringed. The public use, sale, or offer for sale of a product containing an invention more than one year before the application for a patent embodying that invention makes the patent subsequently issued invalid. The date of invention of the patent claims is irrelevant; the pertinent date is one year before the date that the patent application was filed. In this case, the pertinent date is June 18, 1977. Donaldson contends that the invention embodied in Claims **2** and **3** of the '456 patent was on sale, or used in public, or both, on or before June 18, 1977, making those claims of the '456 patent invalid. Donaldson must prove its invalidity defenses by clear and convincing evidence to invalidate the claims of the '456 patent.

“On sale” invalidity defense

To prove the “on sale” invalidity defense, Donaldson must prove by clear and convincing evidence that EPC offered a product containing the invention covered by the '456 patent for commercial sale on or before June 18, 1977. You must give separate consideration to the invalidity of Claim **2** and Claim **3** of the '456 patent. Therefore, to prove this defense as to a particular claim of the '456 patent, Donaldson must prove the following elements by clear and convincing evidence:

One, a product containing the invention covered by a particular claim of the ‘456 patent was the subject of a commercial offer for sale on or before June 18, 1977.

Donaldson contends that there was an offer to sell a product containing the invention covered by the claims of the ‘456 patent to Mack Trucks on or before June 18, 1977. Even a single offer for sale to a single commercial customer may be a commercial offer, even if the customer did not accept the offer. The commercial offer for sale does not have to be a single document or a signed contract, although the offer for sale must have been sufficiently complete as to the terms of an agreement, such as price and quantity, that the other party only needed to accept the offer to make a contract. Preliminary proposals or invitations to negotiate, on the other hand, are not enough to constitute a commercial offer for sale. You may consider whether the totality of the circumstances, including correspondence and other interactions between EPC and Mack Trucks prior to the critical date, establish a commercial offer for sale. Oral testimony of a prior sale must be corroborated by other reliable evidence of the sale, such as documentary or physical evidence made at the time of the sale, to invalidate a patent. However, as explained below, on page 52, under certain circumstances, a sale for “experimental” purposes, rather than commercial purposes, does not invalidate a patent.

Two, the product containing the invention was ready for patenting.

An invention is “ready for patenting” if the product offered for sale has been developed to the point where there was a reason to expect that it would work for its intended purpose. The product may be ready for patenting even if it is not ready for commercial production or has

not been technically perfected. However, to invalidate a particular claim of the '456 patent, the product containing the invention must meet each limitation of that claim of the '456 patent, so that the product is an embodiment of that claim. Remember that the limitations of a dependent claim, such as Claim 2 or Claim 3 of the '456 patent, include the limitations of an independent claim (in this case, Claim 1 of the '456 patent) to which the dependent claim is related.

Donaldson must prove *both* of these elements by clear and convincing evidence to establish the “on sale” invalidity defense as to a particular claim of the '456 patent. Therefore, if Donaldson proves *both* of these elements as to a particular claim of the '456 patent, then that claim is invalid, and EPC cannot recover damages for infringement of that claim. However, if Donaldson fails to prove either element as to a particular claim of the '456 patent, then that claim of the '456 patent is not invalid under the “on sale” invalidity defense.

“In use” invalidity defense

To prove the “in use” invalidity defense, Donaldson must prove by clear and convincing evidence that EPC used in public a product or prototype containing the invention covered by the '456 patent on or before June 18, 1977. Again, you must give separate consideration to the invalidity of Claim 2 and Claim 3 of the '456 patent. Therefore, to prove this defense as to a particular claim of the '456 patent, Donaldson must prove the following elements by clear and convincing evidence:

One, a product or prototype containing the invention covered by a particular claim of the ‘456 patent was used in public on or before June 18, 1977.

Donaldson contends that EPC used a product or prototype containing the invention covered by the claims of the ‘456 patent (1) in a meeting with Mack Trucks in April of 1977, and (2) at a trade show for industry members, known as the SAE, in April of 1977. A “public use” invalidating patent claims may be by anyone, including the inventor, the patent owner, or someone else. Use by someone other than the inventor or patent owner is not a “public use,” however, if the use was subject to a non-disclosure agreement. On the other hand, use by the inventor or patent owner is a “public use,” even if it was done in secret, if it was for a commercial purpose, in other words, primarily for commercial gain. A “public use” includes a public demonstration of a product or prototype containing the invention covered by the claims of the ‘456 patent. However, as explained below, on page 52, under certain circumstances, a use for “experimental” purposes, rather than commercial purposes, does not invalidate a patent.

Two, the product or prototype used in public contained all of the limitations of the particular claim of the ‘456 patent.

To invalidate a particular claim of the ‘456 patent, the product containing the invention must meet each limitation of that claim of the ‘456 patent, so that the product is an embodiment of that claim. Remember that the limitations of a dependent claim, such as Claim 2 or Claim 3 of the ‘456 patent, includes the limitations of an independent claim (in this case, Claim 1 of the ‘456 patent) to which the dependent claim is related.

Donaldson must prove *both* of these elements by clear and convincing evidence to establish the “in use” invalidity defense as to a particular claim of the ‘456 patent. Therefore, if Donaldson proves *both* of these elements as to a particular claim of the ‘456 patent, then that claim is invalid, and EPC cannot recover damages for infringement of that claim. However, if Donaldson fails to prove either element as to a particular claim of the ‘456 patent, then that claim of the ‘456 patent is not invalid under the “in use” invalidity defense.

“Experimental” sale or use

An “experimental” sale or use by the inventor or patent owner is not a sale or use for commercial purposes. In order to qualify as an “experimental” sale or use, the sale or use must be by or for the benefit of the patent owner or inventor and must relate to the claimed features of the invention. It must also be for the purposes of technological development, not commercial gain. Any commercial gain that does occur must be merely incidental to the primary purpose of experimentation. Therefore, an inventor who seeks to perfect his or her invention may conduct extensive testing without losing his or her right to obtain a patent for the invention—even if such testing occurs in the public eye. Such testing and development may encompass or even require disclosure to the public, without invalidating a subsequent patent. Experimentation includes tests needed to convince the inventor that the invention is capable of performing its intended purpose in its intended environment, and an inventor does not inappropriately delay filing an application for a patent by a genuine effort to bring his or her invention to

perfection, or to ascertain whether it will answer the purpose intended. On the other hand, a sale or use is not “experimental,” if the invention has already been “reduced to practice,” that is, if the invention is complete and its utility has been established.

Complete defense

“Invalidity” is a complete defense to a claim of patent infringement. Therefore, if you find that Donaldson has proved either the “on sale” or “in use” invalidity defense as to a particular patent claim by clear and convincing evidence, then you cannot award any damages to EPC for infringement of that patent claim.

**FINAL INSTRUCTION NO. 9 - DONALDSON'S DEFENSES—
UNENFORCEABILITY OWING TO PATENT "MISUSE"**

Donaldson also asserts that the '456 patent is "unenforceable," because EPC "misused" the '456 patent. The defense of patent "misuse" requires proof that the owner of the patent engaged in conduct that improperly extended the term of a patent beyond its expiration date, which in the case of the '456 patent was May 1, 2001. Donaldson must prove patent "misuse" by clear and convincing evidence. However, if you find that EPC "misused" the '456 patent, then I will decide what effect, if any, that patent "misuse" should have on EPC's ability to enforce the '456 patent.

Donaldson contends that EPC improperly extended the term of the '456 patent by marking its products with the number of the '456 patent after the patent expired.

Marking with an expired patent number

Donaldson contends that, after the '456 patent expired on May 1, 2001, EPC continued to mark its products with the expired patent's number. To prove this defense, Donaldson must prove the following elements by clear and convincing evidence:

One, EPC's products used, sold, or offered for sale after May 1, 2001, were marked with the '456 patent number.

Two, those products were manufactured and marked with the ‘456 patent number after May 1, 2001.

To constitute “misuse,” the manufacturing and marking of the product with the patent number must have occurred after the patent expired. Proof that a sale or offer for sale of a product marked with the patent number occurred after the patent expired is not enough to prove “misuse.” The owner of a patent is not required to recall all unsold products marked with the patent number or to remove the patent number from all existing stocks of the product upon the expiration of the patent.

Three, the marking of the product with the ‘456 patent after May 1, 2001, was to obtain or coerce, or to attempt to obtain or coerce, an unfair commercial advantage.

To constitute “misuse,” marking after the expiration date of the patent must be for the purpose of affecting competition in unpatented products or otherwise to extend the economic effect of the patent beyond its expiration. Therefore, EPC must have obtained, or attempted or intended to obtain, a commercial benefit from marking its products with an expired patent number. “Misuse” may occur, for example, where a patent owner continued to mark its products with expired patent numbers with the intent to deceive customers or competitors into believing that the patent owner’s products were still protected by the patent. However, marking after the expiration date of the patent that is merely inadvertent is not sufficient to establish “misuse” of the patent.

Donaldson must prove *all three* of these elements by clear and convincing evidence to establish patent “misuse” based on “marking with an expired patent

number.” Therefore, if Donaldson fails to prove one or more of these elements, you must find in favor of EPC on Donaldson’s patent “misuse” defense based on “marking with an expired patent number.” However, if Donaldson proves *all three* of these elements, I will decide what effect, if any, EPC’s “misuse” of the ‘456 patent should have on EPC’s ability to recover damages for infringement of the ‘456 patent.

FINAL INSTRUCTION NO. 10 - DAMAGES—IN GENERAL

The fact that I am instructing you on the proper measure of damages should not be considered as an indication that I have any view as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given only for your guidance in the event that you should find that the plaintiff is entitled to damages in accord with the other instructions.

You must make a determination on damages for infringement by the original GMT-800, even if you actually found that it did not infringe. Therefore, **if** you find in EPC's favor on Donaldson's invalidity defenses, as explained in Final Jury Instruction No. 8, **then** you must determine what damages were caused by infringement of the '456 patent by the original GMT-800.

On the other hand, you may only award damages for infringement by the Next Generation GMT-800 **if** you find

(1) in EPC's favor on its claim of infringement of the '456 patent by the Next Generation GMT-800, as explained in Final Jury Instruction No. 4 (literal infringement) or Final Jury Instruction No. 5 (doctrine of equivalents infringement), **and**

(2) in EPC's favor on Donaldson's invalidity defenses, as explained in Final Jury Instruction No. 8.

Remember that proof that a claim of the '456 patent is invalid is a complete bar to recovery of damages for infringement of that claim, as explained in Final Jury

Instruction No. 8. On the other hand, as explained in Final Jury Instruction No. 9, if you find in favor of Donaldson on one of its patent “misuse” defenses, it is for me to determine what effect, if any, that patent “misuse” should have on EPC’s damages. Therefore, even if you find in favor of Donaldson on a patent “misuse” defense, you must still award EPC all appropriate damages for any infringement of the ‘456 patent.

In determining damages, you must decide how much financial harm EPC has suffered by reason of infringement of the ‘456 patent. You must decide the amount of money that EPC would have made, had Donaldson not infringed the ‘456 patent. In arriving at an amount of damages, you cannot establish a figure by taking down the estimate of each juror as to damages and agreeing in advance that the average of those estimates shall be your award of damages. Rather, you must use your sound judgment based upon an impartial consideration of the evidence. Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture. Damages are only to compensate EPC, by putting EPC into the position that it would have been in if Donaldson had not infringed. Therefore, you may not add anything to the amount of damages you award to punish Donaldson or to set an example. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against either of the parties.

In this lawsuit, EPC seeks two kinds of damages: “lost profits” and “a reasonable royalty.” I will explain these two kinds of damages in the following instructions. EPC’s claims for “lost profits” and “a reasonable royalty” are alternatives: You must consider each kind of damages separately, as if it were the

only kind of damages that EPC can be awarded in this action. You should not be concerned about any apparent overlap between “lost profits” damages and “reasonable royalty” damages, because I will eliminate any overlap in the damages ultimately awarded to EPC. However, if EPC fails to prove “lost profits” damages, you must award EPC at least “a reasonable royalty” for any infringement.

Attached to these Instructions is a Verdict Form, which you must fill out. In the “Damages” section of the Verdict Form, you should only award those damages, if any, that EPC has proved by the greater weight of the evidence represent how much financial harm EPC has suffered by reason of infringement of the ‘456 patent.

FINAL INSTRUCTION NO. 11 - DAMAGES—“LOST PROFITS”

“Lost profits” damages are to compensate EPC for the additional profits that EPC would have made if Donaldson had not infringed the ‘456 patent, in other words, the additional profits that EPC would have made “but for” Donaldson’s infringement. They are not the profits that Donaldson made by making, using, or selling an infringing product. EPC alleges that it should be compensated for two kinds of “lost profits”: “lost sales” and “price erosion.” EPC must prove “lost profits” damages by the greater weight of the evidence. EPC does not have to prove the exact amount of lost profits, but must prove that lost profits can be calculated in a reasonably reliable manner.

Lost sales

Damages for “lost sales” are damages for the profits, if any, that EPC lost, because Donaldson’s infringement took away sales that EPC would have made. Therefore, to prove “lost sales,” EPC must prove by the greater weight of the evidence that it would have made additional sales if Donaldson had not made infringing sales or carried out infringing activities. You may award EPC damages for “lost sales” only on those products that compete with Donaldson’s infringing products.

In determining whether or not EPC lost sales owing to Donaldson’s infringement, you should consider whether or not EPC has proved by the greater

weight of the evidence that it had the manufacturing capacity and the marketing capability to make the sales that it says it lost. Therefore, EPC must prove by the greater weight of the evidence that it could have made, or could have had someone else make for it, the additional products that it says it could have sold but for Donaldson's infringement. EPC must also prove by the greater weight of the evidence that it had the capability to market and sell the additional products.

In determining whether or not EPC lost sales owing to Donaldson's infringement, you must consider whether or not, if Donaldson's infringing product or products were not available, some or all of the people who bought from Donaldson would have bought a different, non-infringing product from Donaldson or from somebody else, rather than buy EPC's product. In deciding whether or not people who bought from Donaldson would have bought a non-infringing product, you should consider whether or not there was such a demand for the patented aspects of the infringing product or products that purchasers would not have bought a non-infringing product.

Finally, if EPC has proved that it lost sales owing to Donaldson's infringement, you must determine whether or not EPC has proved by the greater weight of the evidence what amount of profit it would have made if Donaldson had not infringed, taking into consideration appropriate market factors.

Price erosion

Damages for "price erosion" are damages for the profits, if any, that EPC lost, because EPC had to lower prices in order to compete with Donaldson's

infringement. EPC contends that it made smaller profits on the actual sales of its products than it would have made on those sales if EPC had not had to compete with Donaldson's allegedly infringing products. Therefore, EPC must prove by the greater weight of the evidence that it had to lower its prices, or was unable to raise its prices, because of Donaldson's infringement, and not for some other reason. Again, if EPC has proved price erosion owing to Donaldson's infringement, you must determine whether or not EPC has proved by the greater weight of the evidence what amount of profit it would have made if Donaldson had not infringed, taking into consideration appropriate market factors.

FINAL INSTRUCTION NO. 12 - DAMAGES—REASONABLE ROYALTY

In the alternative to “lost profits” damages, EPC seeks a “reasonable royalty” for Donaldson’s infringement. As I explained in the **Glossary**, a “royalty” is a payment made to the owner of a patent by a non-owner in exchange for rights to make, use, or sell the invention claimed in the patent. Therefore, a “reasonable royalty” is a payment that a reasonable party wanting to use the patent would pay, and a reasonable patent owner would accept for use of the patent, where both parties to the negotiation know that the patent is valid.

A “reasonable royalty” may be determined by considering the result of a hypothetical negotiation between EPC and a company in Donaldson’s position, taking place at the time just before Donaldson began selling an infringing product. In considering such a hypothetical negotiation, you should assume that both parties understood that the ‘456 patent was valid, enforceable, and infringed by Donaldson’s product or products, and that Donaldson would respect the patent claims. You should also assume that EPC and Donaldson knew at the time such things as the level of sales and profits that Donaldson would make using the invention. You should also assume that EPC was willing to grant Donaldson a license to sell the patented invention and that Donaldson was willing to pay a reasonable price for that license.

In deciding what is a reasonable royalty, you may consider the factors that EPC and Donaldson would consider in setting the amount that Donaldson should

pay. I will list for you a number of factors that you may consider, but this list does not include every possible factor. Rather, it will give you an idea of the kinds of things to consider in setting a reasonable royalty. Some of the factors that you may consider, therefore, are the following:

1. Whether EPC had established a royalty for the patented invention, for example, by granting other licenses at that royalty. You should remember, however, that an established royalty may have been set before the patent was determined to be valid and infringed in court and, therefore, may not be as much as it would be if both the patent owner and the party wanting to use the patent know that the patent is valid.

2. Royalties paid by Donaldson or by others for patents comparable to the '456 patent.

3. Whether or not EPC had a policy of licensing or not licensing the patent.

4. Whether or not EPC and Donaldson are competitors.

5. Whether being able to use the patented invention helps in making sales of other products or services.

6. The profitability of the product made using the patent, and whether or not that product is commercially successful or popular.

7. The advantages and benefits of using the patented invention over products not covered by the '456 patent.

8. The extent of Donaldson's use of the patented invention and the value of that use to Donaldson.

9. Whether or not there is a portion or percentage of the profit or selling price that is customarily paid for use of patented inventions comparable to the inventions claimed in the '456 patent.

10. The portion of the profit that is due to the patented invention, as compared to the portion of the profit due to other factors, such as unpatented elements or unpatented manufacturing processes, or features or improvements developed by Donaldson.

11. Expert opinions as to what would be a reasonable royalty.

FINAL INSTRUCTION NO. 13 - DELIBERATIONS

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

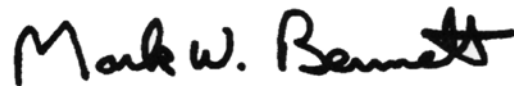
Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment. Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors. Do not be afraid to change your opinions if the discussion persuades you that you should, but do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. *Remember that you should not tell anyone—including me—how your votes stand numerically.*

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Finally, I am giving you the Verdict Form. A Verdict Form is simply the written notice of the decision that you reach in this case. *Your verdict must be unanimous*. You will take the Verdict Form to the jury room. When you have reached a unanimous verdict, your foreperson must complete one copy of the Verdict Form and all of you must sign that copy to record your individual agreement with the verdict and to show that it is unanimous. The foreperson must bring the signed Verdict Form to the courtroom when it is time to announce your verdict. When you have reached a verdict, the foreperson will advise the Court Security Officer that you are ready to return to the courtroom.

DATED this 11th day of May, 2004.

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is fluid and cursive, with a horizontal line drawn underneath it.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

ENGINEERED PRODUCTS CO.,

Plaintiff,

vs.

DONALDSON COMPANY, INC.,

Defendant.

No. C 98-2106-MWB

VERDICT FORM

On the claims and defenses of the parties, we, the Jury, find as follows:

EPC'S CLAIMS				
INFRINGEMENT BY THE ORIGINAL GMT-800			VERDICT	
Step 1: General Verdict	On EPC's claim of infringement of the '456 patent by the original GMT-800, in whose favor do you find? <i>(If you found in favor of Donaldson, do not answer the questions in Steps 2 and 3 of this section of the Verdict Form. Instead, go on to answer the question concerning "willful" infringement in the next section. However, if you found in favor of EPC, please answer the questions in Steps 2 and 3 of this section of the Verdict Form as well as the question in the "willful" infringement section of the Verdict Form.)</i>		___ EPC	
			___ Donaldson	
Step 2: Patent Claims Infringed	If you found in favor of EPC, which claim or claims of the '456 patent do you find are infringed by the original GMT-800?			
	___ (a) Claim 2 (Column 7, lines 56-59)		___ (b) Claim 3 (Column 7, line 60, through Column 8, line 8)	
Step 3: Type of Infringement	If you found that Claim 2 was infringed by the original GMT-800, which type(s) of infringement do you find? <i>("Literal" infringement is explained in Final Jury Instruction No. 4 and "doctrine of equivalents" infringement is explained in Final Jury Instruction No. 5.)</i>		If you found that Claim 3 was infringed by the original GMT-800, which type(s) of infringement do you find? <i>("Literal" infringement is explained in Final Jury Instruction No. 4 and "doctrine of equivalents" infringement is explained in Final Jury Instruction No. 5.)</i>	
	___ "Literal" infringement	___ "Doctrine of equivalents" infringement	___ "Literal" infringement	___ "Doctrine of equivalents" infringement
"WILLFUL" INFRINGEMENT BY THE ORIGINAL GMT-800			VERDICT	
You must decide if infringement by the original GMT-800 was "willful," even if you actually found that the original GMT-800 did not infringe. Therefore, do you find that Donaldson's infringement of the '456 patent by making or selling the original GMT-800 was "willful," as "willful infringement" is explained in Final Jury Instruction No. 6? <i>(If you found that Donaldson willfully infringed the '456 patent by making and selling the original GMT-800, then it is my job to decide whether or not to award increased damages to EPC.)</i>			___ Yes	
			___ No	

INFRINGEMENT BY THE NEXT GENERATION GMT-800			VERDICT	
Step 1: General Verdict	On EPC's claim of infringement of the '456 patent by the Next Generation GMT-800, in whose favor do you find? <i>(If you found in favor of Donaldson, you cannot award EPC any damages for infringement by the Next Generation GMT-800. Also, do not answer any more questions concerning the Next Generation GMT-800. Instead, go on to the next section on Donaldson's defenses. However, if you found in favor of EPC, please answer the remainder of the questions in this section of the Verdict Form pertaining to infringement by the Next Generation GMT-800.)</i>		___ EPC	
			___ Donaldson	
Step 2: Patent Claims Infringed	If you found in favor of EPC, which claim or claims of the '456 patent do you find are infringed by the Next Generation GMT-800?			
	___ (a) Claim 2 (Column 7, lines 56-59)		___ (b) Claim 3 (Column 7, line 60, through Column 8, line 8)	
Step 3: Type of Infringement	If you found that Claim 2 was infringed by the Next Generation GMT-800, which type(s) of infringement do you find? (<i>"Literal" infringement is explained in Final Jury Instruction No. 4 and "doctrine of equivalents" infringement is explained in Final Jury Instruction No. 5.)</i>)		If you found that Claim 3 was infringed by the Next Generation GMT-800, which type(s) of infringement do you find? (<i>"Literal" infringement is explained in Final Jury Instruction No. 4 and "doctrine of equivalents" infringement is explained in Final Jury Instruction No. 5.)</i>)	
	___ "Literal" infringement	___ "Doctrine of equivalents" infringement	___ "Literal" infringement	___ "Doctrine of equivalents" infringement

DONALDSON'S DEFENSES				
INVALIDITY				VERDICT
Step 1: General Verdict	On Donaldson's "invalidity" defenses, as explained in Final Jury Instruction No. 8, do you find any claim of the '456 patent invalid? <i>(If you answered "no," please do not answer any more questions in this section. Instead, go on to the next section on Donaldson's defense of patent "misuse." However, if you answered "yes," please answer the remaining questions in this section to determine the extent of invalidity.)</i>			_____ Yes
				_____ No
Step 2: Claims Invalidated	If you answered "yes," which claim or claims of the '456 patent do you find Donaldson has proved are invalid by clear and convincing evidence?			
	_____ (a) Claim 2 (Column 7, lines 56-59) <i>(If you found this claim was invalid, then you cannot award any damages for infringement of this claim.)</i>		_____ (b) Claim 3 (Column 7, line 60, through Column 8, line 8) <i>(If you found this claim was invalid, then you cannot award any damages for infringement of this claim.)</i>	
Step 3: Basis for Invalidity	If you found that Claim 2 is invalid, which type(s) of invalidity do you find?		If you found that Claim 3 is invalid, which type(s) of invalidity do you find?	
	_____ "on sale" invalidity consisting of an offer for sale to Mack Trucks	_____ "in use" invalidity consisting of "use"	_____ "on sale" invalidity consisting of an offer for sale to Mack Trucks	_____ "in use" invalidity consisting of "use"
		_____ at a meeting with Mack Trucks, and/or		_____ at a meeting with Mack Trucks, and/or
		_____ at the SAE trade show		_____ at the SAE trade show
PATENT "MISUSE"				VERDICT
On Donaldson's defense of patent "misuse," as explained in Final Jury Instruction No. 9, do you find any "misuse" of the '456 patent? <i>(Remember that, if you find that EPC "misused" the '456 patent, then I will decide what effect, if any, that patent "misuse" should have on EPC's ability to enforce the '456 patent.)</i>				_____ Yes
				_____ No

EPC'S DAMAGES		
<p>Remember that, as I explained in Final Jury Instruction No. 10, EPC's claims for "lost profits" and "a reasonable royalty" are alternatives: You must consider each kind of damages separately, as if it were the only kind of damages that EPC can be awarded in this action. You should not be concerned about any apparent overlap between "lost profits" damages and "reasonable royalty" damages, because I will eliminate any overlap in the damages ultimately awarded to EPC. However, if EPC fails to prove "lost profits" damages, you must award EPC at least "a reasonable royalty" for any infringement.</p>		
Step 1: Infringement by the original GMT-800	<p>You must make a determination on damages for infringement by the original GMT-800, even if you actually found that it did not infringe. Therefore, if you found in EPC's favor on Donaldson's invalidity defenses, what amount do you award as damages for infringement of the '456 patent by the original GMT-800?</p>	
	<table border="1"> <tr> <td> <p>"Lost profits" in the amount of \$ _____, consisting of the following: \$ _____ for "lost sales," and \$ _____ for "price erosion." <i>(Damages for "lost profits" are explained in Final Jury Instruction No. 11.)</i></p> </td> <td> <p>A "reasonable royalty" consisting of \$ _____ for sales to Mack and Delphi, and \$ _____ for sales to DAF. <i>(Damages for "a reasonable royalty" are explained in Final Jury Instruction No. 12.)</i></p> </td> </tr> </table>	<p>"Lost profits" in the amount of \$ _____, consisting of the following: \$ _____ for "lost sales," and \$ _____ for "price erosion." <i>(Damages for "lost profits" are explained in Final Jury Instruction No. 11.)</i></p>
<p>"Lost profits" in the amount of \$ _____, consisting of the following: \$ _____ for "lost sales," and \$ _____ for "price erosion." <i>(Damages for "lost profits" are explained in Final Jury Instruction No. 11.)</i></p>	<p>A "reasonable royalty" consisting of \$ _____ for sales to Mack and Delphi, and \$ _____ for sales to DAF. <i>(Damages for "a reasonable royalty" are explained in Final Jury Instruction No. 12.)</i></p>	
Step 2: Infringement by the Next Generation GMT-800	<p>If you found in EPC's favor on its claim of infringement of the '456 patent by the Next Generation GMT-800, and in EPC's favor on Donaldson's invalidity defenses, what amount do you award as damages for infringement of the '456 patent by the Next Generation GMT-800?</p>	
	<table border="1"> <tr> <td> <p>"Lost profits" in the amount of \$ _____, consisting of the following: \$ _____ for "lost sales," and \$ _____ for "price erosion." <i>(Damages for "lost profits" are explained in Final Jury Instruction No. 11.)</i></p> </td> <td> <p>A "reasonable royalty" consisting of \$ _____ for sales to Mack and Delphi, and \$ _____ for sales to DAF. <i>(Damages for "a reasonable royalty" are explained in Final Jury Instruction No. 12.)</i></p> </td> </tr> </table>	<p>"Lost profits" in the amount of \$ _____, consisting of the following: \$ _____ for "lost sales," and \$ _____ for "price erosion." <i>(Damages for "lost profits" are explained in Final Jury Instruction No. 11.)</i></p>
<p>"Lost profits" in the amount of \$ _____, consisting of the following: \$ _____ for "lost sales," and \$ _____ for "price erosion." <i>(Damages for "lost profits" are explained in Final Jury Instruction No. 11.)</i></p>	<p>A "reasonable royalty" consisting of \$ _____ for sales to Mack and Delphi, and \$ _____ for sales to DAF. <i>(Damages for "a reasonable royalty" are explained in Final Jury Instruction No. 12.)</i></p>	

Date: _____

Time: _____

Foreperson	Juror
Juror	Juror
Juror	Juror
Juror	Juror