

IN THE SUPREME COURT OF THE STATE OF DELAWARE

VLIIW TECHNOLOGY, LLC,  
a Delaware limited liability  
company,

Plaintiff Below,  
Appellant,

v.

HEWLETT-PACKARD COMPANY and  
STMICROELECTRONICS INC.,  
Delaware corporations,

Defendants Below,  
Appellees.

No. 305, 2003

On Appeal from the  
Court of Chancery of  
the State of Delaware,  
in and for New Castle  
County

C.A. No. 20069 NC

APPELLANT'S REPLY BRIEF

Arthur G. Connolly, III  
CONNOLLY, BOVE, LODGE & HUTZ LLP  
The Nemours Building  
1007 North Orange Street  
P.O. Box 2207  
Wilmington, Delaware 19899-2207  
(302) 658-9141  
**Attorneys for Plaintiff Below,  
Appellant, VLIW Technology, LLC**

OF COUNSEL:

Kevin M. McGovern  
Brian T. Foley  
MCGOVERN & ASSOCIATES  
One Lafayette Place  
Greenwich, Connecticut 06840  
(203) 622-1101

Michael O. Warnecke  
David R. Melton  
MAYER, BROWN, ROWE & MAW LLP  
190 S. LaSalle Street  
Chicago, Illinois 60603-3441  
(312) 782-0600

J. Brett Busby  
MAYER, BROWN, ROWE & MAW LLP  
700 Louisiana Street, Ste. 3600  
Houston, Texas 77002-2730  
(713) 221-1651

Donald M. Falk  
MAYER, BROWN, ROWE & MAW LLP  
555 College Avenue  
Palo Alto, California 94306  
(650) 331-2000

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## INTRODUCTION

One issue disposes of this appeal: whether VLIW's Complaint gave HP fair notice that it breached the Agreement by allowing the licensed technology to be used in an HP/STM partnership product. If so, the dismissal of the contract claim should be reversed, and VLIW's other claims - which HP concedes rise or fall with the contract claim - should be reinstated as well.

Rather than confronting the controlling question of alleged unauthorized use of VLIW's technology in an HP/STM product, HP spends many pages addressing side issues that do not advance the resolution of this appeal - such as who owns derivative works and whether the licensed technology can be shared to make an exclusively HP product. When these false trails are disregarded, HP's only refuge is its two-page plea that this Court abandon modern standards of notice pleading and require VLIW to plead with specificity every fact and intermediate conclusion supporting its claim. HP Br. 15-16. HP insists that the Complaint must fail because VLIW did not explicitly declare that the HP/STM products are not HP products within the meaning of the contract. That turns notice pleading on its head, and would require plaintiffs to plead not merely the minimal foundational facts traditionally required to give a defendant fair notice of the claim against it, but also to draw precise legal conclusions with unmistakable clarity. This Court should reject HP's efforts to turn back the clock to the days of cumbersome and hypertechnical common-law pleading. Under the fair notice standard, VLIW's Complaint plainly states a claim for breach of contract by use of the licensed

technology in something other than an HP product.

In addition, when all inferences are properly drawn in favor of VLIW, the ambiguities in the Agreement surrounding the level and duration of HP's confidentiality obligations create a fact issue that cannot be resolved short of discovery – much less “found” against VLIW at the motion to dismiss stage, as HP repeatedly concedes the Chancery Court did (*e.g.*, HP Br. 7, 11). VLIW has stated a claim that it is entitled to support with evidence. This Court should reverse the judgment and remand the case for discovery.

## ARGUMENT

### I. VLIW'S BREACH OF CONTRACT ALLEGATIONS STATE A CLAIM.

#### A. The Complaint Gave HP Fair Notice that it Breached the Agreement By Using the Licensed Technology in an HP/STM Product.

In order to state a claim for breach of the Agreement, HP contends that VLIW had to allege, in so many words, the precise conclusion that "the Licensed Technology is being used to make non-HP products." HP Br. 15; see *id.* at 10, 12, 16 (repeating the idea that VLIW must include "specific allegations of fact"). VLIW pleaded the contract provision at issue, set out the complained-of conduct, and alleged that the conduct breached the contract. Under the proper notice-pleading standard, VLIW has pleaded all it needs to state a claim on this theory.

##### 1. HP ignores the fair notice standard.

Contrary to HP's contentions, a plaintiff need not "plead specific facts to state an actionable . . . claim." *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 140 (Del. 1997). Rather, a pleading is sufficient if it contains "a short and plain statement of the claim showing that the pleader is entitled to relief." Ch. Ct. R. 8(a)(1). This rule "adopt[s] a system of notice pleading rather than fully informative pleading." *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952). Under this system, a plaintiff need only "put a defendant on fair notice **in a general way** of the cause of action asserted." *Id.* (emphasis added); see *Emerald Partners v. Berlin*, 726 A.2d 1215, 1220 (Del. 1999). A complaint that gives fair notice "**shifts to the defendant the burden to determine the details** of the

cause of action by way of discovery for the purpose of raising legal defenses." *Klein*, 94 A.2d at 391 (emphasis added).

HP's unwillingness to shoulder that burden does not let it evade discovery. A complaint is sufficient if "a plaintiff may recover under **any reasonably conceivable set of circumstances** susceptible of proof under the complaint." *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978) (emphasis added). And the plaintiff receives the benefit of "all reasonable inferences that can be drawn from its pleading." *Solomon v. Pathe Comm. Corp.*, 672 A.2d 35, 38 (Del. 1996). As a consequence, the Complaint in this case may not be dismissed unless "it appears with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiff[] would not be entitled to relief." *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000). HP did not and cannot make that showing.

**2. VLIW properly alleged the contract terms and conduct amounting to a breach of those terms.**

VLIW met its modest pleading burden by averring that the licensed technology was being used in an HP/STM product, and that this use was not permitted by the Agreement. No more "specific allegations of fact" are necessary. *In re Tri-Star Pictures, Inc. Litigation*, 634 A.2d 319, 326 (Del. 1993).

VLIW set out the HP-product limitation when it pleaded that "[u]nder the 1990 Agreement, [VLIW's predecessor] Multiflow authorized H-P to utilize the . . . trade secrets and know-how concerning the Trace compiler . . . only in 'HEWLETT PACKARD products.'" App. A10 ¶ 21 (quoting Agreement ¶ 2.1). This allegation is based on paragraphs 1.3 and 2.1 of the Agreement, which state that "the Trace compiler" is

a part of the "licensed technology" that HP is granted permission to use "for the purpose of making, using, having made, selling, and otherwise disposing of HEWLETT PACKARD products." App. A22.<sup>1</sup>

VLIW then pleaded facts showing that the licensed technology was being used in an HP/STM product. It alleged that "H-P and STM formed a research and development partnership . . . to work on the design and development of computer chips and other computer products . . . ." App. A11 ¶ 27 (emphasis added). "In the course of their joint R&D work, H-P shared derivatives of the Trace compiler with STM," and these derivatives "were utilized by STM in designing chips." *Id.* ¶ 28(a)-(b) (emphasis added). VLIW also alleged that "[t]he **H-P/STM compiler**" used in these chips "is a copy or at the very least a derivation . . . of the Trace compiler." *Id.* ¶ 28(c) (emphasis added).

More specifically, the Complaint referred to (and attached) Exhibit B, which shows that the product forming a basis of the breach claim bears an "ST" product designation - **not** an "HP" designation. The Complaint alleged that Exhibit B is "literature" regarding "the compiler being marketed." *Id.* This literature bears the logos and website addresses for *both* HP and STM, refers the reader to *both*

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<sup>1</sup> HP's arguments about who owns derivative works, and whether HP could sublicense or otherwise share the licensed technology with STM for the purpose of making **HP** products, are beside the point. The Agreement gives HP the right to "distribute" and "prepare derivative works" of the licensed technology, as well as the right to sublicense third parties to do these things, "within the scope of the license" - *i.e.*, only "**for the purpose of [making or using] HEWLETT PACKARD products.**" App. A22 ¶ 2.1 (emphasis added); see also App. A25 ¶ 6.3 (same). Allowing the licensed technology to be used in an HP/STM product is a breach no matter how HP accomplished it.

"Paolo Faraboschi [of] Hewlett-Packard Laboratories" and "Fred Homewood [of] STMicroelectronics," and it gives the HP/STM product a name that incorporates **STM's** registered trademark – "**ST200**" – **not** an HP mark. App. A37-38 (cited in Complaint at A-11).<sup>2</sup> The first page of Exhibit B looks like this:



## **ST200: A VLIW Architecture for Media-Oriented Applications**

Paolo Faraboschi  
Hewlett-Packard Laboratories (Cambridge, MA)

Fred Homewood  
STMicroelectronics (Cambridge, MA)

<http://www.hpl.hp.com/cambridge/projects/cfp>  
<http://www.st.com>

App. A37. The second page of Exhibit B admits that the compiler in this product is a "[d]escendant of the Multiflow compiler." App. A38.

Finally, under the heading "H-P's Breach of the 1990 Agreement," VLIW both set out its conclusion that this conduct breached the Agreement and identified the obligation that had been breached:

29. Under the 1990 Agreement, H-P was only entitled to utilize the Multiflow trade secrets and know-how related to the Trace compiler **in H-P products**. H-P was not authorized to share those trade secrets and that know-how with other manufacturers nor was H-P authorized to give away

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<sup>2</sup> See also App. A19 (listing this literature as Exhibit B to Complaint).

or resell derivatives of the Trace compiler, **other than as part of H-P products.**

30. VLIW, LLC is informed and believes that H-P has **breached its obligations** under the 1990 Agreement **by sharing trade secrets and know-how** related to the Trace compiler **with STM.**

App. A11-12 (emphasis added); see also App. A12 ¶ 33.

That is, immediately after identifying the contractual limitation to "H-P products" – **twice** in a short paragraph – the Complaint avers that HP's conduct with STM breached the Agreement. Tellingly, HP does not contend that it did not have fair notice that VLIW was suing it in part over the use of licensed technology in HP/STM products. VLIW pleaded the relevant terms of the Agreement, specified conduct by HP that is inconsistent with those terms, and asserted that it "has been damaged by H-P's breach of the 1990 Agreement." App. A12 ¶ 34. That is enough to state a claim. See Opening Br. 14 (citing cases).

**3. The Chancery Court and HP construe the Complaint too narrowly.**

The Chancery Court nonetheless held that VLIW did not plead "that a product exists or will exist that is not an HP product." Mem. Op. 14. HP builds its argument on appeal around this point it did not emphasize below, and now maintains that "the Complaint contains no allegation that the Licensed Technology is being used to make non-HP products." HP Br. 15.

Both the Chancery Court and HP fail to consider "**all** well-pleaded allegations in the complaint." *Solomon*, 672 A.2d at 38 (emphasis added). The Chancery Court looked only at paragraph 28(b), which states that STM used derivatives of the Trace compiler to design chips. Mem. Op. 14; see App. A11. Indeed, it focused so exclusively

on this one subparagraph that it missed the cross-reference to Exhibit B in the very next subparagraph. Compare Mem. Op. 14 n.23 (VLIW "never referred to" Exhibit B "in the body of its complaint") with App. All ¶ 28(c) (quoting from "(Ex. B, p.5)"). As discussed above, however, paragraph 27 of the Complaint speaks of the HP/STM partnership working on the development of computer products, paragraphs 28(a) and (b) explain that HP shared licensed technology that STM used in designing chips for partnership products, and paragraph 28(c) explicitly identifies an "**H-P/STM** compiler" – **not** an "HP compiler" – that the partnership is now marketing as part of its products. See p. 5, *supra*.

These statements plainly allege the existence of an HP/STM product. Yet HP seems to argue that in order to state a claim, VLIW had to allege, not only that HP had used the licensed technology in an HP/STM compiler which in turn is part of other HP/STM products, **and** that HP's actions allowing the licensed technology to be used in HP/STM partnership products constituted a breach of the Agreement, **but also**, explicitly, that the HP/STM product was not an HP product within the terms of the Agreement and therefore breached the use limitation in particular.

To the extent one can read the Complaint as not explicitly alleging this conclusion, however, it can and (at this stage) must be inferred from the facts that VLIW did plead. Although the Chancery Court and HP avoid discussing any reasonable inferences that could be drawn from the Complaint, this Court has repeatedly made clear that all such inferences must be drawn in VLIW's favor. *E.g. Savor, Inc.*

v. *FMR Corp.*, 812 A.2d 894, 897 (Del. 2002). Significantly, HP does not dispute that, under a fair reading of the Agreement, this pleaded HP/STM product **may** violate the provision that the licensed technology can be used only in HP products. See Opening Br. 19. Only the presentation of evidence after discovery could resolve whether the HP/STM product is a violation or is instead an HP product authorized by the Agreement.

In the similar case of *Michelson v. Duncan*, 407 A.2d 211 (Del. 1979), this Court held that legal theories and conclusions need not be explicitly pled in order to state a claim. There, the Chancery Court had dismissed a complaint that did not explicitly allege gift or waste of corporate assets, even though it alleged that options were granted for no consideration. *Id.* at 217. This Court reversed, stating:

A claimant need not necessarily expressly aver "gift" or "waste" in order to make out a claim on these theories. So long as claimant alleges facts in his description of a series of events from which a gift or waste may reasonably be inferred and makes a specific claim for the relief he hopes to obtain, he need not announce with any greater particularity the precise legal theory he is using.

*Id.*; see also 5 Wright & Miller, *Federal Practice & Procedure* § 1219 (1990) (same).

*Michelson* controls this case. VLIW already has alleged that the Agreement limits use of the licensed technology to HP products, and that HP formed a partnership with STM that made products using the licensed technology. No more facts need be pled to support a reasonable inference that an HP/STM product was made in breach of the Agreement. VLIW can state a claim without connecting every last dot

for HP, and HP clearly was able to understand the nature of the claim against it.

**4. Holding that VLIW adequately pleaded breach by use of the licensed technology in an HP/STM product disposes of this appeal.**

For these reasons, VLIW has properly pleaded a breach of contract on the theory that the licensed technology was used in an HP/STM product. This conclusion disposes of the entire appeal. As discussed in the opening brief, VLIW pleaded a breach of contract on two independent theories: unauthorized use in an HP/STM product and unauthorized disclosure of confidential information. Opening Br. 13, 16-17, 19. Because VLIW can state a stand-alone claim for breach of contract on either theory, holding that it properly pleaded facts to support the use theory alone would require reversal of the judgment dismissing VLIW's breach of contract claim. *See, e.g., Williams v. State*, 818 A.2d 906, 908 (Del. 2002); *Equitable Trust Co. v. Gallagher*, 99 A.2d 490, 494 (Del. 1953).

Both HP and the Chancery Court seem confused about this point. The Chancery Court apparently thought that its rejection of the confidentiality theory disposed of the breach of contract claim, and it only reached the use theory as an alternative holding. Mem. Op. 13 ("Even assuming that H-P had a continuing duty to keep . . . the Trace Compiler secret, it still has not breached the 1990 Agreement" under the use theory). HP's brief repeats this mistake several times, though other parts of the brief disavow it.<sup>3</sup> Yet HP does not challenge

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<sup>3</sup> See HP Br. 20 (expiration of confidentiality provisions (cont'd))

VLIW's explanation of why these two theories are independent. Opening Br. 16-17.

Reversing the Chancery Court's dismissal of the breach of contract claim also resolves the other issues in this appeal. There is no dispute that VLIW's other claims rise or fall based on the breach claim, and reversal on the merits moots the question whether STM properly moved for dismissal.

If this Court instead holds that VLIW did not sufficiently plead a breach of contract on the use theory, however, VLIW respectfully requests that the Court grant it leave to replead. Chancery Court Rule 15(aaa) allows a dismissal without prejudice to be granted if "the Court for good cause shown . . . find[s] that dismissal with prejudice would not be just under all the circumstances." It would not be just under these circumstances, where at best HP raised a hypertechnicality rather than a true deficiency of notice, to dismiss the Complaint with prejudice. Furthermore, this Court has found good cause to permit repleading where it "affirms the judgment of the Court of Chancery but announces a new rule of law or clarifies pleading standards that apply to the plaintiff's cause of action." *White v. Panic*, 783 A.2d 543, 555 (Del. 2001). If this Court were to rule against the use theory by narrowing the fair notice pleading standard

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(... cont'd)

"extinguish[ed] HP's obligations" and is "second, independent reason why VLIW's breach of contract claim fails"); *id.* at 9 (breach claim fails "for two distinct reasons"); *but see id.* at 17 ("untrue" that expiration of confidentiality provisions dooms use theory).

or changing the rule that permits conclusions to be inferred, that would be ample good cause to permit repleading under *White*.

**B. Because the Scope of HP's Duty of Confidentiality is Ambiguous, VLIW Has Stated a Contract Claim Under Its Alternative Theory.**

VLIW also has stated a claim for breach of contract under the independent theory that HP disclosed confidential information to STM. HP's objection to this theory is not that VLIW failed to plead it, but that HP's duty of confidentiality expired as a matter of law before it disclosed the information.

When a contract is ambiguous, a fact issue exists that cannot be resolved on a motion to dismiss. Opening Br. 21. HP does not come to grips with the textual and contextual clues that make it ambiguous whether all of HP's confidentiality obligations, or merely its obligation to use an enhanced "level of care" to protect the confidential information, expired after five years. See *id.* at 20-26. For example, paragraph 6.5 of the Agreement states that "HEWLETT PACKARD shall not be obligated to hold in confidence, **and** shall not be subject to the confidentiality obligations of this Article 6," in certain defined circumstances that do not apply here. App. A26 (emphasis added). Because the five-year time limit appears in paragraph 6.3 of Article 6, see App. A25, the first clause of this provision reveals that HP has other obligations to hold the licensed technology in confidence that are not subject to the five-year limit. If HP's only confidentiality obligations appeared in paragraph 6.3 (and thus were limited to five years), the first clause of paragraph 6.5 would be meaningless.

HP's only response is to ignore the plain text and label paragraph 6.5 as a "carve-out." HP Br. 23-24. That begs the question. From what is that paragraph a carve-out – only from paragraph 6.3, or also from larger obligations of confidentiality, as the text of the paragraph and HP's own brief state? HP Br. 23-24 (paragraph 6.3 frees HP from "**all** confidentiality requirements" of the Agreement in certain circumstances). HP (and the Chancery Court) resolve the ambiguity, but that is the role of a factfinder, not a court evaluating pleadings for sufficiency.

HP agrees that a contract interpretation should not render any provision of the contract meaningless. HP Br. 25-26; Opening Br. 22. Yet HP's interpretation assigns no meaning whatsoever to several parts of the Agreement, including the ambiguous first clause of paragraph 6.5 and the "level of care" qualification in paragraph 6.3. See Opening Br. 20-21 (discussing paragraph 6.3). That cannot be right. At this stage of the litigation, all pleaded facts must be taken as true and all inferences drawn in favor of VLIW. *Savor*, 812 A.2d at 896-97; *Solomon*, 672 A.2d at 38. As a consequence, these ambiguities in the Agreement create a fact issue that cannot be resolved without discovery and evidence of the Agreement's meaning. A court cannot try a case and make "findings" at the motion to dismiss stage, much as HP wishes it were otherwise.<sup>4</sup>

Rushing to resolve ambiguities at the pleading stage is particularly inappropriate because the Chancery Court did not have the

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<sup>4</sup> See, e.g., HP Br. 7 ("the Court of Chancery **found**" (emphasis added)); *id.* at 11, 16, 18, 19, 20, 23.

benefit of VLIW's evidence explaining the circumstances and intensity of the negotiations leading up to the specific and bargained-for confidentiality provisions of the Agreement, evidence that would illuminate the parties' intent in entering into the Agreement in general and in particular agreeing to a higher level of care in paragraph 6.3.

VLIW's contentions regarding the context of the Agreement only add to the ambiguities surrounding the level and duration of HP's confidentiality obligations. HP tries to avoid these arguments by arguing that VLIW has gone outside the record. But as VLIW's opening brief explains, the Connecticut law that governs this Agreement authorizes a court to look to context – including the situation of the parties and circumstances connected with the transaction – in order to interpret its provisions. Opening Br. 21. In addition, Delaware courts acknowledge that in order to determine whether a contract is ambiguous, a court must at least be guided by “a knowledge of the simple facts on which, from the nature of language in general, [the contract's] meaning depends.” *Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992). At this stage of the case, VLIW may tell the Court how it believes discoverable facts will reflect on the pleadings. These facts are not required to sustain VLIW's claim against HP's motion to dismiss, but merely give texture to the ambiguity discussed above, and to the inferences to which VLIW is entitled at this stage of the case. Contrary to the Chancery Court's conclusion, those inferences provide much more than a “reasonably conceivable set of circumstances” under

which VLIW could recover. *Spence*, 396 A.2d at 968. The Chancery Court's ruling dismissing VLIW's contract claim should be reversed.

**II. BECAUSE VLIW HAS STATED A CLAIM FOR BREACH OF CONTRACT, THE TRADE SECRET AND UNFAIR TRADE PRACTICE CLAIMS ALSO SHOULD BE REINSTATED.**

The parties agree that the trade secret and unfair trade practice claims rise or fall with the contract claim. Opening Br. 27; HP Br. 6 n.4, 30. Therefore, the Chancery Court's dismissal of these claims should be reversed as well.

### III. STM'S MOTION TO DISMISS SHOULD BE REJECTED AS UNTIMELY.

Finally, even if this Court concludes that dismissal is proper as to HP, it should reverse the dismissal as to STM. Chancery Court Rule 12(b) unequivocally states that a motion to dismiss for failure to state a claim "**shall** be made **before** pleading" (emphasis added). HP and STM do not dispute that STM made its motion to dismiss a full month after filing its answer, but they contend that a failure to comply with this provision has no effect whatsoever. HP and STM rely heavily on *Lewis v. Straetz*, 1986 WL 2252 (Del. Ch.), but neglect to tell this Court that the late-moving defendant in *Lewis* – unlike STM (see App. A65-76) – had earlier pleaded failure to state a claim as a defense in its answer. That was the key reason the Chancery Court agreed to consider the defendant's technically untimely motion to dismiss. *Id.* at \*2. STM cannot claim the benefit of this equitable exception here.

The defendants also appeal to Chancery Court Rule 12(h)(2) and cite *Cairns v. Gelmon*, 1998 WL 276226 (Del. Ch.), and *Brandywine Hundred, Inc. v. New Castle County*, 1991 WL 279374 (Del. Ch.). The two decisions are far afield; *Cairns* seems to address how much argument must appear in an opening brief to avoid waiving a motion to dismiss for failure to state a claim, while *Brandywine Hundred* involves a motion to dismiss for failure to join an indispensable party.

Moreover, neither case gives any effect to the timing requirement of Rule 12(b). When Rules 12(b) and 12(h)(2) are read together, a defendant is given four opportunities to raise a defense of failure to

state a claim: (1) in a motion to dismiss, (2) in any pleading permitted or ordered under Rule 7(a), (3) in a motion for judgment on the pleadings, or (4) at trial on the merits. To date, STM has failed to raise the defense in its answer and failed to file a timely motion to dismiss. The defense has not been waived; STM still has the option of raising the defense in a motion for judgment on the pleadings (which it has not filed) or at trial on the merits. Yet by failing to comply with the timing requirement of Rule 12(b), STM has forfeited its right to avoid discovery and have the defense determined on a motion to dismiss.

STM admits that this Court has not recognized any exception to this timing requirement. STM Br. 7. If the Court chooses to adopt a new exception to Rule 12(b) in this case, VLIW respectfully requests leave to replead. As discussed above (at p. 11-12), this Court recognizes that good cause exists to permit repleading when a judgment of affirmance announces a new rule of law. See *White*, 783 A.2d at 555. The public policy considerations discussed in VLIW's opening brief provide ample good cause to permit repleading if this Court alters the rules in deciding this appeal. Opening Br. 29.

**CONCLUSION**

The judgment of the Chancery Court should be reversed and the case remanded for further proceedings.

Dated: September 19, 2003

Respectfully submitted,

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Arthur G. Connolly, III  
(I.D. #2667)  
CONNOLLY, BOVE, LODGE & HUTZ LLP  
The Nemours Building  
1007 North Orange Street  
P.O. Box 2207  
Wilmington, Delaware 19899-2207  
(302) 658-9141  
**Attorneys for Plaintiff Below,  
Appellant, VLIW Technology, LLC**

OF COUNSEL:

Kevin M. McGovern  
Brian T. Foley  
MCGOVERN & ASSOCIATES  
One Lafayette Place  
Greenwich, Connecticut 06840  
(203) 622-1101

Michael O. Warnecke  
David R. Melton  
MAYER, BROWN, ROWE & MAW LLP  
190 S. LaSalle Street  
Chicago, Illinois 60603-3441  
(312) 782-0600

J. Brett Busby  
MAYER, BROWN, ROWE & MAW LLP  
700 Louisiana Street, Ste. 3600  
Houston, Texas 77002-2730  
(713) 221-1651

Donald M. Falk  
MAYER, BROWN, ROWE & MAW LLP  
555 College Avenue  
Palo Alto, California 94306  
(650) 331-2000

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on September 19, 2003, true and correct copies of Appellant's Reply Brief were served on the following counsel of record in the manner indicated:

**By Hand Delivery**

Allen M. Terrell, Jr., Esq.  
Brock E. Czeschin, Esq.  
Richards, Layton & Finger, P.A.  
One Rodney Square  
Wilmington, Delaware 19801

Robert K. Payson, Esq.  
Philip A. Rovner, Esq.  
Potter Anderson & Corroon LLP  
Hercules Plaza - 6<sup>th</sup> Floor  
1313 North Market Street  
Wilmington, Delaware 19801

**By Federal Express**

Bruce S. Sostek, Esq.  
Jane Politz Brandt, Esq.  
Thompson & Knight LLP  
1700 Pacific Avenue, Suite 3300  
Dallas, Texas 75201-4693

Roger D. Taylor, Esq.  
Virginia L. Carron, Esq.  
John D. Livingstone, Esq.  
Finnegan, Henderson, Farabow,  
Garrett & Dunner, LLP  
303 Peachtree Street, NE  
3200 Sun Trust Plaza  
Atlanta, Georgia 30308

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Arthur G. Connolly, III