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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO TECHNOLOGY INC.,

No. C 11-00291 WHA

Plaintiff,

v.

**ORDER GRANTING  
MOTION TO DISMISS**

ELKAY PLASTICS COMPANY, INC.,

Defendant.

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This order holds that marking an article made via a patented method with the patent number of the method patent does not constitute false marking merely because the public cannot immediately tell whether the number refers to a method patent instead of an apparatus patent. Section 292 of Title 35 has never been construed to go so far. The decision relied on by plaintiff arose in a different context and is not controlling. *Clontech Labs., Inc. v. Invitrogen Corp.*, 406 F.3d 1347 (Fed. Cir. 2005). Section 287(b)(4)(c), moreover, would seem to bless the very marking scheme challenged here. *See also Am. Med. Sys., Inc. v. Med. Eng'g Corp.*, 6 F.3d 1523, 1539 (Fed. Cir. 1993). Until the Federal Circuit approves the extension of false marking cases into this genre of cases, the best course is to dismiss without leave to amend and let plaintiff have a try at establishing appellate authority for the theory here proposed.

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The motion to dismiss is **GRANTED** without leave to amend. Judgment will be entered accordingly.

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**IT IS SO ORDERED.**

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Dated: April 15, 2011.

  
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WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE