

CAUSE NO. 199-596-97

DSC COMMUNICATIONS CORPORATION,

Plaintiff,

v.

EVAN BROWN,

Defendant.

§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

COLLIN COUNTY, TEXAS

199TH JUDICIAL DISTRICT

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR DISQUALIFICATION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Evan Brown files this Brief in Support of Motion for Disqualification and respectfully shows the Court as follows:

FACTS

This lawsuit essentially relates to DSC's alleged ownership of an idea or "solution" developed by Evan Brown which would allow the user of a software program to convert machine executable binary code into a high-level source code using logic and data abstractions. DSC alleges that the idea belongs to DSC based upon an Employee Patent, Copyright and Proprietary Information Agreement Brown signed one week after he began employment with DSC on April 21, 1987. In its lawsuit, DSC sought preliminary and permanent injunctive relief prohibiting Brown from taking any action with respect to his idea and a mandatory injunction requiring him to "disclose the Solution, in its entirety, to DSC." DSC also sought monetary damages and attorneys' fees.

F 0 0 0 0

97 JUN 24 PM 2:35

COLLIN COUNTY, TEXAS
BY *[Signature]*

Judge John R. Roach of the 199th Judicial District Court of Collin County, Texas, is a shareholder in DSC. Judge Roach instructed counsel of DSC to inform Brown and his attorneys that the Court owned stock in DSC. Thereafter, counsel for DSC informed Brown and his attorneys by letter of the Court's stock ownership. Based upon Judge Roach's ownership of stock in DSC, Brown filed a Motion for Disqualification on May 16, 1997, which was heard on May 19, 1997 by Judge Roach and denied. Brown thereafter filed a mandamus proceeding with the Court of Appeals for the Fifth District of Texas. By Order dated June 16, 1997, the Court of Appeals declared Judge Roach's order denying the Motion for Disqualification void and ordered that the Motion be referred to the presiding judge of the administrative judicial district.

ARGUMENT AND AUTHORITIES

I. Judge Roach's stock ownership in DSC mandates his disqualification.

The Texas Constitution sets forth three separate grounds for disqualification of trial judges:

No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case.

TEX. CONST. Art. 5, § 11. These constitutional grounds are the exclusive grounds for disqualification of a trial judge in Texas. *Sun Exploration and Production Co. v. Jackson*, 783 S.W.2d 202, 207 (Tex. 1989)(Gonzalez, J., concurring); *Manges v. Guerra*, 673 S.W.2d 180, 185 (Tex. 1984); *River Road Neighborhood Ass'n v. South Texas Sports, Inc.*, 673 S.W.2d 952, 953 (Tex. App.--San Antonio 1984, no writ). Texas Rule of Civil Procedure 18b restates the constitutional bases for disqualification of judges, stating in part that "Judges shall disqualify themselves from all proceedings in which ... they know that, individually or as a fiduciary, they have an interest in the

subject matter in controversy.” Tex. R. Civ. P. 18b(1)(b). Rule 18b(2), which addresses recusal rather than disqualification, provides that a judge shall recuse himself if he has a “financial interest in the subject matter in controversy or in a party to the proceeding” Tex. R. Civ. P. 18b(2)(e). A “financial interest” is defined as “ownership of a legal or equitable interest, however small.” Tex. R. Civ. P. 18b(4)(d).

DSC concedes that stock ownership in a party is a “financial interest” which is grounds for recusal under Rule 18b(2), but argues that stock ownership is not an “interest” which is grounds for disqualification under Rule 18b(1). DSC provides no authority for this proposition. This is not surprising, since the only Texas court to directly answer this question has held that a “financial interest” which is grounds for recusal also constitutes an “interest” which is grounds for disqualification. In *Gulf Maritime Warehouse Co. v. Towers*, 858 S.W.2d 556 (Tex. App.-- Beaumont 1993, writ denied), the parties learned on the third day of trial that the wife of the judge participated in a 401K plan which owned stock in a party to the case. Another party, Gulf Maritime, requested that the judge disqualify himself pursuant to Tex. R. Civ. P. 18b. *Id.* at 558. The judge declined to disqualify himself, stating that he believed he could be fair despite his wife’s financial interest in a party to the suit. After a jury verdict against Gulf, Gulf appealed. The Court of Appeals noted that the two sources of rules for disqualification are the Texas Constitution and Rule 18b of the Texas Rules of Civil Procedure. With respect to the latter, the court stated as follows:

There is a distinction between Rule 18b(1)(b) and Rule 18b(2)(e). Rule 18b(2) deals with recusal as opposed to disqualification. Under the disqualification portion of Rule 18b the reference is to “an interest.” Under the recusal section of Rule 18b(2)(e) the interest is described as a “financial interest.” Is an “interest” under the disqualification portion of the rule different from a “financial

interest” under the recusal section of the rule? We think not, for, the interest of a judge, in order that he may be disqualified, must, in general, be a direct pecuniary or property interest in the subject matter of litigation. Once a pecuniary interest is shown to exist, the judge is disqualified no matter how slight the interest.

Id. at 558 (emphasis added).¹ The court held that the movant on the motion for disqualification met his burden merely by showing that the judge had stock ownership in a party and that it was not “incumbent upon one challenging the disqualifications of a judge to prove to a nickel the effect that a judgment could possibly have upon a judge’s interest.” *Id.* at 559. Based on the judge’s stock ownership, the Court of Appeals held that the trial judge was disqualified. *Id.* at 563.

The *Gulf Maritime* case clearly holds that an “interest” which mandates disqualification under the Texas Constitution and Rule 18b includes a “financial interest” evidenced by a judge’s ownership of stock in a party. This question of whether an “interest” which mandates disqualification includes ownership of stock in a party has also been answered in the context of disqualification of jurors. The Texas Government Code states that “a person is disqualified to serve as a petit juror in a particular case if he . . . is interested, directly or indirectly, in the subject matter of the case.” Tex. Govt. Code Ann. § 62.105(2) (Vernon Supp. 1996) (emphasis added). In *Texas Power & Light v. Adams*, 404 S.W.2d 930, 943 (Tex. Civ. App.--Tyler 1966, no writ), the trial court disqualified a juror because he was a shareholder in the holding company which owned all of the stock of a party. On appeal, the court held that the trial court properly disqualified the juror because he had an interest in the subject matter of the case. *Id.* at 943. As the court explained, “[w]here a

¹ Rule 18b defines a “financial interest” as “ownership of a legal or equitable interest, however small.” Tex. R. Civ. P. 18b(4)(d). Although the Rule specifically holds that ownership in a mutual or common investment fund is not a “financial interest,” Judge Roach stated at the hearing on the Motion for Disqualification that he owns his DSC stock directly and not as part of a fund.

corporation is a party to the suit, its stockholders are necessarily interested in the result.” *Id.* Similarly, the court of appeals in *Texas Employer’s Ass’n v. Lane*, 251 S.W.2d 181 (Tex. Civ. App.--Fort Worth 1952, writ ref’d n.r.e.) held that jurors who carried workmen’s compensation insurance with the defendant insurance company were properly disqualified as having an interest in the subject matter of the case. As the court explained, much like shareholders of a corporation, “[t]he two prospective jurors were interested parties in the sense that they might be subject to assessments, or, on the other hand, might be entitled to dividends, depending upon the financial status of the association at the end of the calendar year.” *Id.* at 182. Like a juror, a judge who owns stock in a corporation which is a party is “interested” in the subject matter of litigation involving that party and is therefore disqualified to decide issues of fact in the case.

In *Pahl v. Whitt*, 304 S.W.2d 250, 252 (Tex. Civ. App.--El Paso 1957, no writ), the trial judge was a member of the plaintiff electric cooperative. After a judgment was rendered, the appellant raised for the first time on appeal the judge’s possible disqualification. The Court of Appeals held that the trial judge was disqualified under the Texas Constitution because of his financial interest, explaining as follows:

It is our opinion that the trial judge, being a member of the Central Texas Electric Cooperative, Inc., is disqualified to sit in the trial of a case wherein it is a party, even though he is only one of 5,000 members. It is true that his interest may be very small, and we are certain that the trial judge knew, in holding himself to be qualified, that he could try the case with complete fairness and impartiality as to the parties, but that does not seem to be the test. In this case, the plaintiffs were seeking to recover for the benefit of the Cooperative the monies it had expended in defense of certain libel suits brought against the Directors of the Cooperative as individuals. Any money recovered by virtue of such allegation would belong to the Cooperative, of which the judge was a member.

In other words, if a Cooperative makes money, its members may receive dividends in the form of money or lowered rates for electricity, *thus such members are in very much the same situation as stockholders in a corporation.*

It has long been held that a stockholder in a corporation is disqualified to sit as judge in a trial wherein the corporation is a party.

Id. at 252 (emphasis added); *see also Texas Power & Light v. Adams*, 404 S.W.2d 930, 943 (Tex. Civ. App.--Tyler 1966, no writ) (“where a corporation is a party to the suit, its stockholders are necessarily interested in the result”); *Guerra v. Wal-Mart Stores*, 943 S.W.2d 56, 59 (Tex. App.--San Antonio 1997, n.w.h.) (“a disqualifying interest in cases in which a company or organization is a party includes that of stockholders of a corporation”). Based on the foregoing, the Court of Appeals held that the judge was disqualified and reversed and remanded the judgment.

The *Gulf Maritime* and *Pahl* cases are merely an extension of a long-existing rule that when a judge is a stockholder in a corporation, he is constitutionally disqualified to sit in a trial where the corporation is a party. *See Sovereign Camp, Woodmen of the World v. Hale*, 120 S.W. 539, 540 (Tex. Civ. App.--Houston [1st Dist.] 1909, no writ) (“It certainly disqualifies a judge, when he is a stockholder in a corporation, from sitting as judge in trial of a case in which such corporation is a party”); *Templeton v. Giddings*, 12 S.W. 851, 852 (Tex. 1889); *Kilgarlin, Disqualification and Recusal of Judges*, 17 ST. MARY’S LJ 599, 625 (1986). These and other cases are merely extensions of the principle that disqualification of a judge is mandatory under the Texas Constitution if he has a direct financial interest, however small, in the result of the case presented. *See, e.g., Chastaine v. State*, 667 S.W.2d 791 (Tex. App.--Houston [14th Dist.] 1983, writ ref’d n.r.e.); *Blanchard v. Krueger*, 916 S.W.2d 15, 19 (Tex. App.--Houston [1st Dist.] 1995, no writ) (“The interest that

disqualifies a judge is an interest, however small, which rests on a direct pecuniary or personal interest in the result of the case”); *Gulf Maritime*, 858 S.W.2d at 559 (“once pecuniary interest is shown to exist, the judge is constitutionally disqualified no matter how slight the interest”).

In addition to the authorities cited above, other rules and authorities support the conclusion that a judge who owns stock in a party is disqualified. For example, the Texas Code of Judicial Conduct states that a “judge should manage any investments and other economic interests to minimize the number of cases in which a judge is disqualified.” Tex. Gov’t Code Ann., Code of Judicial Conduct, Canon 4. There would be no need to manage investments to avoid disqualification unless such ownership results in disqualification. In addition, although not controlling in this case, a judge’s ownership of stock in a party in federal court is a ground for disqualification. 28 U.S.C.A. § 455(d)(4); *See Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1051 (4th Cir. 1984). Finally, several courts in other states have found disqualification based on a judge’s ownership of stock in a party. *See, e.g., Dacey v. Connecticut Bar Assoc.*, 441 A.2d 49 (Conn. 1981)(“the relationship of a stockholder to a private corporation is such that a judge who owns stock in a corporation appearing before him is disqualified to act”); *Zoline v. Telluride Lodge Assoc.*, 732 P.2d 635, 639-40 (Colo. 1987)(court held that trial judge was disqualified because he owned stock in bank in which party was a substantial depositor, stating that “If the trial judge’s decision would affect him in a pecuniary way,” he “has no alternative other than to disqualify himself”); *Tatum v. Southern Pacific Co.*, 58 Cal. Rptr. 238 (Cal. Ct. App. 1967)(judge was disqualified where he was trustee of trust which owned 400 shares of defendant corporation’s stock); *In re Thoms’ Trust*, 261 N.Y.S.2d 304 (N.Y. App. Div. 1965)(judge was disqualified when he acquired stock in the corporate trustee).

DSC has cited a handful of cases for the proposition that a financial interest alone does not constitute grounds for disqualification. None of the cases, however, stand for this proposition, and none are even remotely similar to the facts of this case. In *Hidalgo County Water Improvement Dist. v. Blalock*, 301 S.W.2d 593, 596 (Tex. 1957), the judge was merely a customer of the defendant water improvement district and therefore “no pecuniary gain or loss would result to Judge Blalock directly upon the event of the suit.” In this case, it is unquestioned that Judge Roach is an owner of DSC (through his stock ownership) who may enjoy a pecuniary gain if DSC prevails at trial, not a mere customer of DSC. The case of *Merendino v. Burrell*, 923 S.W.2d 258 (Tex. App.--Beaumont 1996, writ denied) is also inapplicable since the court of appeals merely held in that case that a party waived its recusal motion by waiting until after trial to raise the issue. *Id.* at 262. The opinion says nothing about disqualification; because the appellant’s point of error merely stated that “[t]he trial court erred in failing to recuse itself,” disqualification was never an issue on appeal. *Id.* In *Rocha v. Ahmad*, 662 S.W.2d 77 (Tex. App.--San Antonio 1983, no writ), the court of appeals held that two members of the appellate panel were not disqualified merely because they received campaign contributions from the counsel for one of the parties. *Id.* at 78. The court differentiated its case from case in which a judge is alleged to have an “interest” justifying disqualification, stating that “[i]t is not contended that Justice Esquivel or Justice Tijerina may gain or lose anything of a pecuniary nature, capable of an estimated value, by reason of the judgment that may be rendered in the case.” *Id.* at 79, Fn.2. Finally, in *American Express Travel Related Services v. Walton*, 883 S.W.2d 703, 707 (Tex. App.--Dallas 1994, no writ), the court of appeals merely held that a judge who was an American Express cardholder was not disqualified to rule on class certification in a

lawsuit brought on behalf of such cardholders because “the trial judge did not have an interest in the litigation until he certified the class.” None of the cases cited by DSC are factually similar to the instant case and none of them hold that stock ownership in a party is not grounds for disqualification.

Judge Roach’s stock ownership in DSC required his disqualification. DSC argues, however, that Brown has waived his right to raise this issue or, in the alternative, is judicially estopped from raising this issue. DSC is wrong. Although Texas Rule of Civil Procedure 18(a) provides that a motion for recusal shall be filed at least ten days before the hearing, a motion for disqualification on constitutional grounds may be raised at any time. *Buckholts Independent School District v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982)(“disregard of the constitutional disqualification is error that can be raised at any point in the proceeding”); *McElwee v. McElwee*, 911 S.W.2d 182 (Tex. App.--Houston [1st Dist.] 1995, writ denied); *Madden v. State*, 911 S.W.2d 236, 240 (Tex. App.--Waco 1995, writ denied). Constitutional disqualification may be raised either before or after a judge’s action and cannot be waived. *Madden*, 911 S.W.2d at 240; *McElwee*, 911 S.W.2d at 186; *Gulf Maritime*, 858 S.W.2d at 560 (“While recusal requires a certain amount of procedural tip-toeing, not so with disqualification. Disqualification may be raised at any time”). In fact, disqualification can “be raised for the first time in a collateral attack on the judgment” and “a trial court or an appellate court may raise the issue on its own motion.” *Gulf Maritime*, 858 S.W.2d at 560; *McElwee*, 911 S.W.2d at 186. None of the waiver or judicial estoppel cases cited by DSC involve disqualification or any other constitutional issue. As set forth above, such a complaint cannot be waived by silence, inaction or neglect.

As noted on the court's docket sheet, Judge Roach unquestionably owns stock in DSC. This stock ownership is the type of direct financial interest in a case that requires disqualification under the Texas Constitution, Rule 18b of the Texas Rules of Civil Procedure and the numerous authorities cited above. Failure to disqualify Judge Roach under the facts of this case will violate the Constitutional rights of Plaintiff as well as the principles behind the requirement of disqualification. This Court should grant Plaintiff's Motion for Disqualification and order that all future proceedings be presided over by another judge.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully requests that a hearing be set on his Motion and that the Court grant his Motion for Disqualification and award him such other and further relief to which he may be justly entitled.

Respectfully submitted,



RICHARD A. SAYLES

State Bar No. 17697500

ERIC D. PEARSON

State Bar No. 15690472

SAYLES & LIDJI, P.C.

1201 Elm Street

4400 Renaissance Tower

Dallas, Texas 75270

(214) 939-8700

Fax: (214) 939-8787

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause in accordance with Rule 21a, Texas Rules of Civil Procedure, on this 24th day of June, 1997.

John Stooksberry, Esq.
Boyd Veigel
P.O. Box 1179
McKinney, Texas 75070

Eric W. Pinker, Esq.
Lynn Stodghill Melsheimer & Tillotson, L.L.P.
750 N. St. Paul Street
Suite 1400
Dallas, Texas 75201


Eric D. Pearson