

CAUSE NO. 199-596-97

DSC COMMUNICATIONS CORPORATION,

Plaintiff,

v.

EVAN BROWN,

Defendant.

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IN THE DISTRICT COURT OF

COLLIN COUNTY, TEXAS

199TH JUDICIAL DISTRICT

**DEFENDANT EVAN BROWN'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT**

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant Evan Brown ("Brown") files this Motion for Summary Judgment and Brief in support and would respectfully show the Court as follows:

**INTRODUCTION**

On April 24, 1997, DSC sued Evan Brown, its former employee. DSC contends that it owns an idea or "solution" in Evan Brown's mind which, if it works, will 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 it based upon the terms of an Employee Patent, Copyright and Proprietary Information Agreement Brown signed one week after he began employment with DSC. DSC makes this argument even though the Agreement provides no consideration to Brown other than an illusory promise of at-will employment. As set forth more fully below, the complete absence of consideration makes the Agreement unenforceable as a matter of law. As such, DSC's claims for relief -- which are based entirely on the terms of the Agreement --

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must fail. The Court should grant Defendant's Motion for Summary Judgment and dismiss DSC's claims in their entirety.

### **BASIS OF MOTION**

This Motion for Summary Judgment is based on the pleadings of the parties, the affidavit of Eric D. Pearson ("Pearson Affidavit"), Plaintiff's Original Petition and Application for Injunctive Relief attached to the Pearson Affidavit as Exhibit A, the deposition of Evan Brown, excerpts of which are attached to the Pearson Affidavit as Exhibit B, and all other competent summary judgment evidence.

### **UNDISPUTED FACTS**

On April 21, 1987, Brown began working for DSC. Exh. A, par. 5. After one week of employment, DSC told Brown to sign an Employee Patent, Copyright and Proprietary Information Agreement (the "Agreement"). Exh. B, pp. 56-7, exh. 1. Brown did as he was instructed and signed the Agreement on April 27, 1987. *Id.* As specifically stated in the Agreement, the only consideration provided to Brown for the promises he made was the illusory promise of continued employment with DSC. Exhs. A-1, B-1.

In 1975, well before his employment with DSC, Brown began mentally developing an algorithm for a software program that could convert machine executable binary code into a high level source code using logic and data abstractions. Exh. B, pp. 69-73. His idea essentially amounts to a computer program which would reverse engineer a computer program from its machine language to a source code of any type. Prior to going to work with DSC, Brown had a mental image of 80% of the ultimate solution. *Id.*

In March 1996, Brown mentally pictured the remaining 20% of the solution while he was in his car coming home from a long weekend. *Id.* In April 1996, Brown sought a release from DSC to pursue a patent on his idea. Exh. B, pp. 101, 102, 106-110, exh. 4. After several months of no response from DSC to Brown's request, Brown inquired of several managers at DSC as to whether DSC would be interested in engaging him to develop the idea. Exh. B, pp. 106-110. DSC and Brown began negotiating an agreement whereby DSC would pay Brown a percentage of savings realized by the company if the idea were successful and a percentage of income from third party sales, if any. Exh. B, pp. 106-110, 120, 121, 127-29, exh. 5. In early 1997, DSC suddenly discontinued negotiations with Brown. *Id.* When Brown refused to reveal his idea, DSC abruptly fired him and initiated this lawsuit. *Id.*

DSC's Original Petition and Application for Injunctive Relief asserts claims for injunctive relief, breach of contract and declaratory relief. Exh. A. All of the claims asserted by DSC are premised on the validity, enforceability and applicability of the Employee Patent, Copyright and Proprietary Information Agreement signed by Brown one week after he began employment with DSC. Exh. A, par. 6, 11, 12, 15, 24, 25. As stated above, and as set forth clearly in the Agreement itself, the only consideration provided to Brown for the promises he made in the Agreement was the illusory promise of continued employment with DSC. Exhs. A-1, B-1.

### **ARGUMENT AND AUTHORITIES**

**I. The contract on which DSC bases all of its claims is not supported by consideration and is therefore unenforceable as a matter of law.**

Consideration is a fundamental element of every valid contract. *Smith v. Renz*, 840 S.W.2d 702, 704 (Tex. App.--Corpus Christi 1992, writ denied); *Garcia v. Villarreal*, 478 S.W.2d 830, 832

(Tex. Civ. App.--Corpus Christi 1971, no writ). As such, “[i]t is elementary that every contract must be supported by consideration.” *Fourticq v. Fireman’s Fund Ins. Co.*, 697 S.W.2d 562, 564 (Tex. App. -- Dallas 1984, no writ); *see also Echols v. Bloom*, 485 S.W.2d 798, 800 (Tex. Civ. App.--Houston [14th Dist] 1972, writ ref’d n.r.e.) (“It is axiomatic that to be valid and enforceable a contract establishing an option must be supported by consideration”). Consideration can consist of either a benefit to the promisor or a loss or detriment to the promisee. *See, e.g., Smith*, 840 S.W.2d at 703; *Garcia*, 478 S.W.2d at 832; *Hoagland v. Finholt*, 773 S.W.2d 740, 743 (Tex. App.--Dallas 1989, no writ). Whether a contract is supported by consideration is a question of law. *Brownwood Ross Company v. Maverick County*, 936 S.W.2d 42, 45 (Tex. App.--San Antonio 1996, writ denied); *Williams v. Hill*, 396 S.W.2d 911, 913 (Tex. Civ. App.--Dallas 1965, no writ).

In order to be valid and enforceable, a bilateral contract must have been supported by consideration at the time of its formation. *See, e.g., TPS Freight Distributors, Inc. v. Texas Commerce Bank - Dallas*, 788 S.W.2d 456, 460 (Tex. App.--Fort Worth 1990, writ denied) (“The mutuality of obligation requirement in a contract is satisfied at the time of its formation, provided that the contract is based on valid consideration”); *Roark v. Stallworth Oil and Gas, Inc.*, 813 S.W.2d 492, 496 (Tex. 1991) (“Consideration is a present exchange bargained for in return for a promise”); *CRC - Evans Pipeline International, Inc. v. Myers*, 927 S.W.2d 259, 263 (Tex. App.--Houston [1st Dist] 1996, no writ) (Relevant point in determining whether a covenant not to compete is ancillary to an otherwise enforceable agreement is “the moment the agreement is made”). Where there is no consideration, there is no contract and, consequently, there can be no breach of contract. *See, e.g., Gary Safe Co. v. A.C. Andrews Co.*, 568 S.W.2d 166, 168 (Tex. Civ. App.--Dallas 1978, writ ref’d n.r.e.) (“In the absence of any benefit to the promisor or detriment to the promisee legally derived

from the promise sought to be enforced, there is no consideration, and hence no contract”); *Hoagland*, 773 S.W.2d at 744 (“The point to be made is axiomatic -- consideration for a contract must precede any breach of contract”); *Fourticq*, 679 S.W.2d at 564 (Defendant could not be held liable for breach of agreement because agreement was unenforceable for lack of consideration).

The Agreement clearly states that the only consideration provided to Brown, who had been employed for one week when he signed the Agreement, was his continued employment by DSC:

In consideration of my employment (or continued employment in the event I am already in the employ of the Company at the time of execution hereof) with DSC Communications Corporation or any subsidiary or affiliate thereof (the “Company”) and of the salary or wages paid for my services in such employment, the Company and I agree as follows . . .

Exhs. A-1, B-1 (emphasis added). This promise of continued employment was illusory, as DSC could terminate Brown at any time. Brown’s employment by DSC, the only consideration to Brown, was merely at-will employment. The Agreement contains no term of employment, no salary and no other provisions typically found in employment agreements. Moreover, the Agreement specifically states that it is not an employment agreement, but rather, an at-will agreement:

The Company and I acknowledge that this Agreement does not constitute a contract of employment and that either the Company or I can terminate the employment relationship at any time subject to any applicable employment policies of the Company then in effect.

Exhs. A-1, B-1 (emphasis added).

DSC contends that the Agreement obligates Brown to disclose to DSC inventions made or conceived while at DSC which are in DSC’s line of business and which result from work Brown performed for DSC. Exh. A. This alleged contractual obligation forms the basis for all of DSC’s claims. Exh. A, par. 6, 11, 12, 15, 24, 25. The only consideration for the alleged obligation of

disclosure was Brown's at-will employment by DSC, an illusory promise which provides no consideration whatsoever. Exhs. A-1, B-1. Because Brown's alleged contractual obligations were not supported by valid consideration, they are unenforceable. The Court should therefore grant Brown's Motion for Summary Judgment and dismiss DSC's claims with prejudice.

There can be no question that an employer's promise of at-will employment is illusory and does not constitute valid consideration. In *Martin v. Credit Protection Association, Inc.*, 793 S.W.2d 667 (Tex. 1990), the court was called on to determine whether a covenant not to compete contained in an employment agreement was enforceable against a former employee. In beginning its analysis, the court stated the now-familiar rule that a covenant not to compete must be ancillary to an otherwise enforceable agreement in order to be enforceable. In order to determine whether the covenant not to compete at issue was enforceable, therefore, the court examined the employment agreement to determine whether it was itself enforceable. The court first noted that although the employee signed an employment agreement which prohibited his competition with his employer for at least three years, "he remained an employee-at-will and was subject to termination at any time." *Id.* at 669. Moreover, the court noted, the covenant not to compete was not signed until some three years after the employee first began working for the Plaintiff. The court concluded that "since an employment at-will relationship is not binding upon either the employee or the employer and either may terminate the relationship at any time, continuation of an employment at-will relationship does not constitute independent valuable consideration to support the covenant." *Id.* For the foregoing reasons, the court held that the covenant not to compete was not ancillary to an otherwise enforceable agreement or supported by independent valuable consideration and was therefore not enforceable against the employee. *Id.* at 670; *see also Travel Masters, Inc. v. Star Tours, Inc.*, 827

S.W.2d 830, 833 (Tex. 1991)(covenant not to compete was unenforceable against at-will employee because “an employment-at-will relationship, although valid, is not an otherwise enforceable agreement”).

In *Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 642 (Tex. 1994), an employee signed an agreement wherein she promised to provide fourteen days notice if she desired to terminate her employment, promised to provide an inventory of all property of the employer upon termination and promised not to compete against her employer for one year after termination. In analyzing the enforceability of this agreement, the court reiterated the principal that at-will employment provides no consideration:

Consideration for a promise, by either the employee or the employer in an at-will employment, cannot be dependent upon a period of continued employment. Such a promise would be illusory because it fails to bind the promisor who always retains the option of discontinuing employment in lieu of performance. When illusory promises are all that support a purported bilateral contract, there is no contract.

*Id.* at 644-45. Expanding on its analysis, the court stated that “any promise made by either employer or an employee that depends on an additional period of employment is illusory because it is conditioned upon something that is exclusively within the control of the promisor.” *Id.* at 644, Fn.5 Finally, the court noted that the employer’s promises to pay the employee’s salary and commissions as well as a package of employee benefits were also illusory, since “each is dependent upon some interval of continued at-will employment.” *Id.* at 646, Fn.9. The court concluded that the covenant not to compete was not ancillary to or part of an otherwise enforceable agreement and was therefore unenforceable. *Id.* at 648.

In *CRC-Evans*, the court analyzed a covenant not to compete which was part of an employment agreement which required the employee to disclose and convey to his employer all inventions related to his employer's business and to assist in obtaining and maintaining patents and copyrights on such inventions. This disclosure provision, much like the disclosure provision in the Agreement between Brown and DSC, was given in return for promised employment and the payment of a salary or other remuneration. *CRC-Evans*, 927 S.W.2d at 263. Unlike the Brown-DSC Agreement, the agreement in *CRC-Evans* also obligated the employer to give the employee trade secrets and proprietary information necessary to perform his duties. In order to determine whether the covenant not to compete was ancillary to an otherwise enforceable agreement, the court first had to determine whether the promises made by the employee -- other than the covenant not to compete -- constituted an enforceable agreement to which the covenant not to compete could be ancillary. In analyzing this issue, the court stated that if the employer's promises are illusory, "then they do not constitute valid consideration for appellees' promises made *in addition to* the covenants not to compete, meaning no otherwise enforceable agreement would have existed at the time each agreement was made." *Id.* at 263-64 (emphasis original). The court noted that the employer's promise to provide initial specialized training was illusory because at the time the employment agreement, the employer could fire the employee and escape the obligation to perform. *Id.* at 265. Further, the court noted, the other promises of the employer, to employ at-will and to provide a base salary and other remuneration, were also illusory. *Id.* Based on the foregoing, the court concluded that the trial court did not abuse its discretion when it held that the covenants not to compete were unenforceable because they were not ancillary to or part of otherwise enforceable agreements. *Id.*; *see also Burgess v. Permian Court Reporters, Inc.*, 864 S.W.2d 725, 729 (Tex. App.--El Paso 1993,

writ dismiss'd w.o.j.)(employment agreement which was terminable at-will by either party was not an otherwise enforceable agreement which could sustain a covenant not to compete).

Finally, at least one Texas court has had an occasion to consider whether at-will employment provides valid consideration to support an agreement other than a covenant not to compete. In *Ichiban Records v. Rap-A-Lot Records*, 933 S.W.2d 546 (Tex. App.--Houston [1st Dist.] 1996, no writ), Willie Dennis signed a recording contract with Rap-A-Lot Records ("RAL"). According to the terms of the contract, he was to render his exclusive services as a performing artist for RAL. *Id.* at 548-49. In return, RAL was to pay the costs of recording sessions conducted in accordance with the terms of the agreement. When RAL learned that Dennis had performed on albums released by other recording companies, it brought suit against him and sought a temporary injunction preventing him from making and distributing unauthorized recordings and performances. The court of appeals agreed with RAL that the restrictive terms in the recording contract were more like a negative restriction in a personal services contract than a covenant not to compete. *Id.* at 551. Because RAL could terminate the recording contract at any time without cause, the court held that the contract was effectively a contract for employment at-will and was unenforceable. *Id.* at 552. As such, the court held, RAL did not establish a probable right to recovery and the trial court therefore erred in granting RAL injunctive relief. *Id.* at 552.

Although the majority of the cases cited above involve covenants not to compete, they are equally applicable to the Agreement which is the basis of DSC's claims in this case. In order to determine whether the covenants not to compete at issue were enforceable, the courts in the cases cited above first had to determine whether they were ancillary to an otherwise enforceable agreement. As such, the courts were called upon to determine whether an agreement between an

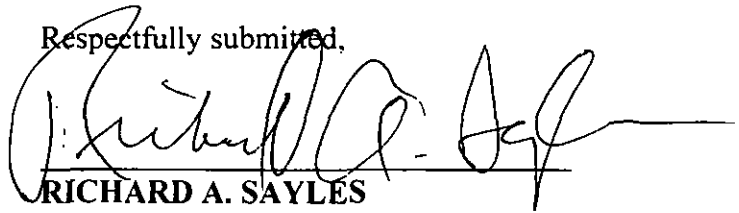
employer and an employee was supported by valid consideration when the only consideration from the employer to the employee was at-will employment. The question, then, was not whether the covenant not to compete was enforceable but, rather, whether the agreement to which it was ancillary was enforceable. The courts in the cases cited above universally held that at-will employment provides no consideration and is merely an illusory promise. As such, these courts concluded, an at-will employment agreement is not an otherwise enforceable agreement to which a covenant not to compete may be ancillary. This principle that at-will employment provides no consideration for an agreement is equally applicable to this case and renders the Agreement between Brown and DSC unenforceable as a matter of law.

As set forth above, at-will employment is a merely illusory promise which provides no legal consideration to a contracting party. *See, e.g., Ichiban Records*, 933 S.W.2d at 552; *Light*, 883 S.W.2d at 644-45. Without valid consideration, there can be no valid, enforceable contract. *See, e.g., Gary Safe Co.*, 568 S.W.2d at 168; *Hoagland*, 773 S.W.2d at 744. As such, the Agreement between Brown and DSC is invalid and unenforceable and DSC's claims against Brown fail as a matter of law. The Court should grant Brown's Motion for Summary Judgment and dismiss DSC's claims with prejudice.

**CONCLUSION AND PRAYER**

For the reasons set forth above, Defendant Evan Brown respectfully requests that the Court grant his Motion for Summary Judgment, dismiss DSC's claims with prejudice and award Brown 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

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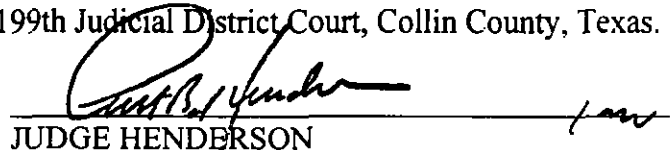
**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument has been served upon all counsel of record on this 3<sup>rd</sup> day of July, 1997, pursuant to rule 21a of the Texas Rules of Civil Procedure.



**FIAT**

This Motion is set for hearing on the 5<sup>th</sup> day of August, 1997, at 9:00 o'clock, A.m., before the Honorable Curt B. Henderson, 219th Judicial District Court, Collin County, Texas, sitting by assignment for the 199th Judicial District Court, Collin County, Texas.



JUDGE HENDERSON

DSC COMMUNICATIONS CORPORATION,

Plaintiff,

v.

EVAN BROWN,

Defendant.

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IN THE DISTRICT COURT OF

COLLIN COUNTY, TEXAS

199TH JUDICIAL DISTRICT

**AFFIDAVIT OF ERIC D. PEARSON**

STATE OF TEXAS §  
  §  
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this date personally appeared Eric D. Pearson who, being by me first duly sworn, upon his oath deposed and stated as follows:

1. My name is Eric D. Pearson. I am an attorney with the law firm of Sayles & Lidji and am one of the counsel of record for Defendant in the above-styled and numbered case. I have personal knowledge of the facts recited in this affidavit. My personal knowledge is derived from my position as one of the lawyers representing Defendant.

2. Attached hereto as Exhibit A is a true and correct copy of DSC's Original Petition and Application for Injunctive Relief filed in this matter and the exhibits thereto. Attached hereto as Exhibit B is a true and correct copy of excerpts of the deposition of Evan Brown taken in this case on May 1, 1997 and the exhibits thereto.

FURTHER AFFIANT SAITH NOT.

  
ERIC D. PEARSON

Sworn and subscribed before me on this 2nd day of July, 1997, to certify which witness my hand and seal of office.



Diana C. Tallant-King  
Notary Public in and for the State of Texas

CAUSE NO. 199 596 97

DSC COMMUNICATIONS  
CORPORATION,

Plaintiff,

v.

EVAN BROWN,

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IN THE DISTRICT COURT OF

COLLIN COUNTY, TEXAS

199 JUDICIAL DISTRICT

**PLAINTIFF'S ORIGINAL PETITION AND  
APPLICATION FOR INJUNCTIVE RELIEF**

TO THE HONORABLE JUDGE OF SAID COURT:

DSC Communications Corporation ("DSC"), Plaintiff, complains of Evan Brown ("Brown"), Defendant, and would respectfully show the Court as follows:

I.

The Parties

1. DSC is a Delaware corporation with its principal place of business in Collin County, Texas at 1000 Coit Road, Plano, Texas 75075-5813.
2. Evan Brown is an individual residing in Collin County, Texas and who may be served with process at his residence at 2705 Chadbourne Dr., Plano, Texas 75023.

II.

Jurisdiction and Venue

3. This Court has jurisdiction over the subject matter of this litigation because the amount at issue is in excess of the minimum jurisdictional limits of this Court.

*J. Ripkin*

<b>EXHIBIT</b>	
A	

4. Venue is proper in Collin County, Texas pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 15.002 because Brown's residence was situated in Collin County, Texas when all or part of the causes of action accrued, and because the causes of action, in whole or in substantial part, arose in Collin County, Texas.

III.  
Facts Applicable to All Claims

5. DSC is a corporation engaged in the business of developing and selling telephone switching systems and other telecommunications technology. On April 21, 1987, DSC hired Evan Brown. Continuously and over the next ten years, DSC employed Brown under various job titles. In each of these positions, Brown worked on software technology for DSC's telecommunications products and systems.

6. The field of telecommunications is a highly competitive technology sector. Inventions, new concepts, ideas, and trade secrets are among the most valuable assets of telecommunications companies like DSC. Recognizing this fact, Brown and DSC entered into an "Employment, Copyright, and Proprietary Information Agreement" ("Employment Agreement") (see Exhibit 1) at the onset of the employment relationship. The terms of the Employment Agreement speak to two types of inventions: (1) those conceived prior to Brown's employment by DSC and (2) those conceived during Brown's employment with DSC. With respect to the first, Brown, in 1987 when he joined DSC, that declared he had none. (See Exhibit 1, ¶ E) With respect to the second, the Employment Agreement states:

In consideration of my employment (or continued employment in the event I am already in the employ of the Company at the time of execution hereof) with DSC Communications Corporation or any subsidiary or affiliate thereof (the "Company")

and of the salary or wages paid for my services in such employment, the Company and I agree as follows:

(A) I will communicate to an officer of the Company promptly and fully all inventions (including but not limited to all matters subject to patent, i.e., processes, machines, computer programs, etc.) made or conceived by me (whether made solely by me or jointly with others) from the time of entering the Company's employ until I leave (1) which are along the lines of the business, work or investigations of the Company or of companies which it owns or controls at the time of such inventions, or (2) which result from or are suggested by any work which I may do for or on behalf of the Company.

(B) I will assist the Company and its nominees during an [sic] subsequent to such employment in every proper way (entirely at its or their expense) to obtain for its or their own benefit patents for such inventions in any and all countries (including the assignment of any inventions to the Company), said inventions to be and remain the sole and exclusive property of the Company or its nominees whether patented or not.

7. As a leader in its field, DSC develops technology and markets products to connect phone calls and move information from one place to another. To achieve this task, DSC developed complex telecommunications hardware and software. An important type of DSC's hardware is a large digital switching computer known as a digital switch. DSC's digital switch simultaneously reroutes thousands of telephone connections. In order to operate, DSC's digital switch requires the appropriate DSC proprietary software to be loaded on and be operating on the switch. This DSC proprietary software comprises many millions of lines of computer code.

8. A great deal of DSC's switching software written since the early 1980s exists in a special type of machine executable binary code called Z8000 language. Recent technological advances have given rise to the development of new high level computer languages, such as C and C++. These newer languages are much easier to use and more efficient than Z8000. As such, there would be great advantage to DSC to translate its millions of lines of Z8000 language to the more

modern C or C++ languages. However, at present, translating the Z8000 is an extremely laborious process, requiring years of work and significant resources.

9. If DSC could develop a computer program which would automatically translate "machine executable binary code," such as the Z8000, to a "high level source code," such as C or C++, it would realize the reward of significant savings both in man hours and resources. Moreover, as both Brown and DSC knew, such an automated translation program would be worth many millions of dollars, because numerous other telecommunications and technology companies are similarly struggling to translate or convert their old computer codes into new computer code as efficiently as possible. In fact, several members of DSC's Research and Development Division recently submitted an invention disclosure form to DSC's patent department relating to their effort to develop just such an automated translation program. (See Exhibit 2).

10. During his employment at DSC, Brown became aware of the enormous resources and data currently invested in the older Z8000 code, as well as the difficulties that currently exist in updating this code. Having learned these facts, Brown realized how valuable a computerized automated translation process would be.

11. Based on this knowledge, and during his employment at DSC, Brown conceived a computer solution which would make possible an automated translation of the computer code in the old Z8000 language to the new C or C++ languages. Brown knew how valuable this computerized solution would be to DSC. On April 19, 1996, Brown sent a memo to Gamini Desoyza, his immediate supervisor, stating that he had

developed a method of converting machine executable binary code [such as Z8000] into high level source code [such as C or C++] form using logic and data

abstractions. The purpose of this idea is to take existing executable programs and "reverse engineer" the intelligence from the programs and "re-code" the intelligence into a portable high level language.

(See Exhibit 3). Thus, during his employment by DSC, Brown conceived and developed a solution which would allow DSC to perform an automated computerized translation of DSC's old Z8000 switching codes into "C" and/or "C++" (the "Solution"). Accordingly, under the terms of the Employment Agreement he was required to disclose the Solution to DSC. Moreover, under the terms of the Employment Agreement, DSC held the "sole and exclusive" right to the Solution. (See Exhibit 1, ¶ B). However, rather than fulfill the terms of his Employment Agreement and disclose the Solution to DSC, Brown refused to disclose the Solution, and instead demanded that DSC pay Brown additional monies for the disclosure of the Solution.

12. By virtue of the Employment Agreement and DSC's employment of Brown, DSC had the exclusive rights to the Solution, and Brown was required to disclose the Solution to DSC. DSC explained to Brown his obligations in these regards under the Employment Agreement. However, Brown would not, as the Employment Agreement required, disclose the Solution to DSC. Without waiving its rights to the Solution, DSC attempted to negotiate with Brown for the disclosure of the Solution. Brown refused DSC's proposals.

13. After protracted negotiations, Brown began to threaten to market the Solution to Europe. In early April 1997, Brown made good on his threat, and spent approximately two weeks in Europe marketing the Solution. Brown has also stated that he has marketed the Solution in the United States.

14. Shortly after his return to the United States, DSC attempted one last time to reason with Brown. DSC again explained to Brown his obligations under his Employment Agreement. DSC asked him to disclose the Solution and comply with his Employment Agreement. Once again, Brown refused. Brown stated that he was prepared to flee to Europe and market the Solution. Because Brown refused to comply with the Employment Agreement, DSC terminated his employment on April 21, 1997.

15. Given this background, several things are clear: (1) Brown had not developed the Solution prior to his employment at DSC; (2) Brown conceived the Solution during his employment with DSC; (3) the Solution is directly related to "business, work, or investigations" of DSC; and thus (4) Brown has breached the terms of his Employment Agreement by refusing to disclose the Solution and by wrongfully asserting that he owned all legal rights to the Solution. Moreover, he has threatened to flee the United States and disclose the Solution to DSC's competitors. Indeed, he has already made one trip to Europe to entertain such bids. Accordingly, if Brown is not enjoined from disclosing, selling, assigning, or transferring, and from negotiating the disclosure, sale, assignment, or transfer of the Solution, DSC will suffer irreparable injury through the loss of an idea it owns.

#### IV.

#### Causes of Action

#### Count One - Injunctive Relief

16. DSC incorporates by reference each and every allegation contained within paragraphs 1 through 15 as if fully set forth herein.

17. DSC seeks injunctive relief from this Court pursuant to both equitable principles, Tex. R. Civ. P. 680 and Tex. Civ. Prac. & Rem. Code § 65.011, which provides in part:

A writ of injunction may be granted if:

(1) the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant;

(2) a party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual;

(3) the applicant is entitled to a writ of injunction under the principles of equity and the statutes of this state relating to injunctions;

\* \* \*

(5) irreparable injury to real or personal property is threatened, irrespective of any remedy at law.

18. DSC will suffer immediate and irreparable harm to its business as a proximate result of Brown's conduct. More specifically, if Brown is not enjoined from disclosing, selling, assigning, or transferring and negotiating the disclosure, sale, assignment, or transfer of the Solution developed during his employment by DSC, DSC will lose not only its exclusive right to the Solution but also the invaluable trade secret embodied in the Solution. Furthermore, if Brown is not enjoined to disclose the Solution to DSC, DSC will be deprived of its exclusive right to the Solution.

19. For the potential harm and damage that would be inflicted upon DSC, DSC has no adequate remedy at law but for the intervention of this Court. Damages will continue and to a large degree are incalculable.

20. As a result, DSC requests this Court issue an immediate temporary restraining order in this case, without notice, requiring that Brown:

- a. Be restrained and enjoined from selling, assigning, or transferring the Solution to anyone other than DSC;
- b. Be restrained and enjoined from negotiating the sale, assignment, or transfer of the Solution to anyone other than DSC;
- c. Be restrained and enjoined from disclosing or negotiating the disclosure of any information or details concerning the Solution to anyone other than DSC;
- d. Be restrained and enjoined from further developing, refining, or implementing the Solution;
- e. Be restrained and enjoined from destroying, and enjoined to preserve, any materials or records (including computer files or disks) that relate to or evidence the Solution or the marketing of the Solution;
- f. Be enjoined to disclose the Solution, in its entirety, to DSC; and
- g. That the Temporary Restraining Order shall continue in effect until the conclusion of a hearing on the Temporary Injunction hereafter set, or until further order of this Court.

21. DSC also seeks and is entitled to a temporary and permanent injunction pursuant to § 65.011 of Tex. Civ. Prac. & Rem. Code because:

- a. DSC is entitled to the relief demanded above and such relief requires the restraint of Brown from acts which will be prejudicial to DSC;
- b. Brown has violated, and upon information and belief, is about to perform actions in further violation of his Employment Agreement with DSC in

violation of the rights of DSC, which action by Brown will cause DSC to lose its rights to interest in the Solution, and would render a judgment in this litigation ineffectual;

- c. DSC is entitled to a writ of injunction under the principles of equity; and
- d. Irreparable injury to DSC's rights will continue to be realized by DSC irrespective of any remedy at law.

22. DSC therefore requests that any temporary restraining order issued in this case be converted to a temporary injunction during the pendency of this action, and upon final trial, a permanent injunction.

#### Count Two - Breach of Contract

23. DSC incorporates by reference each and every allegation contained within paragraph 1 through 22 as if fully set forth herein.

24. By the actions described above, Brown has breached at least two contractual duties spelled out in the Employment Agreement. First, Brown has materially breached his contractual duty to "communicate . . . promptly and fully all inventions (including but not limited to all matters subject to patent, i.e., processes, machines, computer programs, etc.)" developed during his employment by DSC. (*See* Exhibit 1, ¶ A). Second, by wrongfully asserting that the Solution is his to disclose, sell, assign, or transfer, Brown has breached his contractual promise that any "inventions [will] remain the sole and exclusive property of the company . . ." (*Id.* at ¶ B). In addition, Brown will have breached his contractual duties if he has disclosed the Solution to anyone.

25. When DSC hired Brown, he stated that there were not any “discoveries owned or controlled by [him]” (*Id.* at ¶ E). During the time he was an employee at DSC, Brown developed the Solution, which is related to DSC’s business and its ongoing investigation, and which resulted from work he did for or on behalf of the company. Pursuant to his Employment Agreement, the Solution is the property of DSC.

26. Notwithstanding DSC’s legal interest in and right to the Solution, Brown has threatened to market the Solution in Europe and in the United States. Brown has stated that once he takes the Solution to Europe, he will be beyond the reach of United States Courts. In fact, Brown has actually traveled to Europe and “shopped” the Solution to European investors. Accordingly, DSC prays that Brown be restrained from (1) disclosing, selling, assigning, or transferring and (2) negotiating the disclosure, sale, assignment, or transfer of the Solution to anyone other than DSC through a temporary and permanent injunction.

27. In addition, DSC would further show that such conduct by Brown constitutes a clear breach of his contract with DSC. As a direct and proximate result of such breach, DSC has suffered damages in excess of the minimum jurisdictional limits of the Court.

28. Moreover, as a result of the controversy arising between DSC and Brown, it has become necessary for DSC to employ the law firm of Lynn Stodghill Melsheimer & Tillotson, L.L.P. to prosecute this action. Brown should be required to pay DSC’s reasonable and necessary attorneys’ fees in connection with this matter.

Count Three - Declaratory Judgment

29. DSC incorporates by reference each and every allegation contained within paragraph 1 through 28 as if fully set forth herein.

30. As more fully described above, the Solution legally belongs to DSC, and DSC owns all legal title and interest in the Solution. Notwithstanding DSC's legal right, Brown is attempting to deprive DSC of its right to the Solution by selling it to third parties. DSC has repeatedly demanded that Brown cease such activities and disclose and assign the Solution to DSC, but he has steadfastly refused to comply. As such, a present controversy exists between DSC and Brown.

31. Pursuant to the Declaratory Judgments Act, § 37.001 *et seq.* of the Texas Civil Practice & Remedies Code (the "Act"), DSC requests this Court enter a declaratory judgment establishing the following:

- a. That DSC owns full legal title to the Solution;
- b. That Brown must disclose the Solution, in its entirety, to DSC;
- c. That Brown cannot disclose, sell, assign, or transfer the Solution to anyone other than DSC;
- d. That Brown cannot negotiate the disclosure, sale, assignment, or transfer of the Solution to anyone other than DSC;
- e. That Brown cannot further develop the Solution;

32. Also pursuant to the Act, DSC requests an award of its reasonable and necessary attorneys' fees and costs of this lawsuit.

Jury Demand

33. DSC requests that all issues of fact be tried before a jury.

VI.  
Relief Requested

Considering the premises, DSC requests that this court, upon final hearing, enter judgment against Brown for the following relief:

1. That a temporary restraining order be issued as requested and set forth in paragraph 20 above;
2. That Brown be cited to appear and show cause and that on such hearing, a temporary injunction be issued, enjoining Brown, his agents, servants, and employees as more fully described in paragraph 20 above;
3. That a permanent injunction be ordered on final trial of this cause, enjoining Brown, his agents, servants, and employees as more fully described in paragraph 20 above;
4. Compensatory damages in an amount to be determined at trial;
5. Reasonable and necessary attorneys' fees in an amount to be determined at trial;
6. Costs of suit incurred herein;
7. Pre and post judgment interest as provided by law; and

8. Such other and further relief in law or in equity to which DSC may be justly entitled.

Respectfully submitted,

**LYNN STODGHILL MELSHEIMER & TILLOTSON, L.L.P.**

By: \_\_\_\_\_



Michael P. Lynn, P.C.  
State Bar No. 12738500  
Eric W. Pinker  
State Bar No. 16016550

750 North St. Paul Street  
Suite 1400  
Dallas, Texas 75201  
(214) 981-3800 - Telephone  
(214) 981-3839 - Telecopy

**ATTORNEYS FOR PLAINTIFF  
DSC COMMUNICATIONS CORPORATION**

VERIFICATION

STATE OF TEXAS

§

COUNTY OF COLLIN

§

§

BEFORE ME, the undersigned authority, personally appeared DAN ALLMAN, who, being duly sworn, stated that he is the Director Human Resources of DSC Communications Corporation, and is the duly authorized agent for DSC Communications Corporation, Plaintiff in the above-captioned cause; that he has read the above and foregoing Petition; and that every statement contained in paragraphs 5 through 15 and 17 is within either his personal knowledge, information and belief or within the corporate information of DSC Communications Corporation to which he has had access by reason of his position as an officer of the Company, and is true and correct. In making this Verification, Mr. Allman further stated that he had reviewed relevant documents in the personnel files of Evan Brown. Moreover, Mr. Allman stated that for purposes of this Petition, he is the custodian of records of DSC, he had made reasonable inquiry within DSC and he has determined that the documents attached as Exhibits 1, 2 and 3 to this Petition are kept by DSC in the regular course of business and it was in the regular course of business of DSC for an employee or representative of DSC, with knowledge of the act, event, condition, opinion, or diagnoses recorded to make the record or to transmit information thereof to be included in such recording; and the record was made at or near the time or reasonably soon thereafter; and the records attached hereto are the original or exact duplicates of the original.

  
\_\_\_\_\_

Sworn to before me this 24<sup>th</sup> day of April, 1997, to certify which witness my hand and official seal.

  
\_\_\_\_\_  
NOTARY PUBLIC, STATE OF TEXAS

MY COMMISSION EXPIRES: August 28, 1999

**EXHIBIT 1**

EMPLOYEE INVENT, COPYRIGHT AND PROPRIETARY INFORMATION AGREEMENT



Name: Evan Brown  
(please print)

In consideration of my employment (or continued employment in the event I am already in the employ of the Company at the time of execution hereof) with DSC Communications Corporation or any subsidiary or affiliate thereof (the "Company") and of the salary or wages paid for my services in such employment, the Company and I agree as follows:

(A) I will communicate to an officer of the Company promptly and fully all inventions (including but not limited to all matters subject to patent, i.e., processes, machines, computer programs, etc.) made or conceived by me (whether made solely by me or jointly with others) from the time of entering the Company's employ until I leave, (1) which are along the lines of the business, work or investigations of the Company or of companies which it owns or controls at the time of such inventions, or (2) which result from or are suggested by any work which I may do for or on behalf of the Company.

(B) I will assist the Company and its nominees during or subsequent to such employment in every proper way (entirely at its or their expense) to obtain for its or their own benefit patents for such inventions in any and all countries (including the assignment of any inventions to the Company), said inventions to be and remain the sole and exclusive property of the Company or its nominees whether patented or not.

(C) In accordance with Company policy as in effect from time to time, I will make and maintain adequate and current written records of all such inventions, in the form of notes, sketches, drawings, or reports relating thereto, which records shall be and remain the property of and available to the Company at all times.

(D) Except as the Company may otherwise consent in writing, I will not disclose at any time (except as my Company duties may require) either during or within a period of two (2) years subsequent to the term of employment any information, knowledge, or data of the Company I may receive or develop during the course of my employment, relating to trade secrets, formulas, business processes, methods, machines, manufacturers, compositions, inventions, discoveries, computer programs, customer records, lists, accounts or other matters which are of a private, secret or confidential nature. (The terms "secret" and "confidential" as used in this Agreement are used in their ordinary sense and do not refer to official classifications of the United States Government.)

(E) I will notify the Company in writing before I make any disclosure or perform or cause to be performed any work for or on behalf of the Company, which might conflict with (1) the rights I claim in any invention or idea (a) conceived by me or others prior to my employment or (b) otherwise outside the scope of this Agreement, or (2) rights of others arising out of obligations incurred by me (a) prior to this Agreement or (b) otherwise outside the scope of this Agreement. In the event of my failure to give notice under the circumstances specified in (1) of the foregoing, the Company may assume that no such conflicting invention or idea exists, and I agree that I will make no claim against the Company with respect to the use of any such invention or idea in any work or the product of any work which I perform or cause to be performed for or on behalf of the Company. All discoveries owned or controlled by me, in whole or in part, as of the date of this Agreement are listed below.

Discoveries owned or controlled: (If none, so state. Attach separate sheet if necessary.)

-NONE-

(F) I will allow the Company, without charge (fee, license, or arrangement and free from any allegation of infringement whatsoever to make full use of any matter developed (whether developed or written solely by me or jointly with me) during the course of my employment along the lines of business, work or investigations of the Company or of companies which it owns or controls at the time of such development and/or which result from or are suggested by any work which I may do for or on behalf of the Company.

This Agreement may not be changed, modified, reissued, discharged, abandoned or otherwise terminated, in whole or in part, except by an instrument in writing signed by me or an officer or other authorized executive of the Company.

This Agreement shall be binding upon my heirs, executors, administrators or other legal representatives or assigns. Reference to the Company shall include the Company's subsidiaries, successors and assigns.

Except as stated below, I have no agreements with or obligations to others in conflict with the foregoing. (If "none", so state.)

Arrangements with or obligations to others: (If none, so state. Attach separate sheet if necessary.)

-NONE-

The Company and I acknowledge that this Agreement does constitute a contract of employment and that either the Company or I can terminate the employment relationship at any time subject to any applicable employment policies of the Company then in effect. However, my agreement not to use or disclose the Company's proprietary data or information and to preserve the Company's interest in any inventions shall survive termination of my employment.

Employee: Evan Brown

Date: Apr 27, 1987

DSC Communications Corporation  
By: Walter J. ...  
Title: Personnel Director

**EXHIBIT 2**



RECEIVED  
MAY 17 1996

INVENTION DISCLOSURE FORM (2/8/96)

DSC LEGAL  
DEPARTMENT

Send completed form to MS LEGL2

Help: Larry Sewell (214) 519-5735  
Elaine Krauter (214) 519-5103

1. Title of invention: c source code regenerator

2. Inventors (please print):

Full Name	Division	Mail	Phone	Supervisor, MS, Phone
Marvin E. Harbin	TPD	TPDC-2	92658	C. Owen 93709
Raymond P. Percival	TPD	TPDC-2	93272	C. Owen

3. Description of what the invention accomplishes which is new or improved:

The input to the "Unidot C Compiler" is a C source file and the output a 28000 assembly language translation of the input C file. This invent takes the 28000 assembly language output of the "Unidot C Compiler" and recovers the original input C source file.

4. Please attach a page (or more; e.g., a sketch with comments, or excerpts from a report) describing the invention, giving an idea how it accomplishes what it does.

5. Has the invention been described in a publication (not confidentially)? No If so, when? \_\_\_\_\_

6. Has the invention operated successfully? Yes If so, when? 5/6/96

7. If the invention is to be in a product, when is it expected to be sent outside DSC (e.g., for customer test)? n/a

9. Inventor Signature(s): Marvin E. Harbin Date: 5/15/96  
R.P.P. Date: 5/15/96  
 \_\_\_\_\_ Date: \_\_\_\_\_

10. Witness Signatures: I have read and understand this invention disclosure:  
[Signature] Date: 5/15/96  
 \_\_\_\_\_ Date: \_\_\_\_\_

**EXHIBIT 3**

MEMORANDUM  
Apr 19, 1996

TO: Larry Sewell, DSC Legal Council for Intellectual Property  
COPY: Gamini Desoyza *[Signature]*  
FROM: Evan Brown  
SUBJECT: Request for release on patent idea

-----  
This idea was founded on a problem proposed by a friend working for El Paso Natural Gas Co. The company lost part of their original source code for a utility tax payment program and as a result, are not able to retire their existing mainframe computer system.

I have developed a method of converting machine executable binary code into a high level source code form using logic and data abstractions. The purpose of this idea is to take existing executable programs and "reverse engineer" the intelligence from the programs and "re-code" the intelligence into a portable high level language.

This idea was developed from my own personal experience and on my own time.

Since DSC is not in the business of software reverse engineering and my job at DSC does not involve reverse engineering, I request DSC release me to pursue a patent on this idea.

Thank you,

*[Signature]*  
-----

Evan Brown

Evan Brown is here by granted a released by DSC Communications Corporation to pursue this reverse engineering idea. This idea has been judged to not meet the criteria specified in DSC's "Employee Patent, Copyright and Proprietary Information Agreement" dated and signed April 27, 1987 by Evan Brown.

-----  
DSC Legal Representative

NO. 199-596-97

1		
2	DSC COMMUNICATIONS	) IN THE DISTRICT COURT
	CORPORATION	)
3		)
4	VS.	) COLLIN COUNTY, TEXAS
		)
5	EVAN BROWN	) 199TH JUDICIAL DISTRICT

-----  
**VIDEOTAPED  
ORAL DEPOSITION OF  
EVAN BROWN**  
-----

15           ANSWERS AND DEPOSITION OF EVAN BROWN,  
16 produced as a witness at the instance of the  
17 Plaintiff taken in the above-styled and -numbered  
18 cause on the 1st day of May, A.D., 1997, at 2:02  
19 o'clock p.m., before CHARIS M. HENDRICK, a Certified  
20 Shorthand Reporter in and for the State of Texas, in  
21 the offices of Lynn, Stodghill, Melsheimer &  
22 Tillotson, located at 750 N. St. Paul, Suite 1450,  
23 in the City of Dallas, County of Dallas and State of  
24 Texas, in accordance with the Texas Rules of Civil  
25 Procedure.

**EXHIBIT**  
B

**ORIGINAL**

P R O C E E D I N G S

EVAN BROWN

having been first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

EXAMINATION

BY MR. PINKER:

Q Please state your name, sir.

A It is Evan Garland Brown.

Q Where do you currently reside, sir?

A 2705 Chadbourne.

Q How long have you resided there?

A Nearly 10 years.

Q Is it a house?

A Yes.

Q Do you own it?

A Me and the bank.

Q Is anyone else on the note with you?

A No.

Q Mr. Brown, my name is Eric Pinker. We met probably yesterday but shook hands this afternoon just a few moments ago. I represent or am one of the attorneys representing DSC Communications Corporation in this lawsuit that they have brought against you. Do you understand that?



1 signed Exhibit 1?

2 A Yes.

3 Q It is also your handwriting at the top of  
4 the page in the right-hand column the words "none,"  
5 isn't it?

6 A Yes.

7 Q And you wrote none on this document in two  
8 places, correct?

9 A Yes.

10 Q And you wrote that at the time you signed  
11 the contract?

12 A Yes.

13 Q And was it correct when you filled both of  
14 these areas in with the word "none"?

15 A Yes.

16 Q So it was correct that at the time you  
17 signed this document there were no discoveries owned  
18 or controlled by you in whole or in part, right?

19 A Yes.

20 Q At the time you signed this contract you  
21 intended to perform, didn't you, sir?

22 A Yes.

23 Q You didn't intend to break it, right?

24 A I did not intend to break it.

25 Q Didn't intend to disregard it, right?

1 the form of the question. And just so that we are  
 2 talking apples to apples, I would like to say or  
 3 like -- my objection goes to what solution means.  
 4 And so if you could -- I mean, I don't mind you  
 5 asking him all these questions. I just want to make  
 6 sure that we are talking about the same thing.

7 MR. PINKER: That's fair.

8 (Exhibit 2 marked.)

9 Q (By Mr. Pinker) I am going to hand you  
 10 Exhibit 2, sir, to your deposition, which I believe  
 11 is an April 19th, 1996 memo that you wrote; is that  
 12 correct?

13 A Correct.

14 Q And Mr. Gamini Desoyza was Mr. Scudder's  
 15 boss, correct?

16 A Correct.

17 Q One level above your immediate boss?

18 A Correct.

19 Q In this document, Exhibit 2, you describe a  
 20 method of converting machine executable binary code  
 21 into a high-level source code form using logic and  
 22 data abstractions; is that correct?

23 A I wrote that.

24 Q And you have developed such a method,  
 25 correct?

1 MR. ALDOUS: Well, let me just object.  
2 I am not trying to be a horse's rear but when you  
3 say develop -- I mean I am going to have to be  
4 specific about what you mean with respect to that,  
5 so I am going to object to that as being vague. So  
6 I am going --

7 Q (By Mr. Pinker) You wrote that sentence  
8 that I just read, didn't you, sir?

9 A Yes.

10 Q Was it truthful?

11 A Yes.

12 Q All right, sir. Now, using your words,  
13 would it be acceptable if I used the term "solution"  
14 for the sake of consistency to refer to the method  
15 that you developed for converting machine executable  
16 binary code into a high-level source code form using  
17 logic and data abstractions?

18 A Yes.

19 Q Having agreed on the language, then, sir,  
20 is it correct that you had not conceived of the  
21 solution as of April 27th, 1987?

22 A As of March of 1986 I had solved about --  
23 well, prior to 1986, I had solved probably 80  
24 percent of the problem.

25 MR. ALDOUS: Why don't you say

1 solution.

2 A Solution.

3 Q (By Mr. Pinker) You were in court  
4 yesterday when we had that hearing, weren't you,  
5 sir?

6 A Yes.

7 Q In fact, you were standing before the judge  
8 next to your lawyer throughout the hearing, right?

9 A Yes.

10 Q Do you recall your lawyer answering a  
11 question from the judge saying, well, I realize it  
12 is semantics, Your Honor. He was employed by them  
13 at the time he came up with the idea, he didn't come  
14 up with the idea at work for DSC. Do you recall  
15 that statement?

16 A No.

17 Q I would like to hand you, sir, a faxed copy  
18 of the Statement of Facts from yesterday's hearing  
19 and ask you to turn to Page 16 of that Statement of  
20 Facts and specifically look at the section I have  
21 highlighted. When you are done reading that, please  
22 let me know.

23 A Okay. I have read it.

24 Q And you see that Mr. Drake, your attorney,  
25 told the court that you developed or you conceived

1 of the idea while at DSC, correct?

2 A That's what he stated. That's what it  
3 says.

4 MR. ALDOUS: According to this  
5 transcript.

6 MR. PINKER: I am sure you don't have  
7 another copy of the transcript.

8 MR. ALDOUS: Mine actually says that  
9 you said that.

10 MR. PINKER: I think you are reading  
11 the wrong line.

12 MR. ALDOUS: I was just kidding  
13 actually.

14 Q (By Mr. Pinker) Mr. Drake is wrong  
15 according to you?

16 MR. ALDOUS: Let me object to that  
17 question because that calls for speculation as to  
18 what Mr. Drake meant by "the idea."

19 Q (By Mr. Pinker) The question stands, sir.

20 A Restate.

21 Q Mr. Drake was wrong according to you?

22 MR. ALDOUS: Same objection.

23 A Yes.

24 Q (By Mr. Pinker) And it is your testimony  
25 now that the idea -- excuse me -- that the solution

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had already been conceived by you as of March of 1986?

MR. ALDOUS: Objection. That assumes facts not in evidence.

A I have been working on the problem since 1975. The final piece of the puzzle was solved while employed at DSC.

Q (By Mr. Pinker) When?

A March of 1986.

MR. ALDOUS: 19 what?

A I am sorry. 1996.

Q (By Mr. Pinker) Is it your testimony, then, that you had been working on the issue but as of March 1986 had not basically developed a solution to the problem?

MR. ALDOUS: Did you say '96 or '86?

MR. PINKER: I am sorry. Let me rephrase it. I thought I said '86. Let me make sure I get it right.

Q (By Mr. Pinker) Is it your testimony, sir, that you had been working on what you have described as the problem since 1975, but as of March 1986 you had not yet come up with a solution or an answer to the problem?

A I had not come up with a complete solution.

1 that, but tell me when you can't sit anymore but I  
2 would like to keep going.

3 MR. ALDOUS: It is just a matter of my  
4 own preparation time for what is going to occur  
5 tomorrow.

6 Q (By Mr. Pinker) Do you have Exhibit 2 in  
7 front of you, sir?

8 A Yes.

9 Q Is that a copy of the memo you wrote?

10 A Yes.

11 Q Is that an accurate description of the  
12 solution in the first sentence of the second  
13 paragraph?

14 A It is to the point and it is concise.

15 Q There is nothing about it that is  
16 inaccurate, is it?

17 A No.

18 Q No, there is not?

19 A There is nothing inaccurate about the  
20 statement.

21 Q Nobody at DSC ever signed this memorandum,  
22 did they?

23 A No.

24 (Exhibit 3 marked.)

25 Q (By Mr. Pinker) I am going to hand you

1 Exhibit 3 to your deposition, and take whatever time  
2 you need to familiarize yourself with it but I don't  
3 think I am going to have many questions. My first  
4 question will be whether you recognize this  
5 document.

6 A I don't recall having ever seen this.

7 Q You don't recall that this is something you  
8 wrote?

9 A I don't recognize it.

10 Q You don't recognize this is something that  
11 you wrote either?

12 A No.

13 Q All right, sir.

14 (Exhibit 4 marked.)

15 Q (By Mr. Pinker) Exhibit 4 to your  
16 deposition is a June 28th, 1996 memo from you to  
17 Mr. Sewell; is that correct?

18 A Larry Sewell.

19 Q Sewell. Thank you. Do you recall writing  
20 this memo?

21 A Oh, yes.

22 Q I would like to direct your attention to  
23 the second paragraph.

24 A Let me finish reading it here.

25 Q Sure.

1 MR. ALDOUS: I am going to object.  
2 That calls for speculation.

3 A Restate.

4 Q (By Mr. Pinker) Would you agree that the  
5 need to convert from Z8000 Assembly language to C  
6 programming language was widely known at DSC?

7 MR. ALDOUS: Same objection.

8 A Yes.

9 Q (By Mr. Pinker) I would like to quickly  
10 run down the list of people you have on Exhibit 4,  
11 sir. What did Mr. Donald and you talk about with  
12 respect to your idea?

13 A He said that he was interested in it and he  
14 wanted me to talk to Gerald Brunt about working out  
15 an agreement.

16 Q Could that be George Brunt?

17 A I am sorry. George Brunt.

18 Q Had you already talked to Mr. Donald by  
19 June of 1996?

20 A Yes. I had talked to him before I had  
21 written this.

22 Q Incidentally, when was your discussion with  
23 Mr. Tar?

24 A I don't recall the date.

25 Q Can you estimate the year?

1 A 1986.

2 Q Before you were --

3 A I am sorry. 1996.

4 Q What is Mr. Tar's position?

5 A I believe he is a manager.

6 Q In what department?

7 A I don't know.

8 Q Why did you and he have this conversation?

9 A Casual conversation in the hall.

10 Q What did you and Mr. Basham discuss?

11 A I wanted to see if the switching products  
12 division had an interest in this idea.

13 Q Did you discuss with Mr. Donald your view  
14 concerning who owned the idea?

15 A No.

16 Q Did you discuss with Mr. Basham your view  
17 of who owned the idea?

18 A I did, and I did with Jim Donald also.

19 Q What did you tell Mr. Donald?

20 A I believe I quoted this, I have developed  
21 an idea for converting executable machine code to a  
22 high-level language. I believe I told him that I  
23 had submitted a lease -- a request for a release to  
24 pursue a patent. If only I -- to attempt to patent  
25 it, and this was before I knew enough about patents

1 to know that it cannot be patented -- yes, it cannot  
2 be patented. He expressed the interest and then he  
3 referred me, as I said, to George Brunt.

4 Q Why can't it be patented?

5 A There are no hardware dependencies. My  
6 understanding of the patent law prohibits the  
7 patenting of mathematical formulas and algorithms.  
8 It must have some type of a hardware dependency in  
9 order to receive a patent. If it will run on  
10 multiple platforms without dependencies, then it has  
11 to be protected by trade secret or copyright. And  
12 that's my understanding from reading. I am not a  
13 patent lawyer.

14 Q Have you initiated any efforts to try to  
15 patent or copyright the solution?

16 A No. I wanted to get DSC's approval before  
17 I proceeded.

18 Q Did Mr. Donald respond to any of your  
19 statements concerning ownership?

20 A No.

21 Q Did you and Mr. Basham discuss ownership of  
22 your idea or the solution?

23 A I believe I presented it in the same way to  
24 Mr. Basham as I did to Mr. Donald.

25 Q Did Mr. Basham respond?

1 A Not as I recall. He referred me to Ron  
2 Ward.

3 Q Mr. Ward is the next person on your list.  
4 Did you discuss your belief of ownership with him in  
5 about the same way?

6 A I believe so.

7 Q Did he respond?

8 A He referred me back to Wayne Jones, I  
9 believe.

10 Q Mr. Finch is the next one on your list.  
11 Did you discuss with Mr. Finch the -- your belief of  
12 ownership?

13 A Yes.

14 Q About the same way that you previously  
15 described?

16 A Yes.

17 Q Did he respond to that statement or to  
18 those thoughts?

19 A He expressed an interest in this and then  
20 he referred me to Dick Belote.

21 Q The next person on the list is Dave  
22 Hinshaw. Did you have a similar discussion with  
23 Mr. Hinshaw --

24 A Yes.

25 Q -- concerning your belief?

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A Yes.

Q Did he respond?

A He responded with an interest and later he came back with a tentative proposal.

Q Okay. Did he orally respond to the notion of ownership?

A Yes. He was real emphatic about ownership of the idea, as I recall.

Q Believing it was DSC's?

A Yes.

Q Gary Brown is the next person on your list. Did you similarly discuss with Mr. Brown your belief about ownership?

A I talked to Gary Brown. It was in reference to the impact that it would have with DSC, if it would be positive if DSC was able to convert, this is something that he thought DSC would be interested in doing.

Q What did he say?

A He said yes.

Q Did he express to you the value that he thought it might have to DSC?

A No.

Q Have you ever expressed to anyone the value that you think it might have to DSC?

1 challenge not to write it down by hand?

2 A Yes.

3 Q Do you believe it would speed up your  
4 development or would have sped up your development  
5 to have written it down by hand?

6 A It might have.

7 (Exhibit 5 marked.)

8 Q (By Mr. Pinker) I am going to hand you  
9 Exhibit 5 to your deposition, sir, which appears to  
10 be a memo from Mr. Hinshaw to you responding --  
11 excuse me -- just a memo from Mr. Hinshaw from you  
12 dated July 16th; is that right?

13 A Correct.

14 Q Do you recall receiving this?

15 A He handed it to me in his office.

16 Q This was actually during the discussion you  
17 had?

18 A Do you have a copy that is complete?

19 Q I unfortunately handed you the best copy I  
20 have got, I think. If this copy is better, I will  
21 have that numbered. I take that back, sir. I have  
22 a better copy.

23 MR. PINKER: If you don't have an  
24 objection, I will just renumber.

25 MR. ALDOUS: That's fine.

1 Q (By Mr. Pinker) Do you recall receiving  
2 that memo?

3 A Oh, yes.

4 Q And that was given to you during an actual  
5 discussion you and Mr. Hinshaw were having in his  
6 office?

7 A Correct.

8 Q And then you the very next day sent the  
9 memo in response?

10 A Yes. I responded to the offer or the memo.

11 Q I hand you Exhibit 6.

12 (Exhibit 6 marked.)

13 Q (By Mr. Pinker) Is that a copy of the memo  
14 you sent in response?

15 A It appears like it is.

16 Q That's your signature, isn't it, at the top  
17 of the page?

18 A Yes, it is. Uh-huh.

19 Q I would like to direct your attention to  
20 the second paragraph. You write, this process may  
21 be useful to DSC for their Z8000 microprocessor  
22 based products. And then you go on to recount how  
23 DSC has been developing products in that language  
24 and that the process you have developed is capable  
25 of converting the executable Z8000 machine code into

1 you know, I go down to the coast.

2 Q I take it this was one of the things you  
3 will be thinking about on those trips?

4 A Yeah. Uh-huh.

5 Q Certainly wasn't the only thing you would  
6 be thinking about?

7 A No. Huh-uh.

8 Q No, it wasn't?

9 A No. Typically I have got a bunch of  
10 different things that I think of.

11 Q How did the discussions between you and DSC  
12 concerning reaching an agreement terminate?

13 A I received a call from Dan Allman to come  
14 down to his office on April the 21st of this year.  
15 And when I got down there I saw Chris Cole xxx and  
16 Wayne Jones. We went into a conference room, they  
17 tried to coerce the idea out of me. I refused. I  
18 said, no written agreement, no disclosure. And they  
19 fired me. That was the end of the negotiations.

20 Q Was that the first time you met with  
21 Mr. Allman about this?

22 A Yes.

23 Q I hadn't seen any written memos or proposed  
24 agreements between you and the company after  
25 January. Is that consistent with your recollection?

1           A       That's correct. I have not -- oh, I have  
2 received a communication from Chris Cole stating  
3 that DSC was no longer interested in pursuing -- at  
4 the present time they are not interested in  
5 pursuing or negotiating any further. I think that  
6 was given to me early February.

7           Q       The last -- which is consistent with what I  
8 thought the last agreement that was on the table, so  
9 to speak, was in January; is that right?

10          A       There was no agreement on the table, there  
11 was an agreement in principal. I had been in a  
12 meeting with George Brunt and I think Wayne Jones.  
13 I am not sure whether it was Wayne or not; I think  
14 it was. But we had worked out and they had made  
15 some phone calls and it says it looks like we got a  
16 deal worked out. And said, you know, we will write  
17 it up, we will circulate it, we will get back with  
18 you.

19                   I continued to call and they said, you  
20 know, it is in the executive approval chain,  
21 somebody has got it, somebody has made a change, you  
22 know, it has got to go through the process again. I  
23 don't hear anything, I don't hear anything. You  
24 know, I call, Chris Cole says, we are not  
25 interested. I said, can I get it in writing. He

1 said, I will E-Mail it to you. A few days later I  
2 went to his office and he typed it into the  
3 computer, printed it and handed it to me.

4 Q So you never got any sort of written  
5 proposed agreement in January of 1997?

6 A No.

7 Q Where -- who made the last proposal as far  
8 as you are concerned?

9 A The only proposal that I have ever seen was  
10 the one from Dave Hinshaw.

11 Q Which you then responded to the next day?

12 A That's correct.

13 Q And did you ever receive any response from  
14 DSC concerning that proposal?

15 A The only thing I received in writing from  
16 DSC after that was the memo from Chris Cole.

17 Q Which was four or five months later?

18 A Yes.

19 Q What do you remember about the company Goto  
20 Less Conversion?

21 A I don't know anything about them.

22 Q I am sorry?

23 A I don't know anything about a company  
24 called Goto Less.

25 Q Do you recall that was a company that was

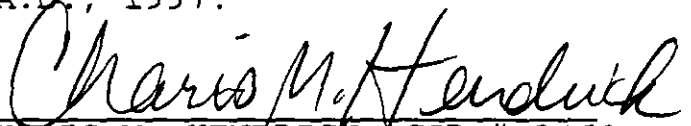
1 STATE OF TEXAS \*\*

2 COUNTY OF DALLAS \*\*

3 I, CHARIS M. HENDRICK, Certified  
4 Shorthand Reporter in and for the State of Texas, do  
5 hereby certify that the proceedings made before me  
6 by EVAN BROWN on the 1st day of May, 1997, at 2:02  
7 o'clock p.m., after said witness had been first duly  
8 cautioned and sworn to testify the truth, the whole  
9 truth and nothing but the truth, and were thereafter  
10 reduced to typewriting by me and under my  
11 supervision, same to be sworn to and subscribed by  
12 said witness by any notary public.

13 I further certify the above and  
14 foregoing deposition as set forth in typewriting is  
15 a full, true, correct and complete transcript of the  
16 proceedings had at the time of taking said  
17 deposition.

18 Given under my hand and seal of office on  
19 this 1st day of May, A.D., 1997.

20 

21 CHARIS M. HENDRICK, CSR # 3469  
22 Certification Expires: 12-31-98  
23 7015 Mumford  
24 Dallas, Texas 75252  
25

# CONFIDENTIAL AND PROPRIETARY INFORMATION AGREEMENT



DSC Communications Corporation

Name: Evan Brown  
(please print)



In consideration of my employment (or continued employment in the event I am already in the employ of the Company at the time of execution hereof) with DSC Communications Corporation or any subsidiary or affiliate thereof (the "Company") and of the salary or wages paid for my services in such employment, the Company and I agree as follows:

(A) I will communicate to an officer of the Company promptly and fully all inventions (including but not limited to all matters subject to patent, i.e., processes, machines, computer programs, etc.) made or conceived by me (whether made solely by me or jointly with others) from the time of entering the Company's employ until I leave. (1) which are along the lines of the business, work or investigations of the Company or of companies which it owns or controls at the time of such inventions, or (2) which result from or are suggested by any work which I may do for or on behalf of the Company.

(B) I will assist the Company and its nominees during on subsequent to such employment in every proper way (entirely at its or their expense) to obtain for its or their own benefit patents for such inventions in any and all countries (including the assignment of any inventions to the Company), said inventions to be and remain the sole and exclusive property of the Company or its nominees whether patented or not.

(C) In accordance with Company policy as in effect from time to time, I will make and maintain adequate and current written records of all such inventions, in the form of notes, sketches, drawings, or reports relating thereto, which records shall be and remain the property of and available to the Company at all times.

(D) Except as the Company may otherwise consent in writing, I will not disclose at any time (except as my Company duties may require) either during or within a period of two (2) years subsequent to the term of employment any information, knowledge, or data of the Company I may receive or develop during the course of my employment, relating to trade secrets, formulas, business processes, methods, machines, manufacturers, compositions, inventions, discoveries, computer programs, customer records, lists, accounts or other matters which are of a private, secret or confidential nature. (The terms "secret" and "confidential" as used in this Agreement are used in their ordinary sense and do not refer to official classifications of the United States Government.)

(E) I will notify the Company in writing before I make any disclosure or perform or cause to be performed any work for or on behalf of the Company, which might conflict with (1) the rights I claim in any invention or idea (a) conceived by me or others prior to my employment or (b) otherwise outside the scope of this Agreement, or (2) rights of others arising out of obligations incurred by me (a) prior to this Agreement or (b) otherwise outside the scope of this Agreement. In the event of my failure to give notice under the circumstances specified in (1) of the foregoing, the Company may assume that no such conflicting invention or idea exists, and I agree that I will make no claim against the Company with respect to the use of any such invention or idea in any work or the product of any work which I perform or cause to be performed for or on behalf of the Company. All discoveries owned or controlled by me, in whole or in part, as of the date of this Agreement are listed below.

Discoveries owned or controlled: (If none, so state. Attach separate sheet if necessary.)

- NONE -

(F) I will allow the Company, without charge, fee, license or other arrangement and free from any allegation of infringement whatsoever to make full use of any matter developed by me (whether developed or written solely by me or jointly with others) during the course of my employment along the lines of the business, work or investigations of the Company or of companies which it owns or controls at the time of such development and/or which result from or are suggested by any work which I may do for or on behalf of the Company.

This Agreement may not be changed, modified, released, discharged, abandoned or otherwise terminated, in whole or in part, except by an instrument in writing signed by me and by an officer or other authorized executive of the Company.

This Agreement shall be binding upon my heirs, executors, administrators or other legal representatives or assigns. Any reference to the Company shall include the Company's subsidiaries, successors and assigns.

Except as stated below, I have no agreements with or obligations to others in conflict with the foregoing. (If "none", so state.)

Arrangements with or obligations to others: (If none, so state. Attach separate sheet if necessary.)

- NONE -

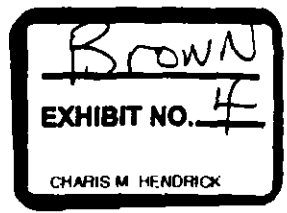
The Company and I acknowledge that this Agreement does not constitute a contract of employment and that either the Company or I can terminate the employment relationship at any time subject to any applicable employment policies of the Company then in effect. However, my agreement not to use or disclose the Company's proprietary data or information and to protect the Company's interest in any inventions shall survive termination of my employment.

Employee: Evan Brown

Date: Apr 27, 1987

DSC Communications Corporation  
By: [Signature]  
Title: Personnel Director

MEMORANDUM



Date: June-28, 1996
To: Larry Sewell
From: Evan Brown
Subject: Brief description of patent "idea"

The "idea" which Evan Brown will patent solves the problem of converting executable machine code into a specified high level language. The process involves extracting logic flow and data references from the executable machine code. These references are then used to produce a high level language source code. This is a simplistic overview but I feel it is sufficient at this time to demonstrate that my "idea" was not conceived from the responsibilities of my DSC job function and that DSC is not in the business of converting executable machine code into high level languages.

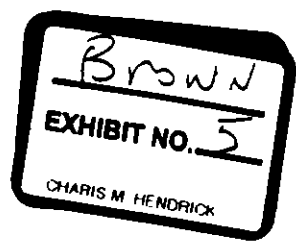
This idea is of interest to DSC in that DSC has millions of lines of 28000 assemble language code which DSC needs to convert to the "C" programming language. I have discudded this with the following people and they have all expressed interest in using this idea:

- Jim Donald CEO
Wylie Basham V.P. Switch Systems Group
Ron Ward V.P. Technology
Dan Finch V.P. Motorola Division
Dave Hinshaw V.P. Switch Products
Gary Brown V.P. Marketing
Chuck Lane Director of Marketing
Dick Belote Director for Motorola Cellular

MEMORANDUM

July 16, 1996

TO: Evan Brown  
 FROM: Dave Hinshaw  
 COPY: Wylie Basham  
 George Brunt  
 SUBJECT: Assembly Language Converter



You have requested the Company to state its position with regard to your idea or invention concerning an assembly language converter product that you believe may be one of the first products to allow automatic conversion of executable machine code or assembly language to a specified high level language. I enclose a copy of your Employee Patent, Copyright and Proprietary Information Agreement (or "Employee Agreement"), executed on April 27, 1987. In paragraph (A), you agreed to communicate to the Company all inventions, etc. "which are along the lines of the business, work or investigations of the Company..." While we understand that your current assignment is not to develop an assembly language converter product, please be advised that the Company has on several occasions investigated assembly language converter systems, software, and ideas. For example, as recently as May of this year, an invention disclosure was provided to the Company by several employees in IN/Wireless Products Division who were specifically directed to work on a potential assembly language converter project. Thus, your work in the assembly language converter area would fall under the provisions of the Employee Agreement concerning "along the lines of the business, work or investigations of the Company." Accordingly, any work that you have done in this area is work that belongs to the Company.

However, the Company is interested in providing and willing to provide you with a format to maintain the security of your employment with the Company while at the same time allowing you to participate in the upside of a fully functional operating and patentable assembly language converter product. Pursuant to the Employee Agreement, we request that you communicate to us a description of the assembly language converter that will permit us to make an assessment as to the viability of the project. Assuming that we are in agreement with you that this is a viable project, and subject to the preparation of mutually agreeable documentation, we propose that the development and marketing of the assembly language converter be handled as follows:

- We will reassign you from your current position to a position known as Software Engineering Tools Development that will enable you to spend full time on the development of the project. We will provide you such assistance, support, funding and personnel as may be appropriate. Additionally, you will report to Matt Bilbo, Development Services, and will be responsible to Rick Billings, Software Engineering Tools Group, as your supervisor.

- At the end of four (4) months or such time as the Company may deem appropriate, the Company will analyze and make a decision as to whether it wants to continue to be involved in the project.
- If at that time the Company decides not to continue the support of the project, it will retain the invention and patent rights, and will apply for and own any patents in our name. We will, however, provide you with a license to entitle you to complete the project. All marketing rights will be licensed to you, including all rights to income. We will retain the right to use the finished product internally for conversion of codes DSC uses, including EMX-2500 Motorola code. In the license, the Company will retain an option exercisable on an agreed upon basis to participate financially and otherwise in the future.
- If instead, the Company decides to continue funding and development of the project, the Company will pay you five percent (5%) of the net savings to the Company (estimated cost to develop the high level language code, minus the cost of converting to the high level language code, both costs including documentation) up to a total maximum payment of \$2,000,000, based upon conversion of our codes, EMX-2500 Motorola code, and any other internal applications. DSC will apply for and own any patents. With regard to third-party markets, the Company will split with you on a fifty/fifty (50/50) basis all net profits generated.