

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

219TH JUDICIAL DISTRICT

MOTION FOR PROTECTIVE ORDER AND TO COMPEL

TO THE HONORABLE JUDGE OF SAID COURT:

DSC Communications Corporation ("DSC") files this Motion for Protective Order Concerning Deposition Schedule and would respectfully show the following:

I.

INTRODUCTION

Since June 30, 1997, Brown has been required to disclose the Solution to DSC. Notwithstanding the clear requirements of the Court's Temporary Injunction Order, Brown has refused to make any disclosure of the Solution to DSC.

Having ignored the disclosure requirements of the Court's Temporary Injunction Order, and having resisted all other attempts to obtain a description of the Solution through alternative discovery methods, *see* DSC's Motion to Compel Interrogatory Responses, Brown now seeks to take the deposition of at least eighteen (18) employees of DSC, including the Chairman of the Board/CEO and others of the most senior executives of the company. Brown's one-sided attempt to take numerous depositions of DSC's senior executives, while simultaneously resisting his court-ordered obligation to disclose the Solution to DSC, constitutes an abuse of the discovery process. As such,

DSC moves for a protective order preventing Brown from taking any depositions in this case until he has complied with the disclosure requirements set forth in the Court's Temporary Injunction Order.

In addition, Brown has refused to disclose the substance of the knowledge supposedly known to each of the individuals whose depositions he seeks to take, despite the pendency of a proper Interrogatory seeking this information. For each of the persons he identified as a fact witness in response to DSC's interrogatories, Brown should be required to provide a description of the substance of that witness' knowledge.

## II.

### **BACKGROUND FACTS**

1. DSC filed this lawsuit against Brown on April 24, 1997, seeking to enforce an Employee Patent, Copyright, and Confidential Information Agreement (the "Employment Agreement") that it entered into with Brown at the onset of his employment relationship with DSC. Specifically, Brown advised DSC that he had "developed a method of converting machine executable binary code into a high level source code form using logic and data abstractions," (hereinafter the "Solution"), but in violation of the Employment Agreement, he refused to disclose the Solution, assign ownership of the Solution to DSC, or assist DSC in protecting the Solution.

2. On June 30, 1997, following an evidentiary hearing, the Court entered a Temporary Injunction Order. The Order, *inter alia*, required Brown to begin making a full and complete disclosure of the Solution beginning at 9:00 a.m. on Tuesday, July 1, 1997, and continuing thereafter until he had completely disclosed the Solution. A true and correct copy of the Order is attached to the Affidavit of Eric W. Pinker ("Pinker Affidavit") as Exhibit "A."

3. Brown did not appear at DSC's offices on July 1, 1997, nor has he appeared at DSC's offices at any time since that date. Mr. Brown has not made any disclosure of the Solution as required by the Order. *See* Affidavit of Cheryl A. Sanders

4. Following the entry of the Order, on July 14, 1997, Brown sent counsel for DSC a letter requested dates for the deposition of eighteen (18) employees of DSC, including its Chairman of the Board/Chief Executive Officer, General Counsel, and other high level executives of the company. A true and correct copy of this letter is attached as Exhibit "B" to the Pinker Affidavit.

5. Thereafter, on or about July 16, 1997, Brown served his Responses to DSC's First Set of Interrogatories. In his response to Interrogatory No. 2, which asked Brown to "identify each person who has any knowledge of any facts relevant to the claims made in the Petition, . . . describing the substance of each person's knowledge." Brown listed all of the persons identified on his July 14, 1997 letter, but refused to provide any description of the information supposedly known by these witnesses. A true and correct copy of this Response is attached to the Pinker Affidavit as Exhibit "C."

### III.

#### **ARGUMENT AND AUTHORITIES**

##### **A. The Court Should Enter a Protective Order Preventing Brown from Taking any Depositions Until he Has Disclosed the solution to DSC.**

Pursuant to Texas Rule of Civil Procedure 166b(5), DSC requests that the Court enter a protective order preventing Brown from taking any depositions in this case until such time as he has complied with his pre-existing court ordered obligation to disclose the Solution to DSC.

Brown's request for dates to take the deposition of eighteen (18) DSC employees, including its Chairman of the Board/Chief Executive Officer, General Counsel, and several other senior

executives, is a classic example of an overly broad, burdensome and harassing discovery strategy. While refusing to comply with his own disclosure (discovery) obligations, and while refusing to even describe the knowledge supposedly known by each of the identified witnesses, Brown nonetheless seeks to impose an onerous discovery burden on DSC by seeking to examine eighteen (18) separate witnesses, including a number of its senior executives. Such a request is an unfair, oppressive and harassing effort to manipulate the discovery system, and the Court should enter a protective order prohibiting Brown from pursuing this strategy until he has complied with his own obligations. *See Axelson, Inc. V. McIlhany*, 798 S.W.2d 550, 553 (Tex. 1990) (holding that the broad scope of discovery is limited by the legitimate interests of the opposing party to avoid overly broad requests and harassment). As such, DSC requests that the Court enter a protective order precluding Brown from taking any depositions in this case until he has complied with his court-ordered obligation to disclose the Solution to DSC.

**B. The Court Should Enter an Order Compelling Brown to Describe the Substance of the Knowledge Held by Each Fact Witness That He Identified in his Response to Interrogatory No. 2.**

In addition, pursuant to the Texas Rules of Civil Procedure, DSC requests that Brown be required to fully respond to Interrogatory No. 2. In this Interrogatory, DSC asked Brown to identify all fact witnesses and describe the substance of each person's knowledge. Texas courts have held that this is a proper discovery request. *See Gustafson v. Chambers*, 1994 Tex. App. LEXIS 1372 (Tex.App. -- Houston [1st Dist.] 1994, no writ) (stating that the "content and extent of knowledge held by persons with knowledge of relevant facts, by definition, would be a matter that is relevant to the subject matter of the pending action," and thus holding that the trial court abused its discretion sustaining objections to this type of interrogatory) (Attachment "1").


In his Response to Interrogatory No. 2, Brown provided a lengthy listing of persons who supposedly have knowledge relevant to the facts of this case, including a number of senior executives of DSC. Brown failed, however to provide any description of the knowledge supposedly possessed by each of these witnesses. This information is not only properly discoverable under Texas law, it is also imperative in this case in order to permit DSC to evaluate the subject matter on which Brown seeks to examine numerous witnesses, and to determine whether the witnesses have any relevant facts that would justify the taking of their depositions. Accordingly, DSC requests that the Court enter an order compelling Brown to fully answer Interrogatory No. 2 by providing a complete description of the substance of each person's knowledge concerning this matter.

WHEREFORE, PREMISES CONSIDERED, DSC respectfully requests that the Court grant this Motion and enter a protective order preventing Brown from taking ant depositions until he has disclosed the Solution to DSC, and further compelling him to respond to Interrogatory No. 2 by providing a description of the knowledge supposedly held by each individual he has named as a fact witness.

Respectfully submitted,

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

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

  
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**ATTORNEYS FOR PLAINTIFF  
DSC COMMUNICATIONS CORPORATION**

**CERTIFICATE OF CONFERENCE**

I hereby certify that on July 22, 1997, I attempted to resolve the subject matter of this motion with counsel for Defendant, but that no agreement could be reached. This motion is, therefore, submitted to the Court for disposition.



\_\_\_\_\_  
Eric W. Pinker

**FIAT**

The above Motion for Protective Order and to Compel is set for hearing in the 219th Judicial District Court on the \_\_\_ day of July, 1997 at \_\_\_\_\_ o'clock \_\_\_\_m.

\_\_\_\_\_  
JUDGE PRESIDING

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served, via hand delivery, upon counsel for Defendant Evan Brown, as identified below, on this the 23rd day of July, 1997:

**Via Hand Delivery**

Steven E. Aldous, Esq.  
Eric D. Pearson, Esq.  
Sayles & Lidji, P.C.  
1201 Elm Street, Suite 4400  
Dallas, Texas 75270

**Via Regular Mail**

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110 East Davis, Suite 200  
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Eric W. Pinker

1994 Tex. App. LEXIS 1372 printed in FULL format.

BEVERLY BEARDEN GUSTAFSON AND ROBERT D. GUSTAFSON, individually and as next friends of MICHAEL JAMES GUSTAFSON, Relators v. THE HONORABLE EUGENE CHAMBERS, JUDGE OF THE 215TH DISTRICT COURT, HARRIS COUNTY, TEXAS, Respondent

No. 01-93-00988-CV

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

1994 Tex. App. LEXIS 1372

June 7, 1994, Rendered and Delivered

June 7, 1994, Filed

PRIOR HISTORY: [\*1] This Opinion Substituted by the Court for Withdrawn Opinion of March 4, 1994, Previously Reported at: 1994 Tex. App. LEXIS 473.

DISPOSITION: Mandamus denied in part and conditionally granted in part

COUNSEL: For Relators: MICHAEL A. PULLARA, NORMAN RIEDMUELLER, HOUSTON, TEXAS.

For Respondent: MARGARET UHLIG PEMBERTON, AUSTIN, TEXAS, KATHLEEN A. GALLAGHER, KEITH S. DUBANEVICH, HOUSTON, TEXAS.

JUDGES: O'CONNOR, Oliver Parrott, Wilson

OPINIONBY: MICHOL O'CONNOR

OPINION: Original Proceeding on Petition for Writ of Mandamus.

CORRECTED OPINION

This Court's opinion of March 4, 1994, is withdrawn and the following substituted in its place.

Relators, Beverly Bearden Gustafson and Robert D. Gustafson, both individually and as next friends of their son, Michael James Gustafson (collectively, the plaintiffs), petition this Court for a writ of mandamus to compel respondent, the Honorable Eugene Chambers, Judge of the 215th District Court, Harris County, Texas, to vacate his order denying their motion to compel discovery and in its place, enter an order granting the motion.

In the underlying case, the plaintiffs filed suit against

real parties in interest, J.P. n1: OB/GYN Associates, a partnership in which J.P. is a principal; Jack Eckerd Corporation; HCA South Arlington Medical Center (the hospital); and Lori David, a pharmacist (collectively, the defendants). The plaintiffs alleged that certain [\*2] medications prescribed for Ms. Gustafson on August 7, 1991, were excessive and incompatible, resulting in physical injuries to her, including seizures. The plaintiffs also alleged that J.P.'s abuse of intoxicants affected his judgment and competence at the time he was treating Ms. Gustafson, caused her injuries, and justified punitive damages. The plaintiffs alleged that the hospital was negligent in granting J.P. staff privileges because it knew or should have known that J.P. abused intoxicating substances, which it knew or should have known impaired his judgment, skill, and competence; because it failed to develop and maintain an adequate alcohol and drug abuse policy; and because it failed to inform the plaintiffs that J.P. abused intoxicating substances. The plaintiffs alleged that J.P. and the hospital engaged in deceptive trade practices by failing to disclose to them information about their services that had it been known to them, they would not have entered into contractual relationships with them.

n1 This Court, on unopposed motion, ordered that the initials be substituted for the name of the real party in interest.

[\*3] The plaintiffs propounded discovery requests to J.P. inquiring about these allegations. These discovery requests inquired about:

1. the identity of the employees at J.P.'s clinic;

EXHIBIT

" | "

2. complaints filed against J.P. with the Texas Board of Medical Examiners and the underlying incidents made the subject of those complaints;

3. J.P.'s abuse of and addiction to alcohol or other intoxicants, including any treatment sought and/or received therefor; and

4. J.P.'s performance of medical procedures while under the influence of alcohol or other intoxicants.

J.P. filed objections and answers to these discovery requests, asserting the physician-patient privilege, the mental health privilege, privileges related to complaints to and files of the Texas State Board of Medical Examiners and medical peer review committees, along with a number of other objections, including assertions that the discovery was overbroad, vague, unduly burdensome, harassing and global, not restricted to seeking relevant information, and not reasonably calculated to lead to the discovery of admissible evidence as required by Tex. R. Civ. P. 166b(2)(a). J.P. answered the requests for admission and some of the interrogatories, [\*4] but did not produce any documents.

After the plaintiffs filed their motion to compel answers to interrogatories and request for production of documents, J.P. amended his discovery responses. He filed a response to the plaintiffs' motion to compel, an affidavit, and certain documents attached to the affidavit for in camera review. In the affidavit, J.P. denied that he was a drug addict and that he abused intoxicating substances at any time during his treatment of Ms. Gustafson. J.P. also swore in the affidavit that the documents he had that might be responsive to discovery requests seeking information about his alleged abuse of or addiction to alcohol relate to

diagnoses, evaluations or treatment sought and/or received by me, [that] were created or maintained by physicians and health professionals . . . and that such documents consist of or include confidential communications between myself as a patient and licensed physicians and health professionals, and such communications and documents were relative to or in connection with professional services I received as a patient from the physicians and health professionals.

On August 16, 1993, Judge Chambers conducted a hearing at [\*5] which he heard argument from counsel on the plaintiffs' motion to compel discovery. No testimonial evidence was offered or received. Later, Judge Chambers reviewed the documents in camera and on

October 21, 1993, issued an order sustaining J.P.'s objections to discovery and denying the plaintiffs' motion to compel.

#### Standard of review

Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Davis v. Stansbury*, 824 S.W.2d 278, 281 (Tex. App.--Houston [1st Dist.] 1992, orig. proceeding). The court may not act in an arbitrary or unreasonable fashion that is without reference to guiding rules and principles. *Id.*

The burden is on the party who objects to discovery to prove why it should not be required to produce discovery. Tex. R. Civ. P. 166b(4); *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 553 n.6 (Tex. 1990); [\*6] *Weisel Enter., Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986).

#### A. Waiver of non-privilege objections

In response to all the discovery requests, the defendants filed a laundry-list of objections, some on grounds of privileges and others on non-privilege grounds. The only evidence the court had before it was J.P.'s affidavit and the sealed documents. The affidavit and the documents only addressed the issues of J.P.'s privileges from discovery, not the other objections.

A party is not required to support all objections to discovery by evidence. *Inwood West Civic Ass'n v. Touchy*, 754 S.W.2d 276, 278 (Tex. App.--Houston [14th Dist.] 1988, orig. proceeding) (party not required to produce evidence to support statutory exemption from discovery). In most cases, however, the party resisting discovery must produce evidence to support its objections. In the following cases, the courts have held the objections to discovery were waived because they were not supported by evidence. *Giffin v. Smith*, 688 S.W.2d 112, 114 (Tex. 1985) (objection on the ground of privilege); *Delgado v. Kitzman*, 793 S.W.2d 332, 334 [\*7] (Tex. App.--Houston [1st Dist.] 1990, orig. proceeding) (objections on ground of privacy, beyond scope of discovery, and not limited to reasonable period of time); *Miller v. O'Neill*, 775 S.W.2d 56, 59 (Tex. App.--Houston [1st Dist.] 1989, orig. proceeding) (objections on ground the requests were overbroad, harrassing, and for trade secrets). The defendants do not argue that any of their objections could have been sustained without evidence to support them.

The defendants waived all objections that were not supported by evidence and the court erred in sustaining them. *Tex.R.Civ.P. 166b(4); Axelson, Inc., 798 S.W.2d at 553 n.6; Weisel Enter., Inc., 718 S.W.2d at 58; Miller, 775 S.W.2d at 59; Delgado, 793 S.W.2d at 334.*

#### B. Interrogatories three and four

Interrogatory three asks for information about every occasion on which J.P. has performed a medical procedure while under the influence of intoxicants. After making numerous objections to this interrogatory, J.P. answered:

Without waiving these objections, Defendant [\*8] responds that he has never performed a medical procedure while under the influence of alcohol or other intoxicants.

Interrogatory four asks for information about every occasion between January 1, 1990 and December 31, 1991, on which J.P. used cocaine. Again after numerous objections, J.P. answered:

Without waiving the foregoing objections, Defendant responds that there were no such occasions or incidents.

Judge Chambers found J.P.'s denial was an adequate answer to these interrogatories. Because J.P. did answer these interrogatories, we cannot say that Judge Chambers abused his discretion in denying the plaintiffs' motion to compel as it relates to them.

#### C. Interrogatory five

Interrogatory five asks J.P. to describe in detail the occasions on which he sought treatment for abuse of intoxicants.

##### 1. The physician-patient and mental health privileges

J.P. objected that interrogatory five invaded the physician-patient and mental health privileges. n2 In his affidavit, J.P. stated the documents he produced for in camera review were confidential communications with his doctors and were privileged under *Tex.R.Civ.Evid. 510(a)(1)*.

n2 *Tex.R.Civ.Stat. art. 4495b, sec. 5.08 (Vernon Pamph. 1994)* provides:

(a) communications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient, is confidential and privileged and may not be disclosed except as provided in this section.

(b) records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

There are similar confidentiality provisions in *Texas Health and Safety Code, 611.002 (Vernon 1992), Tex.Civ.R.Evid. 509 and 510, as well as 42 U.S.C.S. 11137(b)(1989)*.

[\*9]

The plaintiffs contend that the information sought by this interrogatory falls within an exception to privilege in *Tex.R.Civ.Evid. 509 and 510*. According to the plaintiffs, those rules permit the discovery of communications or records between a patient and his doctor or mental health care professional when the information is relevant to an issue of the physical, mental, or emotional condition of a patient and any party relies on the condition as part of the party's claim or defense.

In their lawsuit, the plaintiffs contend J.P. was negligent, and depend on his physical, mental, and emotional condition for part of their proof. Their first amended original petition alleges, among other things, that J.P. was negligent "in practicing while his judgment, skill, and competence was compromised as a result of his abuse of and addiction to alcohol and other intoxicants" and that OB/GYN and the hospital were negligent in letting him practice under such circumstances. The plaintiffs alleged that such acts proximately caused Ms. Gustafson's injuries.

Parties may obtain discovery of any matter that is relevant to the subject matter of the lawsuit, whether it relates to the claim or defense [\*10] of the party seeking discovery, or the claim or defense of the other party. *Tex.R.Civ.P. 166b(2)(a); Kavanaugh v. Perkins, 838 S.W.2d 616, 619 (Tex.App.—Dallas 1992, orig. proceeding)*. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Tex.R.Civ.Evid. 401*. Based on the plaintiffs' pleading allegations, one of the primary issues in the lawsuit is whether J.P. was impaired by intoxicant abuse during the time he treated Ms. Gustafson. The information requested in interrogatory five on J.P.'s treatment for intoxicant abuse would have the tendency to make the existence of his impairment, if any, more probable. The information requested in interrogatory five is relevant. *Kavanaugh, 838 S.W.2d at 619* (patient was entitled to

discovery about her doctor's mental, physical, and emotional condition and his use of alcohol).

Even if relevant, J.P. contends he cannot be forced to divulge information about his mental health because he has not waived the privilege. Tex.R.Civ.Evid. [\*11] 510(b) (communications between a patient and a professional is confidential and shall not be disclosed). The defendants believe this case is governed by *Republic Insurance Co. v. Davis*, 856 S.W.2d 158 (Tex. 1993), a case that recently considered the issue of waiver of the attorney-client privilege. In *Davis*, the Supreme Court held that to waive the privilege, (1) the party asserting the privilege must seek affirmative relief, (2) the privileged information sought must be such that, if believed by the fact finder, in all probability, it would be outcome determinative of the cause of action asserted, and (3) disclosure of the confidential communication must be the only means by which the aggrieved party may obtain the evidence. *Id.* at 163.

In contrast to defendants' argument, the plaintiffs argue they are not relying on J.P.'s waiver of the privilege; they contend they are relying on an exception to the privilege found in Tex.R.Civ.Evid. 510(d)(5). That section provides:

d. Exceptions. Exceptions to the privilege in court proceedings exist:

\* \* \*

(5) as to a communication or record relevant to [\*12] an issue of the physical, mental, or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense.

To support their argument, the plaintiff's cite *S.A.B v. Schattman*, 838 S.W.2d 290 (Tex.App.--Fort Worth 1992, orig. proceeding). In *Schattman*, the court traced the evolution of the mental health privilege and its exception. The Fort Worth Court of Appeals noted that when first enacted by the legislature in 1979, the statute provided no exception similar to that found in what is now rule 510(d)(5). n3 *Id.* at 292-93. In 1983, when the Texas Supreme Court codified the rules of evidence, the court created an exception to the privilege that was limited to a proceeding in which a patient sought to recover damages for mental or emotional harm. *Id.* at 293. In a 1984 amendment to rule 510, the Court broadened the exception to authorize disclosure of relevant mental health information about a patient in any proceeding in which the patient relies upon his physical, mental, or

emotional condition as an element [\*13] of his claim or defense. *Id.* Finally, in 1988, the Court completely re-wrote subsection (d)(5), and adopted the language quoted above. The *Schattman* court concluded, as we must, that the rule means what it says. *Id.*

n3 Act of May 17, 1979, 65th Leg., R.S., ch. 239, 1979 Tex. Gen. Laws 512, amended by Act of June 19, 1983, 68th Leg., R.S., ch. 511, sections 2, 4 1983 Tex. Gen. Laws 2970, 2972-73, 2974-75, repealed by Act of April 29, 1991, 72nd Leg., R.S., ch. 76 19, 1991 Tex. Gen. Laws 515, 648.

To counter the plaintiffs' reliance on the 1988 amendment to rule 510(d)(5), J.P. refers us to three cases that have held to the contrary: *Bosson v. Packer*, 826 S.W.2d 664 (Tex.App.--Dallas 1992, orig. proceeding); *Dossey v. Salazar*, 808 S.W.2d 146 (Tex.App.--Houston [14th Dist.] 1991, orig. proceeding); *Scheffey v. Chambers*, 790 S.W.2d 879 (Tex.App.--Houston [14th Dist.] 1990, orig. proceeding). [\*14] These three cases held that the exception in rule 510(d)(5) applies only when the party resisting discovery is using the privilege "offensively," as when a plaintiff in a personal injury suit sues for damages and then seeks to shield his mental health records that would be evidence that his damages are caused by something else other than the defendant's alleged tortious behavior. J.P. argues because he is not seeking to use the privilege offensively, he is entitled to its protection.

The *Schattman* court rejected the same argument as overlooking the clear language of the amended rule. *Schattman*, 838 S.W.2d at 295. The *Schattman* court analyzed the *Scheffey* and *Dossey* opinions at some length and concluded it was not persuaded by their reasoning, implying that they ignored the clear language of the amended rule. See also *Kavanaugh*, 838 S.W.2d at 619 (patient was entitled to discovery about her doctor's mental, physical, and emotional condition and his use of alcohol). We agree with the *Schattman* analysis: the clear language of rule 501(d)(5) precludes us from reading it more narrowly [\*15] than it was drafted. The clear language of the rule permits the plaintiffs in this case to discover the mental health records of J.P.

2.

Adequate remedy by appeal -- information not available for appeal

A party will not have an adequate remedy by appeal where the trial court disallows discovery and the missing discovery cannot be made a part of the appellate record. *Walker*, 827 S.W.2d at 843. Because J.P. has not answered this interrogatory, on appeal there would be no way for an appellate court to adequately review Judge Chamber's decision. Thus, the plaintiffs have no adequate remedy by appeal.

#### D. Interrogatory six

Interrogatory six asks J.P. to identify all persons with knowledge of his use of intoxicants and to characterize the facts known to such person (e.g., knowledge of what substances he uses, knowledge of the extent of his consumption of those substance(s), knowledge of when, where, and with whom he uses those substances, and/or knowledge of any treatment that he has sought for his use of such substances.) J.P.'s objections to this interrogatory were substantially similar to his objections to previous discovery. [\*16]

##### 1. Physician-patient and mental health privilege

For the same reasons discussed in part C-1 under interrogatory five, we hold Judge Chambers abused his discretion in sustaining the physician-patient and mental health privilege objections.

##### 2. Attorney-work product

J.P. produced no evidence to support his objection to interrogatory six, that the information was exempt from discovery under the attorney work product privilege. Judge Chambers, therefore, abused his discretion by sustaining this objection to interrogatory six. Tex. R. Civ. P. 166(b)(4).

##### 3. Attorney-client privilege

J.P. produced no evidence to support his objection to interrogatory six, that the information was exempt from discovery under the attorney-client privilege. Judge Chambers, therefore, abused his discretion by sustaining this objection to interrogatory six. Tex. R. Civ. P. 166(b)(4).

##### 4.

##### Knowledge of fact witnesses

Last, J.P. objected to interrogatory six on the ground that Tex.R.Civ.P. 166b does not require a defendant to disclose the extent and content of the knowledge held by persons with knowledge of relevant facts. Rule

166b(2)(a) provides that parties may obtain discovery regarding any [\*17] matter which is relevant to the subject matter in the pending action whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. The content and extent of knowledge held by persons with knowledge of relevant facts, by definition, would be a matter that is relevant to the subject matter of the pending action. See, e.g., *Owens v. Wallace*, 821 S.W.2d 746, 748 (Tex.App.--Tyler 1992, orig. proceeding) (interrogatory could ask the party to outline facts upon which it intended to rely). We hold Judge Chambers abused his discretion by sustaining this objection to interrogatory six.

Because J.P. has not answered this interrogatory, on appeal there would be no way for an appellate court to adequately review Judge Chamber's decision. Thus, the plaintiffs have no adequate remedy by appeal.

#### E. Interrogatory seven

Interrogatory seven asks J.P. to identify every complaint filed against him with the Texas Board of Medical Examiners. One of the bases of J.P.'s objections to this interrogatory was that it seeks information protected from discovery by Tex.Rev.Civ.Stat. art. 4495b, sec. 4.05 (Vernon Pamph. [\*18] 1994). This statute provides in part:

(c) All complaints, adverse reports, investigation files, other investigation reports, and other investigative information in the possession of, received or gathered by the board or its employees or agents relating to a licensee, an application for license, or a criminal investigation or proceedings are privileged and confidential and are not subject to discovery, subpoena, or other means of legal compulsion for their release to anyone other than the board, its employees or agents involved in licensee discipline.

This statute, which makes all complaints received by the board confidential, includes any complaints against J.P.. In addition, there are no exceptions to the medical board privilege comparable to the exceptions in the physician-patient and mental health privilege rules of evidence. Judge Chambers, therefore, did not abuse his discretion by denying the plaintiffs' motion to compel J.P. to answer this interrogatory.

#### F. Request for production five

Request for production five asks for documents that relate or refer to J.P.'s purchase or consumption of intoxicants between November 5, 1990 and August 31, 1991.

After stating his objections, [\*19] J.P. responded to the request as follows:

Without waiving these objections, Defendant responds that, other than privileged documents, he has no responsive documents.

We reviewed the documents J.P. submitted to Judge Chambers for in camera examination. J.P. did not submit any documents that responded to request for production five -- he did not submit any invoices or bills for the court to review.

A close reading of his answer shows that J.P. claims there are documents, but they are privileged. The party who asserts a privilege has the burden of showing its existence, scope, and applicability. In *Peeples v. Fourth Court of Appeals*, 701 S.W.2d 635, 637 (Tex.1985), the Supreme Court articulated a four-step process when a party asserts a privilege from discovery. The party must:

1.

specifically plead the particular privilege;

2.

segregate all privileged from unprivileged materials;

3.

produced the requested material to the court; and

4.

request an in camera inspection of the materials.

Failure to follow these four steps results in a waiver of the privilege. *Id.*; see also *Axelson, Inc.*, 798 S.W.2d at 553 n.6; [\*20] *Freeman v. Bianchi*, 820 S.W.2d 853, 858-59 (Tex. App.--Houston [1st Dist.] 1991, orig. proceeding).

We hold J.P. waived any objection to this request by not submitting documents for examination. Judge Chambers abused his discretion by sustaining the objection to request for production five.

Because J.P. did not produce the requested documents, on appeal there would be no way for an appellate court to adequately review the trial court's decision. A party will not have an adequate remedy by appeal where the trial court disallows discovery and the missing discovery cannot be made a part of the appellate record. *Walker*,

827 S.W.2d at 843. Thus, the plaintiffs have no adequate remedy by appeal.

#### G. Request for production six

Request for production six asks J.P. to produce documents that relate or refer to occasions upon which he sought treatment for abuse of intoxicants. J.P.'s objections to request for production six were similar to his objections to interrogatory five, although he did add objections based on the work product, attorney-client, and investigative privileges. Asserting they were privileged, J.P. submitted [\*21] for an in camera review, documents numbered 000016-000118 in "Exhibit A to Affidavit of J.P." as documents that "may be responsive" to this request for production. In the envelope marked, "Addendum to Exhibit B to Affidavit of J.P." we found documents 000120-000133 to also be responsive to this request.

#### 1. Physician-patient and mental health privilege

For the same reasons discussed in part C-1 under interrogatory five above, we hold Judge Chambers abused its discretion in sustaining the physician-patient and mental health privilege objections.

#### 2. Attorney-work product

J.P. produced no evidence to support his objection based on attorney work product. Judge Chambers, therefore, abused his discretion by sustaining this objection to request for production six.

#### 3. Attorney-client privilege

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Tex.R.Civ.Evid. 503(b). None of the documents among documents 000016-000118 or 000120-000133 submitted for in camera review fit the description of the attorney-client privilege [\*22] provided for in rule 503(b). Therefore, we hold Judge Chambers abused his discretion by sustaining J.P.'s attorney-client objection to the documents responsive to this request.

#### 4. Investigative privilege

Investigative privilege can only be invoked when investigations are made in anticipation of litigation. See Tex.R.Civ.P. 166(b)(3)(d); *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 202-03 (Tex.1993). We

have reviewed the documents responsive to this request and find none show they were prepared in anticipation of litigation. Accordingly, we hold Judge Chambers abused his discretion by sustaining the investigative privilege objection to the production of documents responsive to this request.

5.

Adequate remedy by appeal -- information that goes to heart of case

Denial of discovery going to the heart of a party's case can render the appellate remedy inadequate. *Walker*, 827 S.W.2d at 843. The plaintiffs have alleged that Ms. Gustafson's injury was proximately caused by J.P.'s negligence in practicing while his judgment, skill, and competence were compromised by his sustained use of intoxicants.

[\*23]

We hold that documents numbers 000017-24, 000027, 000044-45, 000050-51, 000057, 000062-67, 000089, 000100, 000102, as well as documents 000120-121, 000122, 000129-131 go to the heart of the plaintiffs' case. As such, the plaintiffs have no adequate remedy by appeal from the trial court's abuse of discretion in sustaining J.P.'s objections to their production.

#### H. Request for production seven and eight

Request for production seven asks J.P. to produce all documents that relate or refer to HCA South Arlington Hospital's knowledge of his use of intoxicants and request for production eight asks him to produce all documents relating to inquiries made by the hospital regarding J.P.'s use of intoxicants. J.P. objected to requests for production seven and eight on many of the same grounds he did to most of the discovery requests, but added some new ones that we discuss below. Subject to these objections, J.P. responded to both of these requests for production that he is unaware of any such documents other than privileged documents 000016-000118 that he submitted to Judge Chambers for in camera review. Out of these 102 documents, we have found several documents responsive to these requests. [\*24] In the envelope marked, "Addendum to Exhibit B to Affidavit of J.P." we found documents 000129-000130 to also be responsive to request for production seven.

#### 1. Physician-patient and mental health privilege

For the same reasons discussed in part C-1 under interrogatory five above, we hold Judge Chambers abused his

discretion by sustaining the physician-patient and mental health privilege objections to request for production seven.

#### 2. Attorney-work product

The attorney-work product rule protects from discovery the mental impressions, conclusions, opinions, or legal theories prepared and assembled by the attorney in actual preparation for trial. *Tex.R.Civ.P.* 166b(3); *Owens*, 821 S.W.2d at 747-48. We have reviewed the documents we find responsive to the request contained in documents 000016-000118 and conclude Judge Chambers abused his discretion by sustaining J.P.'s objection to their production based on the attorney work-product rule because none of the documents meet the work product characteristics described in *Owens*.

#### 3. Attorney-client privilege

A client has a privilege to refuse to disclose and to prevent any other person from [\*25] disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. *Tex.R.Civ.Evid.* 503(b); *West v. Solito*, 563 S.W.2d 240, 245 (*Tex.* 1978). None of the responsive documents are documents fitting the description of the attorney-client privilege provided for in rule 503(b). Accordingly, we hold Judge Chambers abused his discretion by sustaining this objection to request for production seven and eight.

#### 4. Party communications/investigative matters

Party communication/investigative privilege can only be invoked when the communications/investigations are made in anticipation of litigation. See *Tex.R.Civ.P.* 166(b)(3)(d); *National Tank Co.*, 851 S.W.2d at 203. We have reviewed the documents responsive to this request and find none that show they were prepared in anticipation of litigation. Accordingly, we hold Judge Chambers abused his discretion by sustaining the party communication privilege objection to the production of documents responsive to this request.

#### 5. Witness statements

We have examined the documents responsive to this request [\*26] and none of them are witness statements. Accordingly, we hold Judge Chambers abused his discretion by sustaining J.P.'s objection to request for production seven and eight on the basis of the witness statement discovery exemption.

#### 6. Consulting expert reports/information

J.P. produced no evidence that documents 000016-000118 were purely consulting expert reports/information. We hold, therefore, Judge Chambers abused his discretion in sustaining this objection to request for production seven and eight.

#### 7. Joint defense privilege

J.P. objected to the request for production on the ground that the information was prepared as a part of a joint defense with the hospital. J.P. did not submit any evidence that documents 000016-000118 constituted documents prepared as part of a joint defense. Accordingly, J.P. waived the objection and Judge Chambers abused his discretion in sustaining J.P.'s objections to their production.

As an important part of their case, the plaintiffs have alleged that Ms. Gustafson's injury was proximately caused by the hospital's negligence in allowing J.P. to practice while his judgment, skill, and competence were compromised because of his abuse of and addiction [\*27] to intoxicants. We hold that Exhibit A, document numbers 000016, 000046-47, 000052, 000076, 000089-90, 000109, Addendum to Exhibit B document numbers 000129-130 go to the heart of plaintiff's allegation of negligence against the hospital. As such, plaintiffs have no adequate remedy by appeal from the trial court's abuse of discretion in sustaining J.P.'s objections to their production.

##### I. Request for production nine.

Request for production nine asks J.P. to produce all documents that relate or refer to representations made by him to the hospital regarding his use of intoxicants. Subject to his customary objections, J.P. responded that other than the in camera documents, he was not aware of documents responsive to this request.

We have reviewed the in camera documents and found no documents that are responsive to this request. Accordingly, we hold Judge Chambers did not abuse his discretion by denying the plaintiffs' motion to compel as it relates to this request for production.

##### J. Request for production 10

Request for production 10 asks J.P. to produce every document that relates or refers to every complaint filed with the Texas State Board of Medical Examiners. J.P. claims documents [\*28] responsive to this request are privileged under the Medical Practice Act, Tex.Rev.Civ.Stat. art.

4495b 4.05 (Vernon Pamph. 1994), which provides in part

(c) All complaints, adverse reports, investigation files, other investigation reports, and other investigative information in the possession of, received or gathered by the board or its employees or agents relating to a licensee, an application for a license, or a criminal investigation or proceedings are privileged and confidential and are not subject to discovery, subpoena, or other means of legal compulsion for their release to anyone other than the board or its employees or agents involved in licensee discipline.

Texas Revised Civil Statutes, art. 4495b, section 5.06 (Vernon Pamph. 1994), provides in part:

(s)(1) Reports, information, or records received and maintained by the board pursuant to this section ... including any material received or developed by the board during an investigation or hearing, are strictly confidential....

\* \* \*

(s)(3) In no event may records and reports disclosed pursuant to this article by the board to others, or reports and records received, maintained, or developed by the [\*29] board, by a medical peer review committee, or by a member of such a committee or by a health-care entity be available for discovery or court subpoena or introduced into evidence in a medical professional liability suit arising out of the provision of or failure to provide medical or health-care services, or in any other action for damages.

(Emphasis added.)

Records of the State Board of Medical Examiners received or gathered by the Board are privileged and are not subject to discovery. *Kavanaugh*, 838 S.W.2d at 622 (Tex.App.--Dallas 1992, orig. proceeding); *Brochner v. Thomas*, 795 S.W.2d 215, 217 (Tex.App.--Eastland 1990, orig. proceeding). The purpose of shielding the files of the State Board of Medical Examiners is to promote improvement of health care and treatment of patients through review, analysis, and evaluation of work and procedures of doctors. *Family Med. Ctr. v. Ramirez*, 855 S.W.2d 200, 202 (Tex.App.--Corpus Christi 1993, orig. proceeding) (peer review committee privilege).

To answer this interrogatory, J.P. would be forced to disclose information disclosed to him [\*30] by the board. Such disclosure is prohibited by article 4495b, section 5.06. We hold Judge Chambers did not abuse his dis-

cretion in sustaining J.P.'s response to this request.

Summary

We are confident that in accordance with this opinion, Judge Chambers will issue a new discovery order to compel J.P. to respond to:

(A) Interrogatories five and six;

(B) Request for production five, by delivering to plaintiffs' counsel all responsive documents;

(C) Request for production six, by delivering to plaintiffs' counsel documents 000017-19, 000020-24, 000027, 000044-45, 000050-51, 000057, 000062-67, 000089, 000100, 000102 from the envelope marked "Exhibit A to Affidavit of J.P." and documents 000120-121, 000122, 000129-131 from the envelope marked

"Addendum to Exhibit B to Affidavit of J.P."; and

(D) Request for production seven and eight, by delivering to plaintiffs' counsel documents 000016, 000046-47, 000052, 000076, 000089, 000090, 000109 from the envelope marked "Exhibit A to Affidavit of J.P." and documents 000129-130 from the envelope marked "Addendum to Exhibit B to Affidavit of Dr. J.P."

We will issue the writ of mandamus only if Judge Chambers does not act according to this [\*31] opinion.  
MICHOL O'CONNOR

Justice

Chief Justice Oliver Parrott and Justice Wilson also sitting.

Judgment rendered and opinion delivered June 7, 1994

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

219TH JUDICIAL DISTRICT

STATE OF TEXAS §  
  §  
COUNTY OF DALLAS §

AFFIDAVIT OF ERIC W. PINKER

BEFORE ME, the undersigned Notary Public, on this day personally appeared Eric W. Pinker, who, being by me duly sworn, on his oath stated as follows:

1. My name is Eric W. Pinker. I am a partner with the law firm of Lynn Stodghill Melsheimer & Tillotson, L.L.P. and I am one of the attorneys of record for Plaintiff in the above-styled and numbered cause of action. 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 Plaintiff.

2. Attached hereto as Exhibit "A" is a true and correct copy of the June 30, 1997 Temporary Injunction Order.

3. Attached hereto as Exhibit "B" is a true and correct copy of the July 14, 1997 letter I received from Defendant's counsel, Richard A. Sayles.

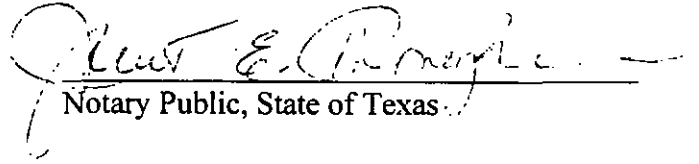
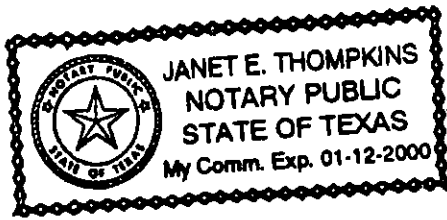
4. Attached hereto as Exhibit "C" is a true and correct copy of Defendant's Responses to Plaintiff's First Set of Interrogatories filed in this case on July 16, 1997.

FURTHER AFFIANT SAITH NOT.



Eric W. Pinker

SUBSCRIBED AND SWORN TO BEFORE ME this 22<sup>nd</sup> day of July, 1997 to certify which witness my hand and official seal.



Notary Public, State of Texas

Cause No. 199-00596-97

DSC COMMUNICATIONS  
CORPORATION

IN THE DISTRICT COURT OF

v.

COLLIN COUNTY, TEXAS

EVAN BROWN

199<sup>TH</sup> JUDICIAL DISTRICT**TEMPORARY INJUNCTION ORDER**

On June 30, 1997, Plaintiff DSC Communications Corporation's ("DSC") Application for Temporary Injunction came on regularly for hearing, due notice having been given to Defendant Evan Brown ("Brown"). The parties appeared in person and by their attorneys. After considering the evidence received, the pleadings before the Court, and the argument of counsel, the Court finds and concludes that Plaintiff DSC will probably prevail on the merits at the trial of this cause, and further that Plaintiff DSC will probably prevail at trial in establishing each and all of the following: that Defendant Brown entered into an Employee Patent, Copyright and Proprietary Information Agreement with DSC (the "Employment Agreement"); that the Employment Agreement is a valid and enforceable contract between DSC and Brown; that Brown 1) developed a method of converting machine executable binary code into a high level source code using logic and data abstractions, 2) developed a method of taking existing executable programs and "reverse engineering" the intelligence from programs and "re-code" the intelligence into portable high level language, and 3) developed a method of converting executable Z8000 machine code into C language source (all collectively describing what shall hereinafter be referred to as the "Solution") during his employment by DSC; that the Solution is along the lines of DSC's business, work, and investigations, and that the Solution further resulted from or was suggested by Brown's work for DSC; that other companies are currently pursuing the Solution; that Brown has stated an intention not to disclose the Solution to DSC and has stated an intention not to assist DSC to obtain patents for the Solution; that Brown has stated an intention to develop the Solution

independent of DSC, including to develop it in foreign countries outside the protection of this and other courts in the United States; that if Brown carries out his intentions it will alter the status quo and make ineffectual a judgment in favor of DSC in that DSC will suffer immediate harm and will be irreparably injured because it will not be able to protect its rights to the Solution; that unless Brown is enjoined from carrying out his intentions, DSC will be without an adequate remedy at law; and that any delay to DSC's ability to exploit the Solution or to take action to protect its rights in the Solution, such as patent applications on the Solution, will irreparably harm DSC.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Defendant Evan Brown, his employees, agents, assignees, or other persons and/or entities acting in concert with him who receive actual or constructive notice of this Order, be and hereby is, commanded forthwith to desist and refrain from the following until final judgment in this cause is entered by the Court:

- a. Disclosing, marketing, selling, assigning, or transferring the Solution to any person or entity other than DSC;
- b. Negotiating the disclosure, sale assignment, or transfer of the Solution to any person or entity other than DSC;
- c. Disclosing or negotiating the disclosure of any information or details concerning the Solution to anyone other than DSC;
- d. Further developing, refining, or implementing the Solution, except as required by the mandatory injunction below; and
- e. Destroying any material or records (including computer files or disks) that relate to or evidence the Solution or his effort to market the Solution.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Defendant Evan Brown, his employees, agents, assignees, or other persons and/or entities acting in concert with him who receive actual or constructive notice of this Order, be and hereby is, commanded forthwith to:

- a. Preserve the Solution; and

b. Disclose the Solution, in its entirety, to DSC in the manner set forth in the following paragraphs of this Order.

IT IS ORDERED, ADJUDGED, and DECREED that the following persons are designated by the Court to be the DSC Development Team (the "DSC Development Team"), to-wit: Tina Young, Court Reporter, Billy Gonzales, Videographer, Rick Billings, Mike McCarty, Jianbai Wang, Dan McMurray, Wayne Jones, Cheryl Sanders, and Steve Levine.

The members of the DSC Development Team shall be bound by the Confidentiality provisions set forth in this Order.

Defendant Evan Brown is hereby ORDERED, COMMANDED and DIRECTED to:

1. disclose the Solution to the DSC Development Team instantler,
2. appear in person at the offices of DSC, 1000 Coit Road, Plano, Texas, each business day at 9:00 a.m. beginning July 1, 1997, and remain in attendance at DSC until 5:00 p.m. each day, and to continue to appear each business day thereafter from 9:00 a.m. to 5:00 p.m. until the disclosure to the DSC Development Team is complete, and
3. make a full and complete disclosure of each aspect of the Solution to the DSC Development Team, both orally and in writing.

DSC shall provide a suitable room for Brown and the DSC Development Team. DSC shall also provide telephone access to Brown's counsel from the room set aside for the disclosure. The DSC Development Team shall maintain accurate records of the Solution as Brown dictates it to them, and a log tracking such records, which records and log shall be made available to the Court upon request. The DSC Development Team shall be permitted to videotape Defendant Evan Brown's efforts, actions and words during the disclosure of the Solution. Any video tape made shall, upon its removal from the video recording device, be placed into the custody of Billy Gonzales, marked and dated for identification, and transported for safekeeping to a location designated by the Court. DSC

shall be permitted to transcribe portions of the disclosure as it deems appropriate with such transcriptions to be made from the videotape or live. The transcription will be subject to the confidentiality provisions of this order, and once completed shall be transported for safekeeping to a location designated by the Court.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that DSC shall compensate Evan Brown for his time in making a good faith, complete and timely disclosure at the rate of \$45.00 an hour. DSC shall, on or before July 1, 1997, make an initial deposit of \$1,000 into the registry of the Court for this purpose, and Brown, upon completion of the disclosure, may apply to the Court, and upon notice and hearing to DSC, demonstrate his good faith, complete and timely compliance with the Order, and his entitlement to his hourly fee for the time spent during the disclosure.

IT IS ORDERED, ADJUDGED, and DECREED that the DSC Development Team shall evaluate the Solution and have the option as it deems necessary to take any appropriate efforts to protect the Solution, including the filing of patent applications in the United States and in foreign countries, if appropriate. The DSC Development Team shall make no use of the Solution other than as set forth in the preceding sentence of this Order. The DSC Development Team shall maintain accurate records of its technical work and documentation concerning the Solution, including a log tracking such records and documents, which records, documents, and logs shall be made available to the Court upon request.

IT IS ORDERED, ADJUDGED, and DECREED that except as otherwise provided by the Court, the disclosure of the Solution by Brown, and any information or documents generated by the DSC Development Team in connection with evaluating or protecting the Solution (collectively referred to as the "Confidential Material"), shall be treated in the manner set forth in this paragraph of this Order. No member of the DSC Development Team shall discuss or show any Confidential Material to any person who is not a member of the DSC Development Team. No person who is not a member of the DSC Development Team shall have access to any of the Confidential Material. The members of the DSC Development Team shall only make copies of the Confidential

Material as are necessary to enable those team members to evaluate and protect the Solution as permitted by this Order, and all such notes and copies shall be preserved in a separate file maintained as confidential. The provisions of this paragraph do not preclude DSC from filing patent applications as otherwise provided in this Order, nor does it preclude the making of a video tape to be preserved by a Collin County Sheriff's Deputy or Constable as provide heretofore in this Order.

IT IS ORDERED, ADJUDGED, and DECREED that trial on the merits of this cause is set for the 3rd day of November, 1997, at 9:00 a.m.

The Clerk shall forthwith on the filing by DSC of the bond hereinafter required and on approving the same according to the law, issue a temporary injunction in conformity with the law and the terms of this order.

This Order shall not be effective unless and until DSC executes and files with the Clerk a surety bond, in conformity with the law, in the amount of five hundred thousand dollars (\$500,000) or a cash bond in the sum of fifty thousand dollars (\$50,000.00).

Signed this 30 of June, 1997.



**Judge Curt B. Henderson, 219<sup>th</sup> Judicial District Court  
sitting by assignment for the 199<sup>th</sup> Judicial District Court**

## SAYLES &amp; LIDJI

July 14, 1997

Richard A. Sayles  
Direct Line 939-8701  
rsayles@saylid.comVIA FAX (214) 981-3839

Mike Lynn

Eric Pinker

Lynn Stodghill Melsheimer &amp; Tillotson, L.L.P.

750 North St. Paul, Suite 1400

Dallas, TX 75201

Re: No. 199-596-97; *DSC Communications Corporation v. Evan Brown*; pending in the 199th District Court, Collin County, Texas

Gentlemen:

We would like to take at least the following depositions:

Dan Allman  
Wylie Basham  
Matt Bilbo  
Gary Brown  
George Brundt  
Chris Cole  
Jim Donald  
Dan Finch  
Marvin Harbin  
Dave Hinshaw  
Wayne Jones  
Chuck Lane  
C. Owen  
Raymond Percival  
Larry Sewell  
Jenks Smith  
Jianbai Wang  
Ron Ward

Since we already know we need to take at least this many depositions, it is time to get underway. I request that you provide us with dates within which these depositions can be taken. We would like depositions to begin as soon as possible after August 5, unless Defendant's summary judgment is granted at that time.

38012.1

4400 Renaissance Tower 1201 Elm Street Dallas, Texas 75270 Telephone 214-939-8700 Fax 214-939-8787

Attorneys - A Professional Corporation

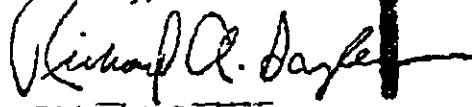
EXHIBIT

"B"

July 14, 1997  
Page 2

We will provide you with written discovery in the near future. We respectfully request that you agree to respond to the written discovery within 15 days of the date of service. If you cannot do so, please inform us so we may consider whether to file a motion to shorten time within which to respond to discovery. We look forward to your continued cooperation.

Sincerely,



Richard A. Sayles

RAS/dtk

cc: John R. Stooksberry  
Dale Drake

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

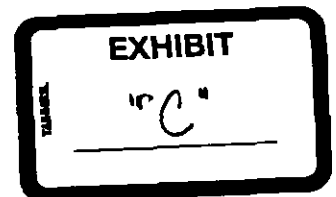
**DEFENDANT'S RESPONSES  
TO PLAINTIFF'S FIRST SET OF INTERROGATORIES**

TO: Plaintiff DSC Communications Corporation, by and through its attorney of record, Michael P. Lynn, Lynn Stodghill Melsheimer & Tillotson, L.L.P., 750 North St. Paul Street, Suite 1400, Dallas, Texas 75201.

Pursuant to Rule 168 of the Texas Rules of Civil Procedure, Defendant Evan Brown submits the following answers to Plaintiff DSC Communication Corporation's First Set of Interrogatories.

**GENERAL OBJECTIONS**

Defendant objects to the instructions and definitions contained in Plaintiff DSC Communication Corporation's First Set of Interrogatories because, as applied to specific discovery requests, they cause the requests to be overly broad and global, vague and ambiguous, unduly burdensome, and to seek information, in part, protected from disclosure by the attorney-client, work product, party communications, investigative, and consulting expert privileges. Subject to and without waiving these general objections, Defendant responds to the specific interrogatories as follows:



## RESPONSES

### Interrogatory No. 1:

Please identify the individual(s) answering these interrogatories.

**Answer:**

Evan Brown

### Interrogatory No. 2:

Please identify each person who has any knowledge of any facts relevant to the claims made in the Petition, as defined in the Texas Rules of Civil Procedure, describing the substance of each person's knowledge.

**Answer:**

Defendant objects to this Interrogatory insofar as it purports to require Defendant to describe the substance of each person's knowledge for the reason that such a requirement seeks to impose burdens on Defendant beyond those permitted by the Texas Rules of Civil Procedure, calls for Defendant to speculate, is overly broad and unduly burdensome and seeks information protected from disclosure by the attorney-client, work product, party communications, investigative, and consulting expert privileges. Subject to and without waiving the foregoing objections, Defendant responds as follows:

Alan Adams  
DSC Communications Corporation

Dan Allman  
DSC Communications Corporation

Jack Barreneaux  
DSC Communications Corporation

Wylie Basham  
DSC Communications Corporation

Dick Belote  
DSC Communications Corporation

Matt Bilbo  
DSC Communications Corporation

Rick Billings  
DSC Communications Corporation

Gary Brown  
DSC Communications Corporation

George Brundt  
DSC Communications Corporation

Chris Cole  
DSC Communications Corporation

Gamini Desoyza  
DSC Communications Corporation

Jim Donald  
DSC Communications Corporation

Dan Finch  
DSC Communications Corporation

Marvin Harbin  
DSC Communications Corporation

Dave Hinshaw  
DSC Communications Corporation

Wayne Jones  
DSC Communications Corporation

Chuck Lane  
DSC Communications Corporation

Mike McCarty  
DSC Communications Corporation

Dan McMurray  
DSC Communications Corporation

Claude Owen  
DSC Communications Corporation

Raymond Percival  
DSC Communications Corporation

Rick Ross  
DSC Communications Corporation

Cheryl Sanders  
DSC Communications Corporation

Brian Scudder  
DSC Communications Corporation

Larry Sewell  
DSC Communications Corporation

Jinx Smith  
DSC Communications Corporation

Jianbai Wang  
DSC Communications Corporation

Ron Ward  
DSC Communications Corporation

Scott Yegal  
DSC Communications Corporation

All members of DSC Communications Corporation's Tools Group

Evan Brown  
2705 Chadborne Drive  
Plano, Texas 75023

Steve Levine

Tina Young

Billy Gonzales

Jack Coates  
College Station, Texas

Sam Horowitz  
Palo Alto, California

Lance Flores  
Dallas, Texas

**Interrogatory No. 3:**

Please identify any experts engaged by you or your attorney who may be called to testify at trial.

**Answer:**

Defendant has not yet engaged any expert witnesses.

**Interrogatory No. 4:**

Please identify any expert that you have consulted in this case, if such experts opinion, impressions or work product have been reviewed by any testifying witness, including any expert witness identified in Interrogatory No. 3 above, in this case.

**Answer:**

Defendant objects to this Interrogatory because it seeks information protected from disclosure by the consulting expert privilege. Subject to and without waiving the foregoing objection, Defendant responds as follows:

Defendant has not yet engaged any expert witnesses.

**Interrogatory No. 5:**

For each expert named in your answer to Interrogatory No. 3 or No. 4 above, please state the date on which he/she was first consulted by you or your attorney(s), the subject matter on which he/she is expected to testify, the mental impressions and opinions held by each expert, and a summary of the grounds for each opinion.

**Answer:**

Defendant objects to this Interrogatory because it seeks information protected from disclosure by the consulting expert privilege and because it seeks to impose burdens on Defendant beyond those permitted by the Texas Rules of Civil Procedure. Subject to and without waiving the foregoing objection, Defendant responds as follows:

Defendant has not yet engaged any expert witnesses.

**Interrogatory No. 6:**

For each expert named in your answer to Interrogatory No. 3 or No. 4 above, please state the facts known to the expert which relate to or form the basis of the mental impressions and opinions held by the expert.

**Answer:**

Defendant objects to this Interrogatory because it seeks information protected from disclosure by the consulting expert privilege. Subject to and without waiving the foregoing objection, Defendant responds as follows:

Defendant has not yet engaged any expert witnesses.

**Interrogatory No. 7:**

Please identify and describe in detail the "method of converting machine executable binary code into high level source code form using logic and data abstractions" (hereinafter "Solution"), that is described in your April 19, 1996 memorandum to Larry Sewell.

**Answer:**

Defendant objects to this Interrogatory because it seeks information which is confidential and proprietary. Defendant further objects to this Interrogatory as vague, ambiguous, overbroad, unduly burdensome and harassing. Finally, Defendant objects to this Interrogatory because its inclusion within Plaintiff's First Set of Interrogatories causes such interrogatories to require more than 30 answers in violation of Rule 168(5) of the Texas Rules of Civil Procedure.

**Interrogatory No. 8:**

Please identify all documents related to the Solution.

**Answer:**

Defendant objects to this Interrogatory as vague, ambiguous, overbroad, unduly burdensome and harassing. Subject to and without waiving the foregoing objections, Defendant states as follows:

Pursuant to Rule 168(2) of the Texas Rules of Civil Procedure, Defendant has produced documents from which the answer to this Interrogatory may be ascertained.

**Interrogatory No. 9:**

Please identify all efforts by you to protect or preserve the Solution.

**Answer:**

Defendant objects to this Interrogatory because it seeks information protected by the attorney-client, work product, party communications, investigative, and consulting expert privileges. Defendant further objects to this Interrogatory as overbroad and unduly burdensome. Finally, Defendant objects to this Interrogatory as seeking information which is confidential and proprietary. Subject to and without waiving the foregoing objections, Defendant states as follows:

Defendant has protected and preserved the Solution by maintaining its confidential status and by refusing to disclose the Solution to any third parties, including DSC.

**Interrogatory No. 10:**

Please identify each and every person to whom you have disclosed any part of the Solution.

**Answer:**

Defendant objects to this Interrogatory because it seeks information protected by the attorney-client, work product, party communications, investigative, and consulting expert privileges. Defendant further objects to this Interrogatory as overbroad and unduly burdensome. Finally, Defendant objects to this Interrogatory as seeking information which is confidential and proprietary. Subject to and without waiving the foregoing objections, Defendant states as follows:

Wylie Basham  
DSC Communications Corporation

Dick Belote  
DSC Communications Corporation

Rick Billings  
DSC Communications Corporation

Gary Brown  
DSC Communications Corporation

Gamini Desoyza  
DSC Communications Corporation

Jim Donald  
DSC Communications Corporation

Dan Finch  
DSC Communications Corporation

Dave Hinshaw  
DSC Communications Corporation

Wayne Jones  
DSC Communications Corporation

Chuck Lane  
DSC Communications Corporation

Mike McCarty  
DSC Communications Corporation

Dan McMurray  
DSC Communications Corporation

Cheryl Sanders  
DSC Communications Corporation

Larry Sewell  
DSC Communications Corporation

Jianbai Wang  
DSC Communications Corporation

Ron Ward  
DSC Communications Corporation

Steve Levine

Tina Young

Billy Gonzales

Lance Flores  
Dallas, Texas

**Interrogatory No. 11:**

Please identify each and every person with whom you have discussed the Solution.

**Answer:**

Defendant objects to this Interrogatory because it seeks information protected by the attorney-client, work product, party communications, investigative, and consulting expert privileges. Defendant further objects to this Interrogatory as overbroad and unduly burdensome. Finally, Defendant objects to this Interrogatory as seeking information which is confidential and proprietary. Subject to and without waiving the foregoing objections, Defendant states as follows:

Defendant refers to his Answer to Interrogatory No. 10 set forth above.

**Interrogatory No. 12:**

Please identify each and every person to whom you have marketed any part of the Solution.

**Answer:**

Defendant objects to this Interrogatory because it seeks information protected by the attorney-client, work product, party communications, investigative, and consulting expert privileges. Defendant further objects to this Interrogatory as overbroad and unduly burdensome. Finally, Defendant objects to this Interrogatory as seeking information which is confidential and proprietary. Subject to and without waiving the foregoing objections, Defendant states as follows:

Defendant has not marketed his Idea to anyone.

**Interrogatory No. 13:**

Please identify each and every person you have contacted in an effort to seek backing or financing for the development of the Solution.

**Answer:**

Defendant objects to this Interrogatory because it seeks information protected by the attorney-client, work product, party communications, investigative, and consulting expert privileges. Defendant further objects to this Interrogatory as overbroad and unduly burdensome. Finally, Defendant objects to this Interrogatory as seeking information which is confidential and proprietary. Subject to and without waiving the foregoing objections, Defendant states as follows:

Defendant has not contacted anyone in an effort to seek backing or financing for the development of the Idea.

**Interrogatory No. 14:**

Please identify the facts underlying your contention, in paragraph IV of Defendant's Original Answer, that "Defendant specifically denies that conditions precedent to recovery have been performed or have occurred."

**Answer:**

Defendant objects to this Interrogatory because it seeks information protected from disclosure by the attorney-client and work product privileges and because it seeks to compel Defendant to provide a legal opinion which he is unqualified to render.

Respectfully submitted,



**RICHARD A. SAYLES**

State Bar No. 17697500

**ERIC D. PEARSON**

State Bar No. 15690472

**SAYLES & LIDJI, P.C.**

**A Professional Corporation**

4400 Renaissance Tower

1201 Elm Street

Dallas, Texas 75270

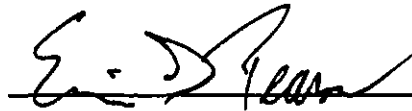
(214) 939-8700

(214) 939-8787 (fax)

Attorneys for Defendant

**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 16th day of July, 1997, pursuant to rule 21a of the Texas Rules of Civil Procedure.



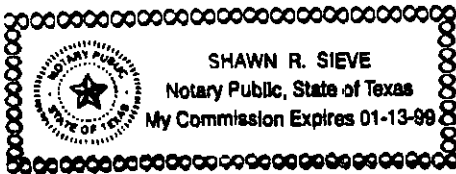
STATE OF TEXAS           §  
  §  
COUNTY OF DALLAS       §

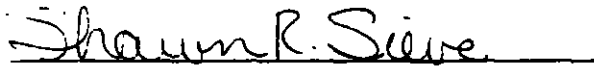
BEFORE ME, the undersigned authority, on this day personally appeared Evan Brown, who being duly sworn by me, upon his oath stated as follows:

1. My name is Evan Brown. I am above the age of 21 and am competent to make this affidavit.
2. I have read the foregoing answers to interrogatories. The answers are true and correct to the best of my knowledge.

  
Evan Brown

SUBSCRIBED AND SWORN TO BEFORE ME on this the 15<sup>th</sup> day of July, 1997, to certify which witness my hand and official seal of office.



  
Notary Public in and for  
the State of Texas

My Commission Expires:  
1/13/99

Defendant's Responses to Plaintiff's First Set of Interrogatories:

**CAUSE NO. 199-596-97**

**DSC COMMUNICATIONS  
CORPORATION,**

**Plaintiff,**

**v.**

**EVAN BROWN,**

**Defendant.**

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§  
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§  
§  
§

**IN THE DISTRICT COURT OF**

**COLLIN COUNTY, TEXAS**

**219TH JUDICIAL DISTRICT**

**AFFIDAVIT OF CHERYL A. SANDERS**

STATE OF TEXAS §  
§  
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared Cheryl A. Sanders, who, being by me duly sworn, on her oath stated as follows:

1. My name is Cheryl A. Sanders. I am over the age of eighteen (18) years, have never been convicted of a felony or a crime involving moral turpitude, and am competent to make this Affidavit. The matters and facts stated herein are within my personal knowledge and are true and correct.

2. I am currently employed as Administrative Patent Aide to Wayne A. Jones, who is Vice President and General Intellectual Property Counsel of DSC Communications Corporation. I have been named as one of the members of the DSC Development Team, which is the team of persons who are authorized to receive Mr. Brown's disclosure of the Solution as provided in the June 30, 1997 Temporary Injunction Order.

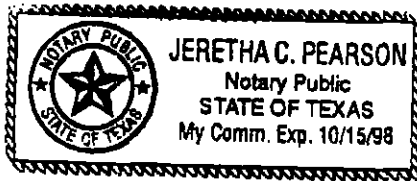
3. Despite the requirements of the June 30, 1997 Temporary Injunction Order, Mr. Brown did not appear at DSC's offices on July 1, 1997, nor has he appeared on any day thereafter.


Since the entry of the June 30, 1997 Temporary Injunction Order, Mr. Brown has not made any disclosure of the Solution to the DSC Development Team whatsoever.

FURTHER AFFLIANT SAITH NOT.

  
Cheryl A. Sanders, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME this 22 day of July, 1997 to certify which witness my hand and official seal.



  
Notary Public, State of Texas