

CAUSE NO. 199-596-97

DSC COMMUNICATIONS CORPORATION,	§	IN THE DISTRICT COURT OF
	§	
	§	
Plaintiff,	§	
	§	
v.	§	COLLIN COUNTY, TEXAS
	§	
EVAN BROWN,	§	
	§	
Defendant.	§	219TH JUDICIAL DISTRICT

DSC'S RESPONSE TO EVAN BROWN'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

Respectfully submitted,

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**DSC'S RESPONSE TO BROWN'S
MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT**

TO THE HONORABLE JUDGE OF SAID COURT:

DSC Communications Corporation ("DSC") files this Response to Defendant Evan Brown's ("Brown") Motion for Summary Judgment and Brief in Support and would respectfully show the following:

I.

INTRODUCTION

In April 1987, Brown signed an Employee Patent, Copyright, and Proprietary Information Agreement with DSC in which he agreed, in exchange for employment by DSC, to disclose to DSC any inventions that he conceived of (relating to certain fields) during his employment with DSC. Relying on this promise, DSC employed Brown for ten (10) years.

Through his Motion, Brown now seeks to avoid his contractual obligations by arguing that this Agreement is not supported by consideration. Brown's argument is untenable for two reasons. First, DSC's full performance of this Agreement constitutes sufficient consideration to support this type of unilateral agreement. Second, the covenant not to compete cases upon which Brown relies

are wholly inapplicable to this case, and by statute impose a standard that is legally incorrect under these facts. For these reasons, and as more fully explained below, Brown's Motion for Summary Judgment should be denied.

II.

FACTUAL BACKGROUND

1. In April 1987, Brown became employed as a software engineer for DSC. *See* Affidavit of Eric W. Pinker ("Pinker Aff."), Ex. "A" (Deposition of Evan Brown ("Brown Depo.")), p. 21.

2. Upon becoming an employee of DSC, Brown voluntarily signed Employee Patent, Copyright, and Proprietary Information Agreement (the "Employment Agreement") with DSC. Pinker Aff., Ex. "B" (May 2, 1997 Statement of Facts ("SOF")), p. 95. On this same day, Brown also signed his Form W-4A and the DSC Communications Corporation Internal Employee Memorandum. Affidavit of Dan Allman, Exhibits "A" and "B."

3. The Employment Agreement speaks 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. *See* SOF, Ex. 1. With respect to the first type of invention, Brown represented that at the time he joined DSC, he had no inventions whatsoever.^{1/} *Id.* 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

^{1/} While Brown claims to have begun thinking about the Solution in 1975, *see* Brown's Motion, p. 2, Brown stated in the Employment Agreement that he had no inventions at the time he began working for DSC. *See* SOF, Ex. 1, Section F. Moreover, Brown has conceded that the Solution was not complete at the time he began his employment with DSC, *see* SOF, p. 98 and Brown Depo. p. 73, and in fact, he did not even think the Solution was possible at that time. *Id.* at p. 99.

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.

Id.

4. In addition, the Employment Agreement also includes a nondisclosure covenant, in which Brown agreed not to disclose any trade secret information, knowledge or data of DSC. *See* SOF, Exhibit 1, Section D.

5. It is the policy of DSC that all employees must sign the Employment Agreement. DSC does not permit people to become employed or continue in their employment at DSC if they do not sign an agreement like the Employment Agreement. *See* SOF, p. 28.

6. Brown knew that executing the Employment Agreement was a required precondition to working at DSC. When he signed the Employment Agreement, Brown understood that he was making certain commitments to DSC. Brown has testified that he is "not trying to get out of these commitments." *See* SOF, p. 95. *See also* Brown Depo., pp. 56-58.

7. DSC employed Brown for ten (10) full years, from April 1986 through April 1996. During that time, Brown received the benefits of being a DSC employee, including receiving training, medical benefits, stock purchase plan benefits, retirement benefits, and the like. *See* SOF, p. 31. Brown would not have received any of these benefits if he had not signed the Employment

Agreement. *Id.* In addition, during his employment, DSC disclosed to Brown confidential and proprietary information. Affidavit of Matt Bilbo.

8. Brown alleges that he developed a method of converting machine executable binary code into high-level source code from using logic and data abstractions (the "Solution"). SOF, p.

10. Brown developed the Solution during the time he was employed by DSC. SOF, p. 90.

9. On April 19, 1996, Brown wrote a memo to Gamini Desoyza, his immediate supervisor, describing the Solution in the following terms:

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 SOF, Ex. 3. Brown sent this memorandum in an effort to secure a release of the Solution from DSC, as required by the Employment Agreement. This memorandum was an effort by Brown to comply with the requirements of the Employment Agreement. *See* SOF, pp. 100-101, 108.

10. The Employment Agreement required Brown to disclose the Solution to DSC. *See* SOF, Ex. 1, Section A. However, Brown refused to disclose the Solution to DSC. *See* SOF, p. 136.

III.

SUMMARY JUDGMENT EVIDENCE

This Response is based on the following Summary Judgment evidence: (1) Plaintiff's First Amended Original Petition; (2) the Affidavit of Eric W. Pinker, attaching excerpts from the deposition of Evan Brown (Exhibit "A") and the May 2, 1997 Statement of Facts (Exhibit "B"); (3) the Affidavit of Matt Bilbo; and (4) the Affidavit of Dan Allman.

IV.

SUMMARY JUDGMENT STANDARD

On a motion for summary judgment, the moving party bears the burden of proving that there exists no genuine issue of material fact and that they are entitled to judgment as a matter of law. *Gosami v. Metropolitan Sav. & Loan Ass'n*, 751 S.W.2d 487, 491 (Tex. 1988); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). In making this proof, the evidence must be viewed in the light most favorable to the non-movant, with all conflicts in evidence disregarded and evidence supporting the position of non-movant accepted as true. *Gosami*, 751 S.W.2d at 491; *Nixon*, 690 S.W.2d at 548-49. All doubts as to the existence of a genuine issue of material fact are resolved against the non-movant and every reasonable inference must be indulged in favor of the non-movant. *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990); *Nixon*, 690 S.W.2d at 548-49. To be entitled to summary judgment on the affirmative defense of no consideration, Brown has the burden of conclusively negating at least one of the elements of consideration as a matter of law. *Roark v. Stallworth Oil and Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991).

A summary judgment for the defendant disposing of the entire case is proper only if, as a matter of law, Plaintiff could not succeed upon any of the theories pled. *Delgada v. Burns*, 656 S.W.2d 428, 429 (Tex. 1983); *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970). Because Defendant's Motion for Summary Judgment is directed solely against DSC's breach of contract claim, and does not address the other claims alleged in DSC's First Amended Petition (e.g. promissory estoppel, misappropriation of trade secrets, unfair competition and breach of fiduciary duty), Brown's request to dispose of the entire case is improper. *Black v. Victoria Lloyds Ins. Co.*,

797 S.W.2d 20, 27 (Tex. 1990)(holding that the trial court erred by granting summary judgment on causes of action not addressed in movant's motion).

V.

ARGUMENT AND AUTHORITIES

A. The Recitation of Consideration in the Employment Agreement Creates a Presumption that Consideration Exists and is Sufficient.

In his Motion for Summary Judgment, Brown argues that he is entitled to judgment on DSC's breach of contract claim on the ground that the Employment Agreement is not supported by consideration. Contrary to his argument, the Employment Agreement is supported by valid consideration, making the contract enforceable.

Consideration is the "something of value" given to induce the making of a contract. *Lemon v. Walker*, 482 S.W.2d 713, 715 (Civ.App.--Amarillo 1972, no writ); *Merchants' Nat. Bank v. Youdouris*, 248 S.W. 810, 812 (Civ. App.--Dallas 1923, no writ). Consideration may consist of a right, interest, profit, or benefit that accrues to one party. Alternatively, it may consist of a forbearance, loss, or responsibility that is undertaken or incurred by the other party. *Champlin Petroleum Co. v. Pruitt*, 539 S.W.2d 356, 361 (Civ. App.--Fort Worth 1976, ref. n.r.e.). In short, "[c]onsideration for a contract may consist of either a benefit to the promisor or a detriment to the promisee." *Hoagland v. Finholt*, 773 S.W.2d 740, 743 (Tex.App.--Dallas 1989, no writ). A promisor benefits when he or she acquires a legal right to which he or she would not otherwise be entitled in exchange for a promise. A promisee suffers legal detriment when, in return for a promise, he or she forbears some legal right that he or she otherwise would have been entitled to exercise. *Security Drilling Co. v. Rathke Oil Co.*, 41 S.W.2d 1019, 1022 (Tex.Civ.App.--Fort Worth 1931, writ dis.); *Harp v. Hamilton*, 177 S.W. 565, 566 (Tex.Civ.App.--Amarillo 1915, no writ).

A signed written contract is *presumed* to be supported by consideration. *Nalana Development Ass'n v. Carsi*, 682 S.W.2d 246, 250 (Tex. 1984); *Tag Resources v. Petroleum Well Services*, 791 S.W.2d 600, 605-06 (Tex.App.--Beaumont 1990, no writ). Moreover, when a written contract recites that a particular consideration was provided, such a recitation creates a *presumption* that the consideration exists and is sufficient to support the contract. *Hoagland*, 773 S.W.2d at 743 (citing *Fourtieq v. Firemans Fund Ins. Co.*, 679 S.W.2d 562, 566 (Tex.App.--Dallas 1984, no writ); *Buddy "L," Inc. v. General Trailer Co.*, 672 S.W.2d 541, 547 (Tex.App.--Dallas 1984, writ ref'd n.r.e.)).

In this case, the Employment Agreement explicitly recites the consideration provided by DSC in exchange for Brown's obligations under the Employment Agreement:

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:

See SOF, Ex. 1. This consideration is presumptively valid and sufficient.

B. DSC's Performance of its Obligations Under the Employment Agreement Constitutes Valid and Sufficient Consideration.

Texas law has long stood for the proposition that:

Though a contract be void for lack of mutuality at the time it is made, and while it remains wholly executory, yet, *when there has been even a part performance by the party seeking to enforce the same, and in such part performance such party has rendered services or incurred expense contemplated by the parties at the time such contract was made*, which confers even a remote benefit on the other party thereto, such benefit will constitute an equitable consideration, and render *the entire contract valid and enforceable*.

Cherokee Communications v. Skinny's, Inc., 893 S.W.2d 313, 316 (Tex.App.--Eastland 1994, writ denied)(emphasis added) (quoting *Hutchings v. Slemons*, 141 Tex. 448, 174 S.W.2d 487, 489 (1943)). Under this standard, “[t]he test for mutuality is to be applied at the time *when enforcement is sought*, not as of the time where the promises are made.” *Id.* (citing *Hutchings*, 174 S.W.2d at 489). As such, where a party to a contract has *performed*, the contract is valid and enforceable against the other party to the contract. *Carr v. Norstok Bldg. Systems, Inc.*, 767 S.W.2d 936, 939 (Tex.App.--Beaumont 1989, no writ) (“A party to a contract cannot enforce it or recover damages for a breach unless that party shows that it has performed the obligations imposed upon it or that it has offered to performed the obligations upon it.”); *Lake LBJ Mun. Util. Dist. v. Coulson*, 692 S.W.2d 897, 907 (Tex.App.--Austin 1985) (same), *rev'd on other grounds*, 734 S.W.2d 649 (Tex.1987). *See also* Farnsworth, *Contracts*, § 2.3 (2nd ed. 1990).

Consistent with these principles, the Employment Agreement in this case is enforceable because DSC rendered full performance of its obligations under the contract. In accordance with its promise to employ Brown, DSC employed Brown for ten (10) years, disclosed to Brown numerous trade secrets of DSC, and provided him with other valuable consideration incident to his employment by DSC, including benefits and training. DSC's performance under the contract between it and Brown constitutes valid consideration sufficient to make the Employment Agreement enforceable against Brown.

Other jurisdictions that have evaluated similar Patent, Trademark, and Invention Agreements regularly hold such agreements to be enforceable. For example, in *Cubic Corporation v. Marty*, 185 Cal. App.3d 438, 229 Cal.Rptr. 828 (Cal. Ct. App. 4th 1986), the court enforced an employment contract with language remarkably similar to Brown's Employment Agreement. In *Cubic*, the

employee signed an invention and secrecy agreement which provided in pertinent part that the employee agreed:

To promptly disclose to Company all ideas, processes, inventions, improvements, developments and discoveries coming within the scope of Company's business or related to Company's products or to any research, design experimental or production work carried on by Company, or to any problems specifically assigned to Employee, conceived alone or with others during this employment, and whether or not conceived during regular working hours. All such ideas, processes, trademarks, inventions, improvements, developments and discoveries shall be the sole and exclusive property of Company, and Employee assigns and hereby agrees to assign his entire right, title and interest in and to the same to Company.

Id. at 443. The court in *Cubic* rejected the employee's arguments on appeal and upheld a declaratory judgment of patent ownership in favor of the Company and breach of the employment agreement by the employee. *Id.* See also, *Goldwasser v. Smith Corona Corp.*, 817 F.Supp. 263 (D.Conn. 1993) (holding that employee breached confidential information and invention agreement by failing to assign employer ideas embodied in computer software patent); *Syntex Ophthalmics, Inc. v. Novicky*, 795 F.2d 983 (Fed. Cir. 1986) (upholding judgment that employee had made two inventions embodied in patents while employed by corporation and applied for patents, in violation of employment agreement).

C. Brown's No Consideration Argument is Premised on a Mistaken Belief that the Employment Agreement Is a Bilateral Contract.

Brown's contention that the Employment Agreement is not supported by consideration is founded on the mistaken premise that the Employment Agreement is a bilateral contract. See Motion for Summary Judgment, p. 4. Contrary to Brown's assumption, the consideration supporting the Employment Agreement is not a promise. Rather, the Employment Agreement is a unilateral

contract under which DSC accepted Brown's promises through its performance -- by employing Brown and disclosing to him confidential and proprietary information of DSC.

The most recent Texas Supreme Court opinion cited in Brown's Motion supports and explains DSC's position on this point. In *Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 642, 647-48 (Tex. 1994), the court held that an at-will employee's covenant not to compete was unenforceable under Section 15.50 of the Texas Business and Commerce Code ("Section 15.50"). In so holding, the Court distinguished its holding from other types of enforceable unilateral contracts:

If only one promise is illusory, a unilateral contract can still be formed; the non-illusory promise can serve as an offer, which the promisor who made the illusory promise can accept by performance. For example, suppose an employee promises not to disclose an employer's trade secrets and other proprietary information, if the employer gives the employee such specialized training and information during the employee's employment. If the employee merely sought a promise to perform from the employer, such promise would be illusory because the employer could fire the employee and escape the obligation to perform. If, however, the employer accepts the employee's offer by performing, in other words by providing the training, a unilateral contract is created in which the employee is now bound by the employee's promise. The fact that the employer was not bound to perform because he could have fired the employee is irrelevant; if he has performed, he has accepted the employee's offer and creating a binding unilateral contract. . . . Such unilateral contract existed between Light and United as to Light's compensation.^{2/}

Id. at 645 n. 6 (emphasis added).

^{2/} The Court continued that the unilateral contract between Light and United could be accepted by future performance, but that such future performance was not sufficient under the narrow provisions of Section 15.50, which require that there be an "otherwise ancillary agreement at the time the contract is made." Because Section 15.50 is inapplicable to this case, *see infra*, Section V(D), DSC's future performance under the Employment Agreement is sufficient to constitute consideration in this case.

As described in *Light*, the Employment Agreement is a unilateral contract between DSC and Brown. Brown promised through the Employment Agreement not to disclose DSC's confidential information, and to assign to DSC all rights to any invention that he created during his employment with DSC. DSC accepted these promises through performance, by employing Brown and providing him with DSC's confidential and trade secret information. This performance constitutes sufficient consideration to bind Brown to the promises that he made in the Employment Agreement.

D. The Covenant Not To Compete Cases on which Brown Relies are Inapplicable to this Case.

Compounding his mistaken analysis of the Employment Agreement as a bilateral contract, Brown cites to a series of cases which, with one exception, arise in the context of evaluating the enforceability of covenants not to compete. These cases are governed by Section 15.50, which impose several requirements that are incompatible with general contract principles applied outside of the context of covenants not to compete. As such, Brown's reliance on this authority is misplaced for several reasons.

First, the Employment Agreement does not contain or in any way relate to a covenant not to compete. Brown has identified no Texas cases or secondary authority that supports applying the legal principles associated with covenants not to compete to an unrelated contract between an employer and an employee. To the contrary, Texas law stands firmly in opposition to extending covenant not to compete principles outside of that limited context.

For example, the Dallas Court of Appeals recently refused to extend the requirements of § 15.50 to other types of agreements between an employer and employee, such as a nondisclosure agreement. See *Zep Manufacturing Co. v. Harthcock*, 824 S.W.2d 654 (Tex.App.--Dallas, no writ). In *Zep*, the former employee had signed a noncompetition agreement with his former employer that

also included a nondisclosure provision. When the former employer sued seeking to enforce this contract, the Dallas Court of Appeals held that the covenant not to compete was unenforceable, but held the nondisclosure covenant to be fully enforceable. In so holding, the court stated that the “mere fact that a noncompete covenant is void does not render void the remainder of the employment contract.” 824 S.W.2d at 662 (citing *Hi-Line Elec. Co. v. Dowco Elec. Prods.*, 765 F.2d 1359, 1363 n. 5 (5th Cir. 1985)(applying Texas law). The court continued by observing as follows:

Noncompete covenants are different than nondisclosure covenants. Noncompete covenants restrain trade and are enforceable only if their terms are reasonable. Nondisclosure covenants, on the other hand, are not restraints on trade. They do not necessarily restrict a former employee’s ability to compete with the former employer. Nondisclosure covenants do not prohibit the former employee from using, in competition with the former employer, the general knowledge, skill, and experience acquired in former employment Because of these differences, noncompete covenants are against public policy unless they are reasonable, but nondisclosure are not against public policy.

824 S.W.2d at 663 (citations omitted). Similarly, in *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593 (Tex.App. -- Amarillo 1995, no writ), the Amarillo Court of Appeals held unenforceable a covenant not to compete that was contained in an at-will contract. In reaching this conclusion, however, the court acknowledged that such a holding would not extend to other types of agreements: “Due to the differing purposes and effects, a covenant restricting competition may well be unenforceable where one pertaining to disclosure is not.” *Id.* at 599. As such, not only is there no authority to support Brown’s request for an extension of the test set forth in Section 15.50, but the authority actually *opposes* such an extension of that test beyond the limited confines of covenants not to compete.^{3/}

^{3/} Moreover, in asking the Court to adopt the portion of Section 15.50's test discussing the requirement of an “otherwise ancillary contract,” Brown ignores the second half of the test established in Section 15.50. The second

Second, Brown's reliance upon covenant not to compete cases is ill-placed because the test utilized by these cases is inconsistent with the general test for determining the enforceability of contracts. Section 15.50 provides the exclusive criteria for evaluating the enforceability of covenants not to compete. See Tex. Civ. Prac. & Rem. Code § 15.52 ("The criteria for enforceability of a covenant not to compete provided by Section 15.50 of this code . . . are exclusive and preempt any other criteria for enforceability of a covenant not to compete . . ."). Section 15.50 provides:

§ 15.50 Criteria for Enforceability of Covenants Not to Compete

Notwithstanding Section 15.05 of this code, a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement *at the time the agreement* is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

Tex. Bus. & Comm. Code, § 15.50 (emphasis added).

The test established by Section 15.50 is inconsistent with the general legal principles that govern the enforceability of contracts that do not contain a covenant not to compete. Section 15.50 explicitly requires that the covenant not to compete must be "ancillary to or part of an otherwise enforceable agreement *at the time the agreement is made.*" As the Houston Court of Appeals recently explained:

Under section 15.50, the relevant point in time is the moment the agreement is made: the issue is whether, "at the time the agreement is made," there exists other mutually binding promises to which the covenant not to compete is ancillary or part and parcel.

half of the test requires that the agreement contain reasonable time, geographic area and scope of activity restraints. Obviously, none of those criteria are capable of being applied or evaluated in connection with the Employment Agreement. The inability to utilize the entirety of the test urged by Brown provides yet another reason why this test is inapplicable to this case.

CRC-Evans Pipeline International, Inc. v. Myers, 927 S.W.2d 259 (Tex.App. -- Houston [1st Dist.] 1996, no writ)(citing *Light*, 883 S.W.2d at 644-45). Indeed, this requirement to evaluate the contract only “at the time the agreement is made” formed the basis for the Court’s holding in *Light*. In that case, the Supreme Court observed that the parties had entered into a unilateral contract which could be accepted by future performance, but that such future performance would not satisfy Section 15.50’s requirement that consideration be present “at the time the agreement is made.” *Light*, 883 S.W.2d at 645 n. 6. As such, the test, and the decisions cited by Brown, necessarily *ignore* the parties conduct after the instant in time when the agreement is entered into.

Because Section 15.50 precludes a court from evaluating actual performance under the terms of the contract, it requires courts to evaluate only the promise that is made at the instant in time that the contract is entered into. Under this limited evaluation, courts have rightly characterized the promise of future or continued employment as illusory. *See e.g. Light*, 883 S.W.2d at 644-45. This characterization is premised on the proposition that the promise of future or continued at-will employment “fails to bind the promisor who retains the option of discontinuing employment *in lieu of performance.*” *Id.* at 645 (emphasis added). Because section 15.50 prevents a court from evaluating actual performance, and instead requires the court to focus exclusively on the promise, the courts have concluded such promises are illusory.

In contrast to the requirements imposed by Section 15.50, it is generally *improper* for a court to limit its evaluation of the enforceability of a contract to the instant in time at which the contract was entered into. General contract principles require that the court evaluate actual performance of a contract, which performance can make an executory contract fully enforceable. *See supra*, Section V(B).

Not only is the legal standard urged by Brown inapplicable, the factual basis for his arguments is equally flawed. Covenants not to compete arising in the context of at-will employment situations involve a disparity in *performance*. The employee assumes an obligation not to compete against the employer for a definite period of time (in addition to whatever period of time that person remains in the employ of the employer), whereas the employer assumes no such definite obligation -- the employer remains free to fire the employee at will.

The Employment Agreement stands in stark contrast to the situation that is present in at-will covenant not to competes. In this case, Brown assumed an obligation to disclose and assign only those inventions made or conceived by him "*from the time of entering the Company's employ until I leave.*" SOF, Ex. 1 (emphasis added). As such, his obligation to perform is necessarily interconnected with DSC's obligation to perform — if DSC does not perform (*i.e.*, employ Brown), then Brown has no obligations under the Employment Agreement; if DSC terminated Brown, then his obligations under the Employment Agreement cease. There is, therefore, no basis for the finding of an illusory promise. Both parties have made a promise that was performed simultaneously throughout Brown's employment with DSC.

Finally, in recognition of the fact that he relies almost exclusively on covenant not to compete cases in support of his argument, Brown asserts that the final case upon which he relies is not a covenant not to compete case. *See* Brown's Motion for Summary Judgment, p. 9 (citing *Ichiban Records v. Rap-A-Lot Records*, 933 S.W.2d 546 (Tex.App.--Houston [1st Dist.] 1996, no writ). Brown's citation to *Ichiban* is highly misleading. Brown argues that the *Ichiban* court held that contract in question, which was characterized as an exclusive services contract, was "unenforceable" because it was effectively a contract for employment at-will. *See* Motion for

Summary Judgment, p. 9. *Nowhere in the body of this opinion does the Ichiban court hold the contract unenforceable.* In *Ichiban*, the employer (RAL) sought an injunction to enforce a restrictive covenant that precluded its employee (Dennis) from working for competitors of RAL. In overturning the injunction entered by the trial court, the appellate court held that the contract “has no time limitation,” and that Dennis could therefore have “terminate[d] the contract anytime without cause.” *Id.* at 552. As the dissent correctly observed:

This holding is based on the majority’s opinion that the provisions in the recording contract most closely resemble those of an employment contract without a definite term, which under the authority of cases such as . . . [citations omitted] allow either party to such a contract to terminate it at will, as the majority impliedly holds Dennis has done.

Id. at 552. Stated otherwise, Dennis was free to lawfully terminate the contract at any time, thereby terminating any *future* obligations he had in connection with the restrictive covenant contained in that contract. *Id.* at 551 (observing that the restrictive covenant was “intended to operate during the term of the contract and not afterward as is generally the case with covenants not to compete”). This holding provides no support for Brown’s request to be excused from *past* performance obligations -- to disclose and assign an invention conceived *during* his employment by DSC.

VI.

CONCLUSION

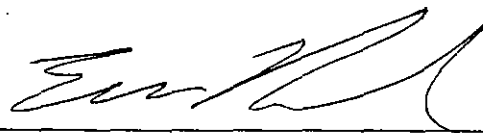
Brown has failed to meet his burden of proof in connection with his Motion for Summary Judgment. He has presented no authority, outside the limited and inapplicable context of covenants not to compete, to support his contention that the Employment Agreement is not supported by consideration. Because that contention is incorrect and unsupportable, and because DSC has

demonstrated that it rendered substantial actual performance under the terms of the Employment Agreement, Brown's Motion for Summary Judgment should be denied.

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**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served upon all parties of record, on this the 28th day of July, 1997:

Via Hand Delivery

Richard A. Sayles, Esq.
Eric D. Pearson, Esq.
Sayles & Lidji, P.C.
1201 Elm Street, Suite 4400
Dallas, Texas 75270

Via First Class U.S. Mail

Dale Drake, Esq.
110 East Davis, Suite 200
Post Office Box 1662
McKinney, Texas 75070-1662

Via First Class U.S. Mail

Mr. Lance Flores
6514 Ridgecrest 222
Dallas, Texas 75231



Eric W. Pinker

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

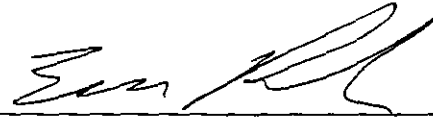
BEFORE ME, the undersigned Notary Public, on this day personally appeared Eric W. Pinker, who, being by me duly sworn, on his oath stated as follows:

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 excerpts from the May 2, 1997 deposition of Defendant Evan Brown.

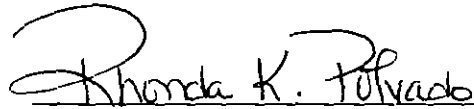
3. Attached hereto as Exhibit "B" is a true and correct copy of excerpts from the May 2, 1997 Statement of Facts, as well as Exhibit Nos. 1 and 3 from that hearing.

FURTHER AFFIANT SAITH NOT.

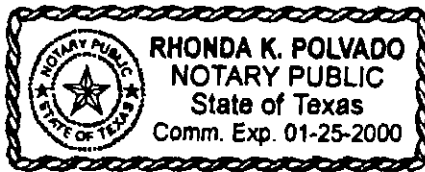


Eric W. Pinker

SUBSCRIBED AND SWORN TO BEFORE ME this 28th day of July, 1997 to certify which witness my hand and official seal.



Notary Public, State of Texas



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NO. 199-596-97

DSC COMMUNICATIONS)	IN THE DISTRICT COURT
CORPORATION)	
VS.)	COLLIN COUNTY, TEXAS
EVAN BROWN)	199TH JUDICIAL DISTRICT

**VIDEOTAPED
ORAL DEPOSITION OF
EVAN BROWN**

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

EXHIBIT
" A "

BRADFORD COURT REPORTING
(972) 931-2799

COPY

1 A I was paid to develop it.

2 Q By whom?

3 A Time Energy Systems.

4 Q What did you develop it to do?

5 A Real time data acquisition and control.

6 Q Do you remember when you went to work for
7 DSC?

8 A I believe according to the records it was
9 April the 21st, 1987. You can verify that through
10 DSC's employment records in case I am wrong.

11 Q Thank you. Why did you go to work for DSC?

12 A They offered me a job.

13 Q I take it you applied for a job first?

14 A Yes.

15 Q Why did you apply for a job?

16 A My wife at the time wanted medical
17 insurance coverage.

18 Q Why apply to DSC?

19 A I applied to several companies.

20 Q What other companies did you apply to?

21 A I don't recall at this time.

22 Q Can you recall any?

23 A No. I went through a recruiting firm.

24 Q What was the recruiting firm name?

25 A I don't recall.

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 A Rephrase.

2 Q You didn't intend to disregard it, did you?

3 A I object to the way the statement was
4 phrased.

5 Q All right. I would still like you to
6 answer the question, please, sir.

7 MR. ALDOUS: Well, let me just
8 state --

9 A It was never --

10 MR. ALDOUS: Hold it. Let me state a
11 legal objection that the way your question is
12 phrased implies that the breach has occurred and
13 therefore I will object because it assumes facts not
14 in evidence.

15 Q (By Mr. Pinker) Okay. I am not intending
16 to imply anything. I am simply asking that you
17 never intended to disregard the agreement, did you?

18 A It was never my intention to disregard the
19 agreement.

20 Q And it was your intention to perform the
21 agreement according to its terms?

22 A Yes.

23 Q Who handed you the agreement?

24 A I don't remember back to April 27th of
25 1987.

1 had already been conceived by you as of March of
2 1986?

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

5 A I have been working on the problem since
6 1975. The final piece of the puzzle was solved
7 while employed at DSC.

8 Q (By Mr. Pinker) When?

9 A March of 1986.

10 MR. ALDOUS: 19 what?

11 A I am sorry. 1996.

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

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

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

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

25 A I had not come up with a complete solution.

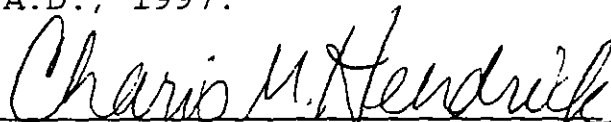
1 STATE OF TEXAS **

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

CAUSE NO. 199-00596-97

DSC COMMUNICATIONS CORPORATION (IN THE DISTRICT COURT
VERSUS (COLLIN COUNTY, T E X A S
EVAN BROWN (199TH JUDICIAL DISTRICT

STATEMENT OF FACTS

A P P E A R A N C E S:

MR. MICHAEL LYNN
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214-939-8700

ATTORNEY FOR DEFENDANT

MR. DALE DRAKE
ATTORNEY AT LAW
McKinney, Texas 75069
972-548-0800

ATTORNEY FOR DEFENDANT

BE IT REMEMBERED that on the 2nd day of May, 1997, the
above styled and numbered cause came on for hearing before
said HONORABLE JOHN R. ROACH, Judge presiding, and the
following proceedings were had; to wit:

COPY

EXHIBIT

"B"

1 in substantial the final relief sought and is prohibited by
2 way of preliminary injunction.

3 It is important to point out that we have agreed to not
4 use, not disclose, not work on all the prohibitive matters
5 that are contained within the injunction. The thing that we
6 dispute or that we -- or the reason that we would go forward
7 is because Your Honor has ordered disclosure of that secret.
8 That is the one issue that is for a resolution.

9 So, your Honor, just so there's no mistake, we have
10 previously -- and I think it is on the record from the last
11 hearing -- that we don't dispute not using it or selling it or
12 whatever until such time as there is a final trial as to who
13 owns it.

14 So the only issue that we still are fighting about and
15 that we're here about is whether or not you order by way of
16 preliminary injunction -- not that he'd be restrained from
17 something, but that he affirmatively divulge to them. And I
18 say, your Honor, that that's really the ultimate relief sought
19 in this case. And that is something that should be decided by
20 a trial.

21 And I don't have any dispute with Your Honor setting an
22 expedited trial, which would be totally appropriate if you
23 entered injunctive relief based upon the prohibited factors.

24 So we believe that that ultimate issue should be decided
25 at trial by any means that Your Honor sets, but in accordance

1 A. Yes, sir, I have.

2 Q. Is that a standard document that is used by DSC for
3 its employees?

4 A. Yes, sir, it is.

5 Q. Okay.

6 Now, there's been some discussion -- well, let me ask it
7 this way.

8 In the first line that reads, In consideration of my
9 employment, in a paren, or continued employment in the event I
10 am ready -- already in the employ of the company at the time
11 of the execution hereof, and then it goes on to the rest of
12 the contract.

13 In your experience at DSC, does DSC permit employees to
14 continue their employment if in fact they do not sign this
15 agreement?

16 A. No, sir, we do not.

17 Q. And is that a policy at DSC?

18 A. Yes, sir, it is.

19 Q. Can we take it from your statement that, unless an
20 agreement like Plaintiff's Exhibit 1 is signed, they don't
21 continue to work there at all?

22 A. No, sir, they do not.

23 Q. Let me ask you, prior to April of 1997, had you ever
24 met Mr. Brown, the defendant in this case?

25 A. Yes, I had.

1 A. I was shocked and surprised that he would make such a
2 statement, being that he'd signed the document and also
3 acknowledged that it would give DSC profit of over millions of
4 dollars to have this solution.

5 Q. What was Mr. Brown earning there towards the end of
6 his employment at DSC?

7 A. Around \$97,000 a year.

8 Q. In addition to that, are you aware of whether or not
9 Mr. Brown was able to take training seminars and other sorts
10 of things as one of the software engineers out there?

11 A. Yes, sir. He sure was.

12 Q. And this was part of what he got for being an
13 employee out there?

14 A. Yes, sir. Sure was.

15 Q. And were there other benefits that came as well with
16 being an employee at DSC?

17 A. Yes. Medical benefits, life insurance benefits,
18 stock purchase plan benefits, 401-K contributions and matching
19 funds by the company, and retirement benefits.

20 Q. And, again, all of that he would not get if he hadn't
21 signed this employee patent agreement.

22 A. That's correct, sir.

23 MR. LYNN: Pass the witness.

24 THE COURT: Mr. Aldous.

25 (No omissions)

1 Q. And you understood that Motorola was one of DSC's
2 principal customers. Right?

3 A. Motorola is a -- my understanding is, Motorola is a
4 customer of DSC.

5 Q. It's one of -- probably the second largest customer,
6 isn't it?

7 A. I have no idea as to that. I'm not in the marketing
8 and sales. I have no idea.

9 Q. Okay.

10 You also said that last year while you were driving back
11 from Hamilton County, quote, I actually saw the last piece of
12 the puzzle.

13 Is that right?

14 A. Yes.

15 Q. Is that true?

16 A. Yes.

17 Q. So last year you were working for DSC. Right?

18 A. Yes.

19 Q. And what we're talking about is the piece of the
20 puzzle on the solution that we're here today about. Correct?

21 A. Yes.

22 Q. So it was last year that you saw the last piece of
23 the puzzle for the solution. Right?

24 A. (No audible response)

25 Q. Correct?

1 these higher-level programs and the conversion of those
2 compilers and linkers that allowed you to talk to the zilog.

3 A. Can you be clearer on that?

4 Q. I doubt it. I will try to be. I apologize.

5 When you came to work for DSC, did you understand that you
6 were required to sign an agreement with them, a proprietary
7 agreement, that's marked as Exhibit 1?

8 A. At the time of my employment, I was not given that
9 agreement to review before employment.

10 If you'll notice, it's signed April the 27th, which was
11 six days after I started.

12 I was informed if I don't sign it, you know, I'm
13 unemployed. Six days after starting a job.

14 Q. Okay.

15 A. I did sign the agreement.

16 Q. And did you intend to live up to the terms of that
17 agreement?

18 A. Yes.

19 Q. You understood you were making certain promises in
20 that agreement?

21 A. I understand that I made certain commitments.

22 Q. Okay. Commitments, if you will.

23 You understood that -- I mean, you're not trying to get
24 out of those commitments.

25 A. No.

1 you have any trouble understanding what that meant?

2 A. What is your definition of a discovery?

3 Q. Okay. Well, did you believe that what you were
4 involved in was a discovery, or not?

5 A. Well, I think that perpetual motion is a very
6 interesting problem, and a number of people continue to work
7 on it.

8 Now, is that listed as a discovery?

9 Q. No. I apologize if I were -- if I was unclear.

10 Did you believe that what you had been -- said you'd been
11 working on -- and we'll take that as a given right now -- up
12 through April 27th of 1987, did you believe that at that
13 moment in time that what you had available was a discovery?

14 A. (No audible response)

15 Q. Something you had discovered.

16 A. It was not a complete discovery.

17 Q. Oh. Well, how complete was it?

18 A. Let's see. At that time I had been working on the
19 problem for eleven years.

20 Q. Okay. How complete was it, in percentage-wise --

21 A. Percentage-wise I would probably say that I had --
22 probably 80 percent.

23 Q. Mm-hmm. So 80 percent of the solution finished at
24 that time.

25 A. Yes.

1 Q. 80 percent of the discovery completed at that time.

2 A. Yes.

3 Q. Okay.

4 So when it said for you to disclose all discoveries owned
5 or controlled by me in whole or in part as of the date of this
6 agreement, you put none. You simply ignored that project that
7 you'd been working on for ten years.

8 A. That's correct. Because I, along with Matt Bilbo,
9 considered it to be impossible. But it was a challenging
10 thought.

11 Q. Okay. So this thing that you'd been working on for
12 ten years you thought was impossible as of April 27th, 1987.

13 A. Yes.

14 Q. Right?

15 That meant you didn't -- that next twenty percent was the
16 part that convinced you it wasn't impossible.

17 A. No. It -- it remained a challenge.

18 Q. Okay. A challenge that you worked on after you went
19 to work with DSC. Right?

20 A. Yes.

21 Q. Now, there is a paragraph down here; it's B.
22 Do you see that, sir?

23 A. Yes.

24 Q. Okay.

25 And then it says, I will notify the company in writing

1 before I make any disclosure or perform or cause to be
2 performed any work for or on behalf of the company which might
3 conflict with, one, the rights I claim in any invention or
4 idea.

5 Do you see where I ended?

6 A. Yes.

7 Q. Okay.

8 Now, throughout the time that you were working in the tool
9 section, and working with Mr. Bilbo, did you ever notify
10 anybody in writing that you had this solution?

11 A. No.

12 Q. Do you think that the fact that you were working on
13 it ought to have been disclosed to DSC during that period?

14 A. No more than I should disclose the fact that I
15 continue to think about perpetual motion.

16 Q. Yes, sir. But did you think you had a solution at
17 any point time that rose to the level where you ought to give
18 DSC notification?

19 A. I requested a release for a patent in April of '96.

20 Q. Okay.

21 A. That was the point at which, you know, I had enough
22 of an idea that I wanted to pursue it.

23 And so, according to the contract, I contacted DSC --

24 Q. Okay. So I'm clear on this, and -- you were -- and I
25 just want to make sure I'm certain of this -- you in April of

1 1996 were following this contract when you gave notice under
2 this contract of the solution. Is that fair?

3 A. Can you restate that, please?

4 Q. Did you give notice under this contract in April of
5 1996?

6 A. Yes.

7 Q. And that's because you thought what you had, the
8 solution that you had come up with, was something that might
9 be in conflict with DSC, and you needed that release.

10 A. No.

11 Q. Okay.

12 A. My request was to pursue a patent outside of DSC.

13 Q. Now, if we read further in this paragraph, sir, it
14 goes on to say, An idea conceived by me -- that's A --
15 conceived by me or others prior to my employment, or otherwise
16 outside the scope of the agreement, or, two, rights of others
17 arising out of obligations incurred by me, A, prior to this
18 agreement, or, B, otherwise outside the scope of this
19 agreement. In the event of my failure to give notice under
20 the circumstances specified in one of the foregoing, the
21 company may assume that no such conflicting invention or idea
22 exists.

23 Did you mean to follow that portion of the contract as
24 well?

25 A. Yes, because I did not feel that my idea was along

1 there were not only these investigations going on, but that
2 there was actual work being done in terms of translating some
3 of the source code to -- I'm sorry -- some of the assembly
4 code to a higher-order language; that is, they actually were
5 contracting out to some people to do some of that?

6 A. I'm not aware of that.

7 Q. You heard that here today.

8 A. I was sitting in the chair. If it was said, I heard
9 it. I do not remember it.

10 Q. Is it fair to say that you were seeking a release
11 from the contract you signed, Plaintiff's Exhibit 1, when you
12 approached DSC?

13 A. Yes.

14 MR. LYNN: One moment, your Honor.

15 (Short break in the proceedings)

16 MR. LYNN: Your Honor, I believe I'll pass the
17 witness at this time.

18 THE COURT: All right.

19 Mr. Aldous.

20 MR. ALDOUS: Thank you, your Honor.

21 CROSS-EXAMINATION

22 BY MR. ALDOUS:

23 Q. Is this the first time that you've ever been sued by
24 your employer?

25 A. Yes.

1 had a series of meetings.

2 Q. Do you recall when those meetings occurred?

3 A. Without looking at documents, I couldn't say
4 exactly. But I'd expect they were in the spring of last --
5 last year. That would be 1996.

6 Q. Did Mr. Brown express to you an opinion on a position
7 concerning his solution?

8 A. I think he had several of them.

9 I pointed out to him the -- the invention disclosure
10 agreement that we have, or the -- I guess it's Exhibit 1, --
11 and the provisions that I thought from that contract applied
12 to him. And it -- I told him that I thought that the idea he
13 had came under the provisions of this contract, and that,
14 under the contract, we expected him to disclose his idea.

15 Q. Did Mr. Brown ever, in response to your request,
16 disclose the idea to DSC?

17 A. No, he didn't.

18 Q. Did Mr. Brown also, I take it, describe to you
19 briefly what his solution would do?

20 A. In very general terms he did.

21 Q. And he described it as something that would convert
22 machine code to a higher-level source code?

23 A. Yes.

24 Q. Are you aware of other investigations by DSC to do
25 conversions to some higher-level code?

1 STATE OF TEXAS :

2 COUNTY OF COLLIN :

3 I, SHERI J. VECERA CSR/RPR, Official Court Reporter for
4 the 199th Judicial District Court in and for Collin County,
5 Texas, do hereby certify that the above and foregoing contains
6 a true and correct transcription of all the proceedings in the
7 foregoing styled and numbered cause, all of which occurred in
8 open court or in chambers and were reported by me.

9 I further certify that this transcription of the
10 proceedings truly and correctly reflects the exhibits, if any,
11 offered by the respective parties.

12 Witness my hand this the 23rd day of May, 1997.

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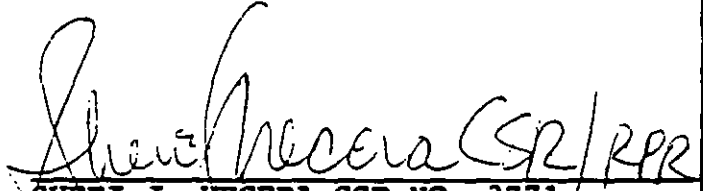
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SHERI J. VECERA CSR NO. 3771
Official Court Reporter
199th Judicial District Court
Collin County, Texas

My CSR license expires: December 31, 1998
Business Address: 210 S. McDonald, Suite 434
McKinney, Texas 75069.
Telephone Number: (214) 424-1460

TAXABLE COST: \$ 999.00 (Expedited)
To be Paid By: Defendants

AND PROPRIETARY INFORMATION AGREEMENT



DSC Communications Corporation

PLAINTIFFS EXHIBIT 1

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 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. All 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

From mbilbo Mon Oct 18 13:09:39 1993
Date: Mon, 18 Oct 1993 12:56:37 -0500
From: Matt Bilbo <mbilbo>
To: evbrown

mlin, mbilbo, cthayer, dgillen, jwang, nkorman, rhicks, kwfisher, jsulliva,
jcooke, dhayes@sun001.dsccc.com, kcoyle@sun001.dsccc.com,
jfusselm@sun001.dsccc.com
Subject: Software Tools Weekly Status Report

MEMORANDUM

October 18, 1993

TO: Evan Brown

CC: Judy Cooke
Kevin Coyle
Kevin Fisher
John Fusselman
Dave Gillen
David Hayes
Randy Hicks
Nancy Korman
Monica Lin
Joe Sullivan
Craig Thayer
Jianbai Wang

FROM: Matt Bilbo

SUBJECT: Software Tools Weekly Status Report

SECTION 1 - Accomplishments

LANGUAGE TOOLS

DEVELOPMENT TOOLS

SECTION 2 - Missed Goals

None

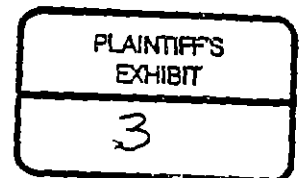
SECTION 3 - Items of Interest

GENERAL

LANGUAGE TOOLS

A new version of the BD tool was built and released. The new version corrects problems parsing the PSW O/S symbol. Several major outstanding problems still exist, most notably that the tool does not recognize field lengths based on previously defined C structures.

We held a meeting to discuss goals for the upcoming trip to Motorola. Those scheduled to go on the trip and subject matter experts attended. It was generally agreed that one of our primary objectives should be to determine how Motorola is integrating the CYGNUS GNU C compiler into their development environment.



We provided the Cellular Mobile Radio Telephone and the National SS7 groups customized versions of the SDE 'spcc' utility. These customized versions of the utility support invocation of the latest installed version of CYGNUS GNU C instead of UCC. Our intent is to allow selected users assist us determine which UCC constructs imbedded in existing code are not supported by GCC.

We have completed the Perennial Compiler Test Suite execution against the GCC segmented memory model. We are currently combining the errors encountered from the unsegmented and segmented tests into one report.

We added several missing functions to the CYGNUS Z8000 simulator.

We have started a more intensive investigation into a (C)EKOS standard C run time library.

We have restarted the effort to develop a YASM to GAS conversion utility.

DEVELOPMENT TOOLS

General:

A SDE V2.x class has been scheduled for Tuesday, November 2. A member of the tools group will be instructing it. The attendees will be key engineers from the National and International STP/SS7 groups.

We provided Claire McGee, Frame consultant, an update on the status of the tools.

A special version of the SDE Korn shell utility 'open.lib' was built to support threaded GCC builds.

The VAX based tools are working normally after the VMS upgrade last weekend.

We restarted the XDLTD servers. Several of the servers do not appear to start correctly whenever the machine is rebooted.

We met with John Strange to complete the detailed design of the Oracle life cycle tools interface table. We are waiting for John Benson to supply us the key information for the RDS and RTT systems. Our next step will be to write a process document describing how the table will be populated and maintained.

The common Tools group interleaf document tree has been re-structured to segregate documents by project, not by document type.

Todd Jolly is scheduled to join our group November 1. We have already submitted the requests to have him moved to PB2-1169.

HP/UX Upgrade:

The ClearCase VOB used by the Tools Group has been placed on the second VOB server, hpap10.

Migration of the UCC compiler has been halted while we investigate a problem with the machine description file.

We have asked the Apollo based SoCCs to adopt HP/VUE. We will be

encouraging the remaining Apollo users to adopt HP/VUE in November.

Workstation services has built another HP/PA-RISC box for use by selecte users. The users that have been granted accounts on the machine are assisting us port existing tools to the HP/UX environment.

SUN Tools Steering Committee:

The committee has not met for several weeks.

The committee is working towards finalizing which GUI builder should be purchased.

SUN based design tools appear to be the next area of interest for the committee.

Unit Test Environment:

Quiet.

CONFIGURATION MANAGEMENT

SDE Version 4.0:

We are making an effort to keep the SDE requirements and design documents synchronized.

We are completing the definition of the SDE 4.x command set. SDE will be supporting the notion of command aliasing and environment variable expansion. We hope to have the initial set of required functions defined by the end of the month.

An initial version of the top level GUI interface for SDE V4.x has been completed.

Work on the SDE V4.x user manual has started.

Interleaf:

The Interleaf archiving pilot project members have requested SDE be modified to prevent interactive access to archived documents. Their intent is to limit access to archived documents to the Interleaf/SDE interface.

AIN/ClearCase:

The AIN ClearCase VOB was successfully moved to the larger, loaner disk Atria provided us. The move not only gets us past our disk space problems, but also provides us more time to formalize our ClearCase disk management strategies.

*** Big thanks go to Dave Gillen for sacrificing his weekend to coordinate and execute the VOB move.

We provided the AIN SoCCs a memorandum detailing our suggestions for improving their configuration management and use of the ClearCase software.

The AIN group held a meeting to discuss ClearCase process alternatives. It was agreed that the generation of the Sparcworks browser files would be

turned off and that the make files would be updated to specifically allow target labels for the generation of the common libraries.

We assisted members of the AIN group modify their make files to remove the compiler options for the generation of source browser files and position independent code.

We continue to install ClearCase on workstations as requested.

DATACOMM X.25:

The Datacomm group has designated a second SoCC, Kent Lyons.

We met with the Datacomm SoCCs during the week, and continued the preliminary work for their Apollo migration. They are presently identifying what their SDE products and release levels will be. They will be providing us the language tools options they currently employ on the VAX.

DEX600 Cellular:

Quiet.

ELM Host Software:

They have indicated a desire to move their remaining VAX based development to SDE.

We assisted them add a new release level to both their and the MegaHub versions of 'history.txt'.

Firmware:

We have resolved the problems encountered building source with the Microtec assembler under the MegaHub environment. We are now experiencing problems with the Microtec linker.

We assisted / trained them on the procedures for checking out and replacing source code in CMS.

MegaHub:

Re-protected one OSI DSEE library that had lost it's protection seals.

Tracked down a problem the Config group was having building programs with the latest version of the MTN include files. The problem was caused by the fact the MTN group was using a macro not defined by the MegaHub version of the operating system include files.

MTN:

The MTN SoCC has been updating files in the MTN common source SDE repository. This is the first effort by the MTN group to support their common source and include files on the Apollos.

OS:

The tools to automate the conversion of existing SDE V1.x libraries have been completed. We tested the tools on the KR program.

We have successfully built a model under SDE V2.x for KR. Several link time errors were encountered when we tried to build the program. We are presently verifying the same language tools options were used in both the SDE V1.x and SDE V2.x O/S environments.

SCP Host Software:

Quiet.

SS7:

We continue to work Apollo migration issues with the International SS7/S11 SoCC. This effort has bogged down due to the unrealistic expectations of one of the SS7 managers.

Tandem Maintenance:

Quiet.

X08:

We re-ran the procedures to lock the X08 and X08E VAX product disks. The disks are now protected against unauthorized changes.

USER SUPPORT

Total support requests for the week: 56

Phone	E-mail	Walk-in	Support Time
29	15	12	31.0 hrs.

Development Tools:

SDE	DLT	KornShell	Megahub	VAX	Apollo	PC	Sun	HP
9	0	0	8	4	5	0	27	2

Language Tools:

UCC	YALL	YADLIB	BD	YASM	Y68	MISC	Z8KRTL	ASM68	LOD68	Y80
0	1	0	0	0	0	0	0	0	0	0

PRT STATUS

A PRT report is attached.

SECTION 4 - Anticipated Travel

Matt Bilbo be going to Motorola Chicago October 25 and 26.

SECTION 5 - Customer Meetings

None.

Report for PRT Project: TOOLS

Beginning 11-OCT-1993 and ending 18-OCT-1993

Subsystem	Open on 11-OCT-1993	New Since 11-OCT-1993	Closed Before 18-OCT-1993	Open on 18-OCT-1993
PIC	2	0	0	2
DLT	14	0	0	14
PREMB	3	0	0	3
GENRAD	0	0	0	0
SDE	38	0	0	38
HELPMAKER	1	0	0	1
UCC	23	0	0	23
KORNSHELL	0	0	0	0
XDLT	1	0	0	1
LIB68	0	0	0	0
YADLIB	0	0	0	0
LOD68	3	0	0	3
YALL	12	0	0	12
MB	0	0	0	0
MEGAHUB	1	0	0	1
MIGR_AUDIT	0	0	0	0
YASM	19	0	0	19
MISC	1	0	0	1
Z8KRTL	8	0	0	8
MM	2	0	0	2
ASM68	3	0	0	3
TOTAL	131	0	0	131

***** Reduction for specified period = 0.00 % *****

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

AFFIDAVIT OF MATT BILBO

STATE OF TEXAS §
 §
COUNTY OF DALLAS §

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

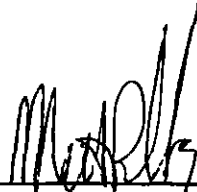
1. My name is Matt Bilbo. I am over the age of 18 years, have never been convicted of a felony or a crime involving moral turpitude, and am competent to make this Affidavit. The matters and facts stated herein are within my personal knowledge and are true and correct.

2. I first became employed by DSC in 1988, and have been continuously employed by DSC since that time. I am currently employed by DSC as a senior manager in software development. During my employment with DSC, I worked with Evan Brown for several years. Initially, Mr. Brown was my supervisor, but through a series of promotions and reassignments, I eventually became Mr. Brown's manager. Because of the fact that we worked together for several years, I became familiar with the type of work in which Mr. Brown was involved.

3. During the time that Brown was employed by DSC, DSC exposed Mr. Brown to information that DSC considers to be confidential and proprietary. Such information included, but was not limited to, (i) the manner in which DSC's compilers, assembler, and linkers are customized

for DSC, (ii) the techniques used by DSC to customize these software tools, (iii) the status of various projects on which he was working, and (iv) knowledge of certain contracts that DSC had with some of its customers. In my experience as an employee of DSC, DSC treats this type of information as confidential, and does not share such information with persons who are not employees of DSC.

FURTHER, AFFIANT SAITH NOT.



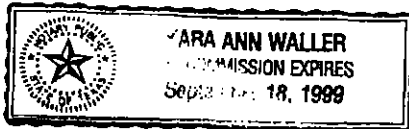
Matt Bilbo, Affiant

SWORN TO AND SUBSCRIBED BEFORE ME by the said Matt Bilbo, on this 28th day of July, 1997.

[Seal]



Notary Public in and for the State of Texas



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

AFFIDAVIT OF DAN ALLMAN

STATE OF TEXAS §
 §
COUNTY OF DALLAS §

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

1. My name is Dan Allman. I am over the age of 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 have been employed by DSC for approximately seven (7) years, all in the human resources area. I am currently employed by DSC as one of the Directors of Human Resources for DSC. I am the Director responsible for the Switch Systems Group personnel records.

3. In my position as Director of Human Resources, I am the custodian of the documents maintained by DSC in each employee's personnel file.

4. Attached hereto as Exhibit "A" is a true and correct copy of the DSC Communications Corporation Employee Internal Records Memorandum, which is signed by Mr. Brown and dated April 27, 1987. It is the regular practice of DSC to make records such as Exhibit

"A." This documents was contained in Mr. Brown's personnel file, and it was kept in the course of DSC's regular business activity.

5. Attached hereto as Exhibit "B" is a true and correct copy of Mr. Brown's Form W-4A in connection with his employment at DSC, which Mr. Brown signed and dated April 27, 1987. It is the regular practice of DSC to make records such as Exhibit "B." This documents was contained in Mr. Brown's personnel file, and it was kept in the course of DSC's regular business activity.

FURTHER, AFFIANT SAITH NOT.



Dan Allman, Affiant

SWORN TO AND SUBSCRIBED BEFORE ME by the said Dan Allman, on this 28th day of July, 1997.

[Seal]



Notary Public in and for the State of Texas

DSC COMMUNICATIONS CORPORATION
EMPLOYEE INTERNAL RECORDS

MEMORANDUM

TO: All New Employees
FROM: Personnel
SUBJECT: Employee Records Data Base Verification

Please provide your individual personnel data below to insure keeping our records as current as possible. Medical information is voluntary and will be used only in the case of an emergency. This data will remain confidential. Thank you for your assistance.

Home Address 4416 FOXFIRE WAY FT. WORTH TX 76133

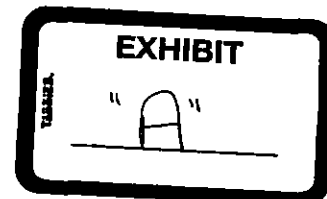
Birth Date JAN 19, 1952 Work Location 1000 COIT RD

Home Phone (817) 294-0276 Work Phone _____

<u>LISA BROWN</u>	<u>(817) 294-0276</u>	<u>WIFE</u>
Emergency Contact	Phone	Relationship

Medical Conditions

Lisa Brown 4/27/87
Signature Date



EMPLOYER DSC Comm Corp				CASE #	CERT. #
EMPLOYEE LAST NAME BROWN		FIRST EVAN	INITIAL G	DATE OF BIRTH MO JAN DAY 19 YEAR 1952	SEX MALE (<input checked="" type="checkbox"/>) FEMALE ()
HOME ADDRESS 4416 FOXFIRE WAY		STREET/P.O. BOX	CITY FT. WORTH	STATE TEXAS	ZIP CODE 76133
EMPLOYMENT DATE MO APR DAY 21 YEAR 1987		REQUESTS DEPENDENT COVERAGE YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	OTHER GROUP HEALTH INS. YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	LIFE VOLUME	SOCIAL SECURITY NUMBER 449-80-3986
OCCUPATION SOFTWARE ENGINEER					BENEFIT CODE
LIST ALL DEPENDENTS TO BE INCLUDED FOR COVERAGES					
RELATIONSHIP	FIRST NAME	INITIAL	LAST NAME	MO	DATE OF BIRTH DAY YEAR
1 WIFE	LISA	S	BROWN	JULY	23 1952
2					
3					
4					
5					
6					
7					
BENEFICIARY'S FIRST NAME LISA	INITIAL S	LAST NAME BROWN	RELATIONSHIP WIFE	AGE 34	WITNESS DE
(SIGNATURE) FIRST NAME Evan G Brown					DATE 4/27/87
TO BE COMPLETED BY EMPLOYER:					EFFECTIVE DATE 4/21/87

----- Cut here and give the certificate to your employer. Keep the top portion for your records. -----

Form **W-4A** **Employee's Withholding Allowance Certificate** OMB No. 1545-0010
 Department of the Treasury Internal Revenue Service **1987**
 For Privacy Act and Paperwork Reduction Act Notice, see reverse.

1 Type or print your full name EVAN BROWN	2 Your social security number 449-80-3986
Home address (number and street or rural route) 4416 FOXFIRE WAY	3 Marital Status <input type="checkbox"/> Single <input checked="" type="checkbox"/> Married <input type="checkbox"/> Married, but withhold at higher Single rate Note: If married, but legally separated, or spouse is a nonresident alien, check the Single box.
City or town, state, and ZIP code FT. WORTH, TX 76133	
4 Total number of allowances you are claiming (from line G above, or from the Worksheets on back if they apply).	4
5 Additional amount, if any, you want deducted from each pay	5 \$ 242
6 I claim exemption from withholding because (check boxes below that apply):	
a <input type="checkbox"/> Last year I did not owe any Federal income tax and had a right to a full refund of ALL income tax withheld, AND	
b <input type="checkbox"/> This year I do not expect to owe any Federal income tax and expect to have a right to a full refund of ALL income tax withheld. If both a and b apply, enter the year effective and "EXEMPT" here	
c Are you a full-time student? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Under penalties of perjury, I certify that I am entitled to the number of withholding allowances claimed on this certificate or, if claiming exemption from withholding, that I am entitled to claim the exempt status.	
Employee's signature Evan G Brown	Date April 27 1987
7 Employer's name and address (Employer: Complete 7, 8, and 9 only if sending to IRS)	8 Office code
9 Employer identification number	

EXHIBIT
"B"