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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

DSC'S MOTION FOR CONTINUANCE OF DEFENDANT EVAN BROWN'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

TO THE HONORABLE JUDGE OF SAID COURT:

Pursuant to Texas Rule of Civil Procedure 166a(g), DSC Communications Corporation ("DSC") files this Motion For Continuance of Defendant Evan Brown's Motion For Summary Judgment and Brief in Support and would respectfully show the following:

I.

INTRODUCTION

Despite refusing to comply with the Court's mandatory disclosure Injunction and denying DSC meaningful discovery concerning the Solution, Evan Brown has filed a second Motion for Summary Judgment. The sole factual underpinning for his motion is his own self-serving affidavit. Brown should not be permitted to thwart DSC's discovery efforts and then file a Motion for Summary Judgment asserting that DSC has no evidence to support its position. Accordingly, DSC requests this Court continue Brown's Motion for Summary judgment until Brown provides DSC with a complete disclosure of the Solution, as previously required by the Court.

II.

ARGUMENT AND AUTHORITIES**A. The Hearing On Brown's Motion for Summary Judgment Should Be Continued.**

DSC cannot fully and fairly respond to Brown's Motion for Summary Judgment without additional discovery. When a party is unable to respond to a motion for summary judgment because of a lack of discovery, the party must file an affidavit stating why it cannot present evidence in opposition to the motion for summary judgment. Tex.R.Civ.P. 166a(g). If the party seeking a continuance has been diligent in attempting to obtain discovery material to a cause of action, yet no discovery has been obtained, it is an abuse of discretion for the trial court to deny the motion for continuance. *See Levinthal v. Kelsey-Seybold Clinic, P.A.*, 902 S.W.2d 508, 512 (Tex.App-Houston [14th Dist] 1995, no writ) (holding that trial court had abused discretion by denying motion for continuance of summary judgment hearing when respondent to motion for summary judgment had obtained no discovery on issues material to "proving his cause of action").

B. DSC Has Not Obtained Material Discovery Necessary To Prove Its Cause of Action.

DSC has obtained no discovery related to the Solution. On June 30, 1997, this Court entered a Temporary Injunction Order ("Temporary Injunction") mandating, among other things, that Brown disclose the Solution to DSC. (See Affidavit of Eric W. Pinker ("Pinker Aff. at ¶ __") at ¶3). Brown has refused to comply with the Temporary Injunction and, in every material respect, thwarted DSC's attempts to discover the Solution. (*Id.*). DSC has been diligent in its efforts to obtain discovery. (*Id.*). First, DSC sought and obtained a court order mandating disclosure of the Solution. (*Id.*). In addition, DSC has served two sets of discovery on Brown, but has not yet received a disclosure of

the Solution.^{1/} (*Id.*). In connection with his refusal to respond to this discovery, DSC filed a motion to compel disclosure of the Solution, which Motion was denied (without prejudice to DSC's right to reurge the Motion) on the grounds that the relief sought would grant substantially the same relief as that contained in the order from which Brown appeals. *See* T.R.A.P. 43(d). As a result of Brown's conduct, DSC has no information on the Solution other than the information Brown has disclosed to the press.

C. DSC Needs Discovery On Several Material Issues To Defend Brown's Motion for Summary Judgment.

Now, Brown attempts to use his refusal to comply with the Temporary Injunction or provide meaningful discovery as a sword to defeat DSC. Brown should not be permitted to deny DSC disclosure and discovery and then assert that he wins because DSC has no evidence concerning the Solution.

Brown argues two points in his Motion for Summary Judgment. First, Brown contends that the Solution is not an invention; therefore, the Solution is not covered by the Patent, Copyright, and Proprietary Information Agreement ("Agreement") he signed. Second, Brown contends that he has "conceived" nothing. In support of these two arguments, Brown has provided the Court with his own affidavit, asserting the following facts:

- In 1975, well before my employment with DSC, Brown began mentally developing an algorithm for [the Solution]. (*See* Affidavit of Evan Brown ("Brown Aff."), attached as Exhibit B to Defendant Evan Brown's Motion for Summary Judgment and Brief in Support at ¶2).
- The Solution does nothing that cannot be accomplished manually (*Id.*).
- Prior to going to work with DSC, Brown had a mental image of 80% of the ultimate idea (*Id.*).

^{1/} Responses to DSC's second set of discovery are not due until October 20, 1997.

- In March 1996, Brown mentally pictured the remaining 20% of the [Solution] (*Id.* at ¶ 4).
- In April 1996, Brown sought a release from DSC to pursue the [Solution] (*Id.*).
- The [Solution] is only in his mind (*Id.* at ¶ 5).
- There is no computer program, computer model or any other tangible representation of the Solution. Moreover, he has not written the idea down on paper. In fact it would take a month to simply write down the idea, which would take 400 single-spaced pages to document. (*Id.*).

The success or failure of Brown's motion (*i.e.*, whether the Solution is an "invention" and whether it has been "conceived," as those terms are used in Brown's Employee Agreement) depends on the truth and accuracy of these statements. For example, Brown argues that the Solution is not an invention because he has not written it down. Also, Brown argues that he has "conceived" nothing because "the [Solution] is nothing more than the seed of an idea in Evan Brown's mind." (*See* Brown's Motion For Summary Judgment and Brief in Support at p. 4). However, in sharp contrast, Brown is willing to make specific and firm calculations about the benefits the Solution will afford DSC, *see* "A Gray Matter," Dallas Morning News, May 2, 1997, attached as Exhibit 2 (Brown stating that the Solution would save DSC "\$1 billion in labor for rewriting" the code and "about 3,200 man years of labor"), and claims that it would take 400 single-spaced pages to memorialize the Solution as presently constituted. (*See* Brown Aff., ¶ 5).

Brown's summary judgment motion depends almost exclusively on his own credibility in characterizing the Solution as something that is not permanent, complete, or sufficiently developed. *See* Brown's Motion for Summary Judgment and Brief in Support at p. 15. However, Brown has refused to provide DSC with discovery sufficient to test the truth of Brown's assertions in his affidavit. DSC is entitled to discovery which will allow it to contest Brown's assertions and

demonstrate the numerous inconsistencies and factual disputes raised by Brown's motion for summary judgment. In short, DSC cannot fully and fairly respond to Brown's Motion For Summary Judgment unless it obtains discovery on the material factual issues identified above. (See Pinker Aff. at ¶ 7). Accordingly, DSC seeks a continuance of the hearing on Brown's Motion for Summary Judgment.

III.

CONCLUSION

For the foregoing reasons, DSC requests the Court continue Brown's Motion for Summary Judgment unless and until Brown provides a complete disclosure of the Solution, as required by the Court.

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 October 6, 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 to Compel Interrogatory Responses is set for hearing in the 219 Judicial District Court on the 7 day of October, 1997 at 2:30 o'clock p.m.

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JUDGE PRESIDING

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served upon counsel for Defendant Evan Brown and Intervenor Lance Flores, as identified below, on this the 6th day of October, 1997:

Via Telecopy: (214) 939-8787

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Eric W. Pinker

EXHIBIT "1"

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. DSC Communications Corp. ("DSC") cannot fully and fairly respond to Brown's Motion for Summary Judgment because Brown has failed to provide DSC with meaningful discovery on material issues raised in this case and, specifically, those issues raised in Brown's Motion for Summary Judgment.

3. On June 30, 1997, this Court entered a Temporary Injunction requiring Brown to disclose the Solution. Brown has refused to comply with the Temporary Injunction.

4. In addition to the Injunction, DSC has been diligent in its efforts to obtain a complete description of the Solution through discovery from Brown. On June 19, 1997, DSC served it first set of discovery requests on Brown. Included among this set of discovery were interrogatories requesting a complete disclosure of the Solution. Brown refused to respond to DSC's interrogatories about the Solution, forcing DSC to file a Motion to Compel. Although the Court denied this motion, it did so without prejudice to DSC's right to reurge this motion at a later date, and the Court specifically premised its denial of the motion on T.R.A.P. 43(d), which prevents a trial court from granting substantially the same relief as an order on appeal. Consequently, and despite its diligent efforts, DSC has yet to obtain from Brown any disclosure regarding the Solution.

5. Brown has now moved for summary judgment arguing that the Solution is not an "invention" and has not been "conceived" because the Solution has not been written down and is not fully developed.

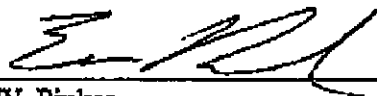
6. Brown's argument relies on the following assertions found in Brown's Affidavit:

- In 1975, well before my employment with DSC, Brown began mentally developing an algorithm for [the Solution] (See Affidavit of Evan Brown, attached as Exhibit B to Defendant Evan Brown's Motion for Summary Judgment and Brief in Support, ("Brown Aff. at ¶ __") at ¶2).
- The Solution does nothing that cannot be accomplished manually (*Id.*).
- Prior to going to work with DSC, Brown had a mental image of 80% of the ultimate idea (*Id.*).
- In March 1996, Brown mentally pictured the remaining 20% of the [Solution] (*Id.* at ¶ 4).
- In April 1996, Brown sought a release from DSC to pursue the [Solution] (*Id.*).
- The [Solution] is only in his mind (*Id.* at ¶ 5).

- There is no computer program, computer model, or any other tangible representation of his idea. Moreover, he has not written the idea down on paper. In fact it would take a month to simply write down the idea, which would take 400 single-spaced pages to document. (*Id.*)

7. These factual assertions by Brown are material to Brown's Motion for Summary Judgment. In short, Brown uses those factual assertions in an effort to characterize the Solution as something which is vague, incomplete, impermanent, and not sufficiently developed to be an "invention" that he "conceived." In order to rebut each of these premises, DSC needs (and, pursuant to an existing Court order, is entitled to) a full and complete disclosure of the Solution. At present, DSC has no evidence and is left to theorize and speculate based on newspaper articles and a single brief description of the Solution. Consequently, it is imperative that DSC have an opportunity to conduct full discovery concerning the Solution. Unless DSC obtains a disclosure of the Solution, its rights will be severely prejudiced in responding to and defending against Brown's Motion for Summary Judgment.

FURTHER AFFLIANT SAITH NOT.


Eric W. Pinker

SUBSCRIBED AND SWORN TO BEFORE ME this 6th day of October, 1997 to certify which witness my hand and official seal.


Notary Public, State of Texas

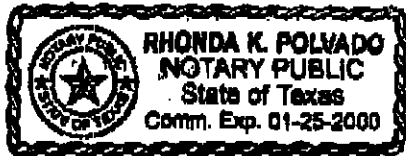


EXHIBIT "2"

The Dallas Morning News

Dallas, Texas, Friday, May 2, 1997

A gray matter

Company, fired worker wage court battle over rights to software idea

By Linda Stewart Ball

Senior North Bureau of The Dallas Morning News

PLANO — Evan Brown believes he's figured out how to convert old computer language into an easier-to-use computer code, a process that could be worth many millions of dollars.

His employer, DSC Communications, agrees, and fired him because he wouldn't give the company his idea. It then sued him because he refused to concede the company's ownership.

On Friday, the company is seeking to extend a temporary restraining order preventing Mr. Brown from sharing, selling or giving the "invaluable trade secret" to anyone other than DSC.

DSC is suing Mr. Brown for what's in his head, as opposed to claiming a tangible invention or application written on paper.

"For a layperson, it seems interesting to say, 'See those brain cells? We own them.' But in the area of trade secrets, that's not uncommon at all," said Robert Merges, co-director of the Center for Law and Technology at the University of California at Berkeley.

"We value intellectual property as a company," said Raymond T. Adams, vice president of corporate communications for DSC. "Our employees are charged with working for the benefit of our shareholders ... and their fellow employees. In this case, this gentleman had different opinions."

Mr. Brown, according to the suit, worked on software technology for DSC's telecommunications products and systems for 10 years. He said he provided technical support for DSC's customers.

AN issue is a sought-after software. Please see COMPANY on Page 16A.

Company, fired worker battle over rights to software concept |

Continued from Page 1A.

ware concept Mr. Brown says he thought up on his own time, stressing that it had nothing to do with his job.

"I think that they (DSC officials) tried to coerce information from me that does not belong to them," Mr. Brown said.

The 45-year-old Plano man believes he has found a way to automatically convert an old computer language or executable binary code, such as the one DSC and other companies depend on, into an easier-to-use and much more efficient, higher-level computer code.

"It's (the idea) not related to DSC (it's) not related to telecommunications," Mr. Brown said, adding that it would allow any company using antiquated computer equipment to take advantage of higher performance microprocessors.

If Mr. Brown's idea works, it could help companies preserve the existing investment they've made in computer equipment and still benefit from modern technological advances.

"By translating this code into a higher-level language, now it has the opportunity to be run on a much broader set of equipment," said John Dinkel, associate provost for computing at Texas A&M University. "Certainly, in one sense, yes this is really good stuff. It kind of breaks the tie between the code and the machine. You can run it on a variety of machines. . . . The year 2000 puts pressure on these old codes. They're not going to work. Now is the time to get rid of old code."

In its suit, DSC contends that "such an automated translation program would be worth many millions of dollars, because numerous other telecommunications and technology companies are similarly struggling to translate or convert their old computer code."

Had he not been fired, Mr. Brown said he could have saved DSC "\$1 billion in labor for rewriting the code and 'about 3,000 man years of labor.'"

Mr. Brown said DSC last summer offered him a percentage of that savings up to \$2 million for his idea, but "I turned it down because it's worth substantially more than that."

"We value intellectual property as a company. Our employees are charged with working for the benefit of our shareholders . . . and their fellow employees."

— Raymond T. Adams
DSC vice president
of corporate communications

DSC develops technology and markets products that connect phone calls and moves information from one place to another. It does that with complex telecommunications hardware and software. A key piece of DSC's hardware is a large digital switching computer that simultaneously reroutes thousands of telephone connections. The software used to operate the switch is comprised of millions of lines of computer code, much of which is becoming outdated.

"I offered to convert all of DSC's code at no charge," Mr. Brown said. "They wanted to include Motorola's source code also. I said no." Motorola is one of DSC's larger customers.

DSC officials say that under the terms of an employment agreement Mr. Brown signed when he was hired on April 21, 1987, he was required to give any invention, whether "made or conceived," to DSC. According to the employment agreement, that invention or idea remains the exclusive property of the company. While such agreements are pretty standard, legal experts in intellectual property say few people who sign them are aware of their potential impact.

The lawsuit states that instead of giving DSC his idea, Mr. Brown demanded that the company pay him additional money for the information.

Mr. Brown says that the computer software concept did not belong to DSC, because "DSC is not in the business of software reverse engineering (which converts old computer code into easier to understand languages). It was not my job function," he said. "It was not my title, and it was not my responsibility."

Although the suit claims that Mr. Brown conceived of the concept while working for DSC and that it was directly related to the company's business, Mr. Brown said the idea was something he's been working on since 1975, while still a student at Texas A&M.

"A friend of mine posed the problem and it was intriguing to me," he said. "I didn't think it was solvable."

But last year, while driving back from visiting his farm in Hamilton County, "I actually solved the last piece of the puzzle," he said. "I was excited. I just kept it in my mind. It is only in my mind. I have not written it down."

He did, however, send a memo to DSC's legal counsel April 19, 1996, requesting that DSC release him from the employment agreement. He said he wanted DSC to understand that since the idea came from his "own personal experience" he should be free to pursue a patent.

Without waiving its rights to the information, the suit said that DSC attempted to negotiate with Mr. Brown for disclosure of his idea, but he refused their proposals and threatened to market it in Europe. On April 21, the company fired him.

"I'm not going to go into the thought processes as to why we did what we did," said Mr. Adams, the DSC vice president. "We'll see how the litigation turns out."

CAUSE NO. 199 596 97

**DSC COMMUNICATIONS
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IN THE DISTRICT COURT OF

COLLIN COUNTY, TEXAS

219TH JUDICIAL DISTRICT

**ORDER GRANTING DSC'S MOTION FOR CONTINUANCE OF
DEFENDANT EVAN BROWN'S MOTION FOR SUMMARY JUDGMENT**

On October 7, 1997, the Court heard DSC's Motion for Continuance of Defendant Evan Brown's Motion for Summary Judgment and Brief in Support, and after considering the arguments of counsel, including the arguments presented in Defendant Evan Brown's Response to DSC's Motion, and the pleadings on file in this case, the Court makes the following order:

DSC's Motion for Continuance is **GRANTED**. Further proceedings on Brown's Motion for Summary Judgment are continued until Brown has provided DSC with a full and complete disclosure of the Solution, or until further order of the Court.

SIGNED, this the ___ day of October, 1997.

Judge Curt Henderson