

CAUSE NO. 199-00596-97

<p><b>DSC COMMUNICATIONS CORPORATION,</b> <i>Plaintiff,</i></p> <p>v. <b>EVAN BROWN,</b> <i>Defendant,</i></p> <p>v. <b>LANCE FLORES,</b> <i>Intervenor-Plaintiff.</i></p>
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**IN THE DISTRICT COURT OF**

**COLLIN COUNTY, TEXAS**

**199<sup>TH</sup> JUDICIAL DISTRICT**

AMENDED ANSWER TO MOTION TO STRIKE INTERVENTION

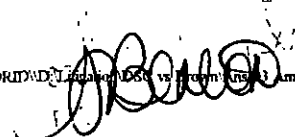
TO THE HONORABLE JUDGE OF THE COURT:

Intervenor, Lance Flores respectfully submits this ANSWER TO DEFENDANT’S MOTION TO STRIKE INTERVENTION (Defendant’s Motion to Strike Petition in Intervention of Lance Flores, hereinafter known as the “Motion to Strike”), incorporating by reference Intervenor’s Petition in Intervention from the records of the Court as if fully set forth at length, and presents the following:

I. STATEMENT ON THE NATURE OF THE ISSUE BEFORE THE COURT

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1. This issue involves a motion made by the Defendant Evan Brown to strike the Petition in Intervention filed by Lance Flores. Defendant alleges as grounds for his Motion to Strike that Intervenor lacks standing or capacity to sue and claims that Intervenor “has not demonstrated a justiciable interest in the subject mater of this suit, and has instead brought suit to enforce the alleged rights of Cyber.”

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2. Defendant hinges the grounds for his Motion to Strike on the following a single averment of fact to which he attaches several points of law as follows:

a. that, as an alleged fact by the Defendant, “[Intervenor] concedes that he transferred to Cyber all technology rights and limited intellectual property rights to the technology which he claims Brown or DSC has wrongfully appropriated.”<sup>1</sup> Thus, Defendant relies on his belief that the limited intellectual property rights which Intervenor granted to Cyber do not belong to the Intervenor but to Cyber, a Texas corporation;

b. that, as a point of law raised by the Defendant, because Cyber has forfeited its charter for failure to pay franchise taxes, it cannot sue in Texas state courts; and

c. that, as a point of law raised by the Defendant, neither the CEO nor the majority shareholder of a corporation may file suit to enforce the rights of the corporation. Defendant annotates this point of law with his own commentary<sup>2</sup> defending some inferred property rights of the corporation, Cyber, stating “the rights of the corporation belong to the corporation itself.

3. Defendant thus concludes based on this single fact and these points of law that Intervenor failed to demonstrate that he has a justiciable interest in the subject matter of this suit.

## II. STATEMENT OF FACTS

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4. On December 12, 1983, Intervenor transferred “all right, title, and interest” in the PHOENIX VE technology and all documents pertaining to the technology to Cyber for “the issuance and delivery

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<sup>1</sup> | See Motion to Strike, p. 1.

<sup>2</sup> | Motion to Strike, p. 2

of 283,000 shares of common stock of CYBER AUTOMATION SCIENCES, INC., a Texas corporation, with the remaining unpaid principal amount of \$58,000.”

5. On January 14, 1987, Intervenor executed an intellectual property assignment arrangement that granted CYBER AUTOMATION SCIENCES, INC. “right of first refusal of any and all of my [Intervenor] inventions, trade secrets, or technology developments where upon acceptance of such intellectual property must be made in writing within thirty days of documented presentation of the intellectual property. Consummation of acceptance must be made by actual commercial use by a viable contract to an end user or product vendor or by issuance of a U.S. patent. I understand that if CYBER AUTOMATION SCIENCES, INC. fails to consummate acceptance within one year of acceptance all property rights shall revert back to me.”

6. Cyber Automation Sciences, Inc., has not accepted nor consummated any inventions, trade secrets, or technology developments related to the technology which the Defendant alleges belongs to Cyber.

7. Plaintiff (DSC Comminations Corporation, hereinafter “DSC”) alleges in its Plaintiff’s Amended Petition at paragraph 11 that Defendant during his employ at DSC:

“DSC committed time and resources to investigate alternative methods for translating its Z8000 code to high level source code, including the evaluation of third party technology capable of performing this type of language translation.”

Plaintiff continues further stating that Defendant Brown was

“aware of, and was directly involved in, some of these investigations.”

8. Plaintiff also alleges in paragraph 12 of same said pleading, *ante*, that based on the knowledge procured during the investigation described, On April 19, 1996, Brown sent a memo to Gamini

Desoyza, his immediate supervisor, stating that he had developed a method of converting machine executable binary [such as Z8000] into higher level source code (&c.) ... Thus, during his employment by DSC, Brown conceived a computer solution which would make possible an automated translation of the computer code in old Z8000 language to the new C or C++ languages. This establishes that DSC believes that the Solution was invented or refashioned by Brown at sometime after the nexus of the Intervenor's technology proposal and the DSC investigation for the Solution.

9. Plaintiff claims (Plaintiff's Amended Petition at paragraph 12) that it (DSC), by virtue of an Employment Agreement, holds "'sole and exclusive' right to the Solution" referencing Plaintiff's Amended Petition Exhibit 1 at paragraph "B".

10. The Intervenor's verified Petition in Intervention clearly alleges and shows by virtue of the verified Petition in Intervention Exhibit that Intervenor has an individual justiciable interest in the suit:

a. The Petition in Intervention paragraph 2 establishes a nexus between the fact established in the Plaintiff's Amended Petition at paragraph 11 that DSC was seeking a solution for the conversion of Z8000 code to high-level source code from third party vendors and that the Intervenor and Cyber Automation Sciences, Inc. was a third party vendor involved in the investigation for the Solution. *et seq.*

"During the time that Brown was employed by DSC, DSC committed time and resources to investigate alternative methods for translating its Z8000 code to high level source code, including the evaluation of third party technology capable of performing this type of language translation. Brown was aware of, and was directly involved in, some of these investigations." [*emphasis added*]. (Plaintiff's Amended Petition, ¶ 11.)

b. Plaintiff's Amended Petition also sets forth value of the "Solution," thus,

establishes the requisite *entitlement to some recovery* of TRCP Rule 60 expressed by the higher courts if the technology for the Solution is the intellectual property of the Intervenor.

“If DSC could develop a computer program which would automatically translate ‘machine executable binary code,’ such as the Z8000, to a ‘high level source code,’ such as C or C++, it would realize the reward of significant savings both in man hours and resources. Moreover, as both Brown and DSC knew, such an automated translation program would be worth many millions of dollars, because numerous other telecommunications and technology companies are similarly struggling to translate or convert their old computer codes into new computer code as efficiently as possible.” (Plaintiff’s Amended Petition, ¶ 9.)

c. “Plaintiff’s Amended Petition admits that “the Solution is directly related to ‘business, work, or investigations’ of DSC [emphasis added],” which sets forth the premises that the Solution was acquired or may have been acquired by the investigative process though the unauthorized procurement of the trade secrets and technology belonging to a third party.

### III. ARGUMENT AND AUTHORITIES

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11. ISSUE 1: INTELLECTUAL PROPERTY OWNERSHIP. Defendant has misstated the fact of the intellectual property ownership relating to the technology which is the subject matter of this suit. Throughout Defendant’s Motion to Strike he reiterates that the “technology rights claimed by Flores are the property of Cyber.” This fact advanced by the Defendant is simply false. Although counsel for the Defendant may desire to advocate for Cyber Automation Sciences, Inc. by advancing the proposition that such technology rights belong to Cyber it is clearly not counsel’s place to do so. Defendant’s statement of the fact is a clearly wrong and misrepresents what is actually plead. The

actual statement in the Intervenor's verified pleading reads:

"In December of 1983 Intervenor transferred all technology rights of certain computer technology and additionally assigned limited intellectual property rights to Cyber of technology related to Artificial Intelligence, and code procedural techniques or mathematical algorithms, and maintains an intellectual property rights interest subject to the limits of assignment agreement." (Petition in Intervention, § 1, ¶ 1)

Note that the Petition in Intervention says "additionally assigned limited intellectual property rights to Cyber. [emphases added]" Limited means exactly what it says: limited.<sup>3</sup> Nowhere, in the Intervenor's pleadings is there reference to a transference of ownership. Cyber was granted limited property rights bound by restraints established by an agreement establishing a right of first refusal to Intervenor's intellectual property for which he must be compensated. Lacking acceptance, consummation of the offer (pursuant to Cyber's right of first refusal) and consideration which would create an enforceable agreement,<sup>4</sup> Cyber cannot make a claim to the Intervenor's intellectual property. Therefore, the intellectual property developed by the Intervenor and subject matter of this cause of action is indisputably his own property and not that of Cyber as Defendant Brown contends.

12. ISSUE 2: POINTS OF LAW SUGGESTED BY DEFENDANT. Denying Defendant's allegation that Intervenor has no standing or capacity to sue, Intervenor acknowledges the points of law suggested<sup>5</sup> as codified statutes although not identified by Defendant.

13. ISSUE 3: JUSTICIABLE INTEREST IN THE SUBJECT MATTER OF THIS SUIT. Defendant

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<sup>3</sup> | Webster's New World Dictionary: Basic School Edition © 1971 defines limited as "1. having a limit or limits; restricted in some way [This offer is good for a *limited* time only.] &c."

<sup>4</sup> | An excellent source on this subject matter may be found in the Appellant's Brief, *Evan Brown, Appellant, v. DSC Communications Corporation, Inc., Appellee*, No. 05-97-01098 (CA 5<sup>th</sup> Dist. Dallas, 1997 pend.). Appellant Brown's Point of Error No. 2, pp 14-28, clearly establishes the requirement of *consideration* as a fundamental element of every valid contract and where *at-will employment* is an illusory promise which provides no legal consideration.

<sup>5</sup> | See § I. ¶¶ 2a-2c

argues that a party has a right to intervene in an ongoing dispute “so long as he has a justiciable interest in the subject matter that makes it necessary or proper for him to come into the case for his self protection,” citing *Beutel*.<sup>6</sup> Intervenor agrees. Intervenor would additionally support this point by looking further into the Appellate Court’s reasoning in *Beutel*. Justice Cummings delivering the opinion for the court addressed the question of the trial court’s denial of their motion to strike of Beutel’s<sup>7</sup> intervention. The court first had to determine whether or not the intervenor had a justiciable interest in the law suit in review of District’s<sup>8</sup> motion to strike.<sup>9</sup> The court found that because Beutel was not an owner of the property at the time of taking in the property condemnation he had no justiciable interest. However, the court made it very clear that had Beutel “been considered an owner” of the property or “merely possessed a lien interest in it” at the time of taking he would have had a justiciable interest. Thus, Beutel’s justiciable interest in the subject matter would have made it necessary or proper to intervene in the lawsuit for his self-protection had such been the case. In retrospection, it is apparent that in the instant cause the latter is case. Since the Defendant argues only because Cyber owns the property Intervenor does not have a justiciable interest, then all points of law he has raised are mute as the Intervenor is the owner of the intellectual property he developed. Therefore, his intervention into this lawsuit is justly and properly qualified as a justiciable interest in the subject matter and makes it necessary for him to come into

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<sup>6</sup> | *Beutel v. Dallas County Flood Control Dist. No. 1*, 916 S.W.2d 685, 961 (CA Waco 1996, Writ denied)

<sup>7</sup> | Beutel had acquired a lien interest in a condemned tract well after the property had been taken in a condemnation case and had intervened.

<sup>8</sup> | Dallas County Flood Control District, No. 1

<sup>9</sup> | *Beutel, supra* at 691.

the case for his self-protection.<sup>10</sup> Further, if Defendant's assertion, that the technology belongs to Cyber, is to hold but a drop of water he must fully defeat the argument he has presented in his appeal<sup>11</sup> and further show that there was the required offer by the Intervenor, acceptance by Cyber, consummation of Cyber's right of first refusal, and compensation to Intervenor. Since only the presentation of the offer took place it is clear that Intervenor is the owner of the intellectual property he developed. Defendants's Motion to Strike should be denied at this point in the argument.

14. ISSUE 4: NECESSARY FOR INTERVENOR TO COME IN TO THE CASE FOR HIS SELF-PROTECTION. Given the nexus established between the Intervenor-Plaintiff, Defendant, and Plaintiff, the opportunity, proximity, that there had been no automated Solution prior to the Cyber proposal of its technology to DSC, there is substantial and objective reason to believe that the technology attributing to the Solution belongs to the Intervenor. Further, since DSC alleges sole and exclusive right to that technology which may belong to the Intervenor which DSC has placed appreciable economic value. Intervenor may be significantly harmed or damaged in this cause of action, thus, a justiciable interest in the suit.

15. ISSUE 5: JUDICIAL ECONOMY. As a matter of judicial economy, the severance, or striking of Intervenor's pleadings would only result in substantial complication and delay of a final resolution to this matter. Intervenor would be forced to initiate separate litigation and be joined to this cause of action or have the issues re-litigated in another court or removed from state court on a federal issue. Courts have broad discretion in issues of intervention and joinder but for the most part decisions are based on a practical view giving consideration to a fair, orderly, and timely

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<sup>10</sup> | *Id.*

<sup>11</sup> | *See Evan Brown v. DSC, supra, note 4*

prosecution and deposition of pending litigation.<sup>12</sup> Generally, the issue is a matter of judicial economy where, encouraged by the rules of procedure, the courts' propose is to protect the defendant from a multiplicity of suits.<sup>13</sup> To strike the Intervenor's pleadings serves no practical litigation purpose nor advance the ends of justice.

#### IV. CONCLUSION

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16. It is abundantly clear that the Defendant has based his objection of intervention on two points of law that require a corporation to be represented by licensed counsel and that a corporation whose franchise tax is delinquent may seek relief in Texas courts. Intervenor has stipulated that these alleged points of law are valid in that they have been codified statute. However, Defendant underpins his only claim for objection on a single false and completely unsupported fact. I appears quite hypocritical that Defendant comes before the Court defending his own self interest against a contract which there is no stipulation of limited property rights for his intellectual creations for which he was employed by DSC to do, receiving compensation for his intellectual labors. Where, on the other hand, Intervenor's intellectual property arrangement with Cyber were limited; specific in its intellectual property rights and ownership. Yet, Defendant would virtually recant the legal theory underpinning his own defense in order to support his allegation that the Intervenor's Technology is the property of Cyber, expecting the Court to turn its gaze from Defendant's previous pleading and appeal. The facts unequivocally bear witness to the Intervenor's ownership of the

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<sup>12</sup> | *Fireman's Fund Ins. Co. v. McDaniel*, 327 S.W.2d 358 (CA Beaumont 1959) (disapproved on other grounds, *Colorado Interstate Gas Co. v. MAPCO, Inc.*, 570 S.W.2d 164 (CA Amarillo))

<sup>13</sup> | *In re P.*, 636 S.W.2d 597 (CA San Antonio 1982)

Technology he developed bears upon the subject matter of this case, wherefore, the Defendants motion should be denied.

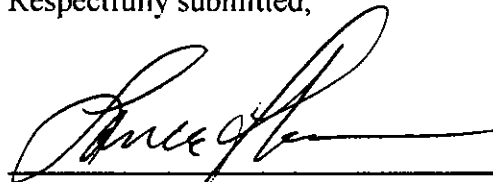
17. Intervenor enters this cause with reluctance and even greater restraint. However, the issues presented beyond the specific issue raised and additionally plead herein by the Intervenor requires him to enter the case for two reasons. The first to protect his interest of intellectual property and secondly as his duty to support the Court in its own obligation to aid in the resolution of ongoing litigation and re-litigation of issues toward the ends of judicial economy.

V. PRAYER

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WHEREFORE, IN CONSIDERATION OF THE FOREGOING, INTERVENOR, prays the Court dismiss the Defendant's motion to strike denying any relief sought by the Defendant, that he continue and go forth to prosecute his cause of action and that upon trial hereof Defendant take nothing and that Intervenor recover his costs, and for any other relief to which he may be entitled under equity and law.

Respectfully submitted,



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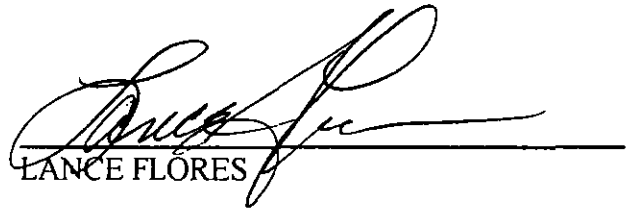
Attorney for the Intervenor

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the above instrument was served upon:

DSC Communications Corporation, through its attorney of record Michael P. Lynn, at Lynn, Stodghill, Melsheimer & Tillotson, 750 N. St. Paul Street, Ste 1400, Dallas, Texas, 75201, in accordance with the Texas Rules of Civil Procedure, Rule 21a on November 14, 1997 by hand delivery.

Evan Brown, through his attorney of record Richard Sayles, at Sayles & Lidji, 4400 Renaissance Tower, Dallas, Texas, 75270, in accordance with the Texas Rules of Civil Procedure, Rule 21a on November 14, 1997 by hand delivery.

  
LANCE FLORES

Attorney for the Intervenor