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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 MOTION TO COMPEL INTERROGATORY RESPONSES AND FOR SANCTIONS

TO THE HONORABLE JUDGE OF SAID COURT:

DSC Communications Corporation ("DSC") files this Motion to Compel Interrogatory Responses and for Sanctions and would respectfully show the following:

I.

Introduction

Immediately after filing this lawsuit, DSC sought and obtained a Temporary Injunction Order requiring, among other things, that Defendant Brown disclose the Solution to DSC. On June 30, 1997, the Court entered a Temporary Injunction Order which provided, in part:

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

- a. Preserve the Solution; and
- b. Disclose the Solution, in its entirety, to DSC in the manner set forth in the following paragraphs of this Order.

Since the entry of that Order, Brown has willfully refused to disclose the Solution to DSC. The Dallas Court of Appeals affirmed this Court's Temporary Injunction Order on January 6, 1998, and denied Brown's Motion for Rehearing on February 11, 1998. On July 20, 1998, the Dallas Court of Appeals returned the mandate to this Court. In addition to the entry of the Order, DSC has also sought disclosure of the Solution through interrogatories directed to Brown. Brown has, however, refused to provide any substantive response to this interrogatory.

DSC is entitled to an immediate disclosure of the Solution. Brown has refused to disclose the Solution and continues to willfully violate this Court's Order. Accordingly, DSC requests that this Court enter an Order (1) compelling disclosure of the Solution and (2) sanctioning Brown for discovery abuse.

II.

Factual Background

1. DSC filed this lawsuit against Evan Brown ("Brown") on April 24, 1997, in which it sought to enforce an Employee Patent, Copyright, and Confidential Information Agreement (the "Employment Agreement") that it entered into with Brown at the onset of his employment relationship with DSC. Specifically, Brown advised DSC that he had "developed a method of converting machine executable binary code into a high level source code form using logic and data abstractions (the "Solution")," but in violation of the Employment Agreement, he refused to assign ownership of the Solution to DSC or assist DSC to protect the Solution. In its Amended Petition, DSC has also alleged claims for promissory estoppel, misappropriation of trade secrets, unfair competition, and breach of fiduciary duty, all with respect to Brown's refusal to disclose the Solution.

A. Temporary Injunction

1. On June 30, 1997, the Court entered the Temporary Injunction Order (the "Order") in this case, requiring Brown, *inter alia*, to disclose the Solution to the DSC Development Team. Specifically, the Order provides as follows:

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

- a. preserve the Solution; and
- b. disclose the Solution, in its entirety, to DSC in the manner set forth in the following paragraphs of this Order.

Order at p. 2-3. A true and correct copy of the Order is attached to this Motion as Exhibit 1.

2. Brown is fully aware of the entry of the Order. Both he and his counsel attended the hearing at which the Court orally entered the temporary injunction in favor of DSC. In addition, Brown appealed the Order, filed a Notice of Filing of Cash Bond on July 1, 1997, and filed his Appellant's Brief on August 4, 1997.

B. The Appeal of The Temporary Injunction

1. Following the entry of the Order, Brown noticed an appeal of that order. On January 6, 1998, the Court of Appeals denied Brown's appeal and affirmed this Court's Order. A true and correct copy of that Order is attached as Exhibit 2.

2. On January 12, 1998, Brown filed a Motion for Rehearing with the Court of Appeals.

3. On February 11, 1998, the Court of Appeals denied the Motion for Rehearing. A true and correct copy of that Order is attached as Exhibit 3.

4. On July 17, 1998, the Court of Appeals returned the mandate to this Court. A true and correct copy of correspondence from the Court of Appeals confirming the return of the mandate is attached hereto as Exhibit 4.

C. Interrogatories and Motion To Compel

1. On June 19, 1997, DSC served Defendant Brown with its First Set of Interrogatories to Defendant. In Interrogatory No. 7, DSC asked Brown to "identify and describe in detail" the Solution.

2. On or about July 15, 1997, Brown served his Responses to Plaintiff's First Set of Interrogatories. A true and correct copy of that Response is attached hereto as Exhibit 5. Brown refused to provide any substantive response to Interrogatory No. 7.

3. On July 23, 1997, DSC filed a Motion to Compel Interrogatory Responses. This Court denied that motion based solely on the conclusion that Brown's pending appeal and Texas Rule of Appellate Procedure 43 precluded any action regarding the disclosure of the Solution. Although the Court denied the motion, it did so without prejudice to refile after the appellate court had ruled on the pending appeal. A true and copy of that Order is attached hereto as Exhibit 6.

D. Since The Mandate Was Returned, Brown Has Done Nothing To Disclose The Solution

1. Since July 20, 1998, Brown has not supplemented his interrogatory responses, appeared at DSC to disclose the Solution, or taken any other actions to disclose the Solution. *See* Affidavit of Wayne Jones.

2. Based on Brown's failure to provide any description of the Solution, as required by the Court's Order, DSC files the instant Motion to Compel Interrogatory Responses and for Sanctions. In addition, based on Brown's continued refusal to provide a substantive response to

Interrogatory No. 7. DSC files the instant Motion to Compel Interrogatory Responses and for Sanctions.

III.

Motion to Compel Interrogatory Responses

Allowing full discovery is favored by Texas courts. As the Supreme Court of Texas stated:

Affording parties full discovery promotes the fair resolution of disputes by the judiciary. This court has vigorously sought to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed. Discovery is thus the linchpin of the search for truth, and it makes a trial less of a game of blind man's bluff and more a fair contest with the issues and facts disclosed to the fullest practicable extent. In recent years, we have sought to secure this objective through . . . our opinions discouraging gamesmanship and secrecy.

State v. Lowry, 802 S.W.2d 669, 671 (Tex. 1991) (Citations omitted).

In Interrogatory No. 7, DSC sought for Brown to provide a complete description of the Solution. This description is critical for several reasons. First, Brown has argued in this lawsuit that the Solution is not within the scope of his Employment Agreement. In order to properly litigate this case, and to fully respond to this contention, DSC needs a full and complete description of the Solution. Notwithstanding its need to obtain a full and complete description of the Solution in order to properly litigate this case, Brown has refused to disclose the Solution in response to the Court's June 30, 1997 Temporary Injunction Order; in response to deposition questions seeking this disclosure; and in response to Interrogatory No. 7.

Second, DSC needs a complete description of the Solution in order to evaluate and defend against claims by third parties who assert an ownership interest in the Solution. For example, on July 21, 1997, Mr. Lance Flores filed a Petition for Intervention in this matter claiming that he disclosed the Solution to Brown and that he is therefore the owner of the Solution. In order to

defend against this claim (and potentially others), DSC needs a complete description of the Solution so that it may compare the Solution to the technology purportedly owned by Mr. Flores.

Finally, DSC requires a complete disclosure of the Solution in order to evaluate whether the Solution was obtained through other lawful means. As DSC demonstrated at the Temporary Injunction hearing, it has investigated the acquisition of technology similar to the Solution for a number of years. In addition, DSC employees have undertaken independent research and development in an effort to develop this type of technology. In order to evaluate whether Brown's Solution is actually different than the technology that was the subject of these other investigations and independent developments, DSC needs a complete disclosure of the Solution.

In refusing to describe the Solution, Brown relies on a series of ill-founded objections. First, Brown argues that the information is confidential and proprietary. As a preliminary matter, trade secrets and confidential information are not necessarily "privileged" matters. *Automatic Drilling Machines, Inc. v. Miller*, 515 S.W.2d 256, 259 (Tex.1974). As such, when faced with a request for discovery of trade secrets and confidential information, courts will weigh the need for discovery against the desirability of preserving the secrecy of the material in question. *Id.* Typically, courts preserve the secrecy of the information through the issuance of an appropriate confidentiality order. A stand alone Confidentiality Order has been entered in this case,^{1/}

Second, Brown objects to Interrogatory No. 7 "as vague, ambiguous, over broad, unduly burdensome and harassing." These boilerplate objections are unfounded and should be overruled.

Finally, Brown objects to this Interrogatory on the grounds that "its inclusion within Plaintiff's First Set of Interrogatories cause such interrogatories to require more than 30 answers."

^{1/} In addition, the Court did include a number of confidentiality features within the June 30, 1997 Temporary Injunction Order, but these features are presumably limited to a disclosure of the Solution under that Order.

Contrary to this objection, DSC's First Set of Interrogatories included only fourteen (14) interrogatories, with few if any subparts. As such, this set of interrogatories was well within the permissible limit established by Texas Rule of Civil Procedure 168(5). This is perhaps best evidenced by the fact that Interrogatory No. 7 is the *only* interrogatory to which Brown made this objection, and he purported to provide a substantive answer to each of the *following seven* (7) interrogatories.

For the foregoing reasons, DSC requests that Brown be compelled to immediately answer Interrogatory No. 7.

V.

Motion for Sanctions

Brown should be sanctioned for failing to comply with the Court's Temporary Injunction Order, for failing to respond to DSC's Interrogatory No. 7, and for bad faith and abuse of the judicial process in needlessly and vexatiously increasing the cost and expense of this litigation. Pursuant to Rule 215 of the Texas Rules of Civil Procedure, the Court may sanction a party that fails to comply with proper discovery requests or fails to obey an order to provide discovery. Tex. R. Civ. P. 215(2). Additionally, the Court may sanction a party for abusing the discovery process by resisting discovery. Tex. R. Civ. Pro. 215(3). As set out above, Brown has violated Rule 215 by (1) failing to comply with the Temporary Injunction Order and (2) failing to respond to Interrogatory No. 7, and his conduct amounts to an abuse of the discovery process.

In addition to Rule 215, the Court has the inherent power to sanction Brown's bad faith refusal to comply with the Order. The Court's inherent power to sanction was first articulated in *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979), when the Texas Supreme Court recognized the inherent powers of a court, not derived from specific legislation or constitutional

provisions, but necessary for the exercise of the court's jurisdiction, administration of justice, and the preservation of the court's independence and integrity. *See also, Kutch v. Del Mar College*, 831 S.W.2d 506, 509-10 (Tex.App.-- Corpus Christi 1992, no writ)(holding that a court has the inherent power to sanction for abuse of the judicial process which may not be covered by rule or statute). Recently, the Texas Supreme Court reiterated that courts have "comprehensive" inherent power to sanction counsel for abusive conduct occurring during litigation. *Remington Arms Co., Inc. v. Hon. Benjamin Martinez*, 850 S.W.2d 167, 172 (Tex. 1993). *See also, Public Util. Com'n of Texas v. Cofer*, 754 S.W.2d 121, 124 (Tex.1988) ("We recognize that a court has inherent powers it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in preservation of its independence and integrity."); *Kutch v. Del Mar College*, 831 S.W.2d 506, 509 (Tex.App.--Corpus Christi 1992, no writ) (Texas courts have certain inherent powers, "including the power to sanction for bad faith abuse of the judicial process"). A court's inherent power to sanction exists when necessary to deter, alleviate, and counteract bad faith abuse of the judicial process, such as any significant interference with a court's traditional core functions. *Kutch*, 831 S.W.2d at 510.^{2/}

If, after all of the above remedies have been enforced against Brown for thirty days and he continues to violate the Order and/or an order to compel, DSC requests the Court to consider a motion from DSC for a "death penalty sanction." Tex. R. Civ. Pro. 215 endorses the "death penalty" sanctions for the specific type of abusive conduct in which Brown has and will likely continue to engage. Rule 215 reads, in pertinent part:

If a party . . . fails . . . to obey an order to provide or permit **discovery** . . . the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are

^{2/} A trial court's imposition of sanctions will be reviewed subject to an abuse-of-discretion standard. *Kutch*, 831 S.W.2d at 512; *see also, Greiner v. Jameson*, 865 S.W.2d 493, 498, 500 (Tex.App.--Dallas 1993, writ denied).

just, and among others the following . . . (5) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, **or rendering a judgment by default against the disobedient party.**

Tex.R.Civ.P. 215(2)(b)(5) (emphasis added). But, before a court can impose a death penalty sanction, it must consider lesser sanctions. Case law reveals that “an order to compel, standing alone, is not the type of lesser sanction that must precede the ultimate sanction. However, an order to compel joined with a statement that noncompliance would result in dismissal does constitute a lesser sanction.” *Andras v. Memorial Hospital System*, 888 S.W.2d 567, 572 (Tex. App. -- Houston [1st Dist.] 1994, writ denied). Thus, out of an abundance of caution, DSC requests that the Court insert a provision in its order stating that if after 30 days Brown has failed to comply with the Court’s Orders, it will entertain a motion to strike Brown’s pleadings and enter default judgment in favor of DSC.

For his actions set forth above, and pursuant to Rule 215(2) of the Texas Rules of Civil Procedure, Brown should be sanctioned and ordered to pay DSC’s discovery expenses, attorneys fees and taxable court costs incurred in its quest to compel Brown to answer Interrogatory No. 7. In addition, Brown should be precluded from initiating any discovery in this matter until he fully discloses the Solution to DSC pursuant to the Court’s Order and Interrogatory No. 7.

VI.

Conclusion

For all these reasons, Brown’s objections to Interrogatory No. 7 should be overruled, and Brown should be required to immediately provide a full substantive response to this Interrogatory. The Court should also order Brown to pay DSC’s reasonable discovery expenses, attorneys fees and taxable court costs incurred in compelling the answer to Interrogatory No. 7. Finally, if Brown

continues his refusal to respond to the Interrogatory, after being sanctioned for such refusal, the Court should strike Brown's pleadings in this matter pursuant to Rule 215 of the Texas Rules of Civil Procedure.

WHEREFORE, PREMISES CONSIDERED, DSC respectfully requests that the Court enter an order (1) compelling Brown to fully answer Interrogatory No. 7 by identifying and describing the Solution in detail, (2) requiring Brown to pay DSC's reasonable discovery expenses, attorneys fees and taxable court costs incurred in compelling the answer to Interrogatory No. 7, (3) stating that, in the event that Brown continues to violate the Court's Order for thirty (30) after being sanctioned for failing to comply with the Order, the Court will entertain a "death penalty" sanction such as striking Brown's pleadings, and (4) granting DSC such other and further relief to which it may show itself to be justly entitled.

Respectfully submitted,

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

By: 

Michael P. Lynn, P.C.
State Bar No. 12738500
Eric W. Pinker, P.C.
Texas Bar No. 16016550
John T. Cox III
Texas Bar No. 24003722

750 North St. Paul Street, Suite 1400
Dallas, Texas 75201
(214) 981-3800 - Telephone
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**ATTORNEYS FOR PLAINTIFF
DSC COMMUNICATIONS CORPORATION**

CERTIFICATE OF CONFERENCE

I hereby certify that I attempted on numerous occasions 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, P.C.

FIAT

The above Motion to Compel Interrogatory Responses is set for hearing in the 219th Judicial District Court on the ___ day of _____, 1998, at _____ o'clock __.m.

JUDGE PRESIDING

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served upon counsel for Defendant Evan Brown, as identified below, on this the 13 day of November, 1998:

Via Hand Delivery

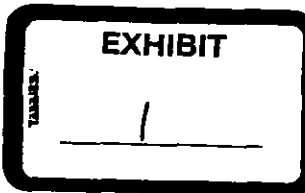
Richard A. Sayles, Esq.
Eric D. Pearson, Esq.
Sayles & Lidji, P.C.
1201 Elm Street, Suite 4400
Dallas, Texas 75270

Via Regular Mail

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



Eric W. Pinker, P.C.



Cause No. 199-00596-97

DSC COMMUNICATIONS CORPORATION

IN THE DISTRICT COURT OF

v.

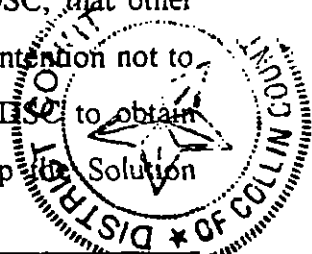
COLLIN COUNTY, TEXAS

EVAN BROWN

199TH JUDICIAL DISTRICT

TEMPORARY INJUNCTION ORDER

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



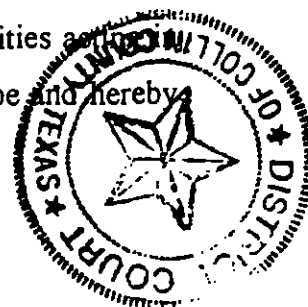
independent of DSC, including to develop it in foreign countries outside the protection of this and other courts in the United States; that if Brown carries out his intentions it will alter the status quo and make ineffectual a judgment in favor of DSC in that DSC will suffer immediate harm and will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

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

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

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

- a. Preserve the Solution; and



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

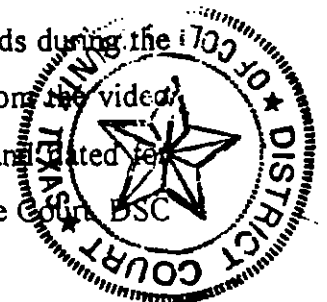
IT IS ORDERED, ADJUDGED, and DECREED that the following persons are designated by the Court to be the DSC Development Team (the "DSC Development Team"), to-wit: Tina Young, Court Reporter, Billy Gonzales, Videographer, Rick Billings, Mike McCarty, Jianbai Wang, Dan McMurray, Wayne Jones, Cheryl Sanders,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

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

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

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

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

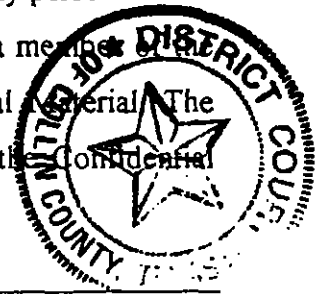


shall be permitted to transcribe portions of the disclosure as it deems appropriate with such transcriptions to be made from the videotape or live. The transcription will be subject to the confidentiality provisions of this order, and once completed shall be transported for safekeeping to a location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

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

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

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



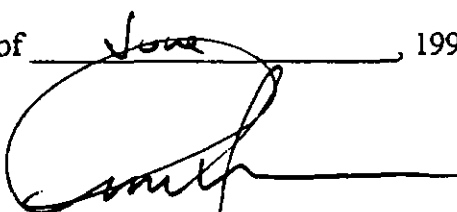
Material as are necessary to enable those team members to evaluate and protect the Solution as permitted by this Order, and all such notes and copies shall be preserved in a separate file maintained as confidential. The provisions of this paragraph do not preclude DSC from filing patent applications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

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

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

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

Signed this 30 of June, 1997.



Judge Curt B. Henderson, 219th Judicial District Court
sitting by assignment for the 199th Judicial District Court

