

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

APR 13 2006

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY [Signature] DEPUTY CLERK

ATSER, L.P., and ATSER RESEARCH
TECHNOLOGIES, INC. §

Plaintiff, §

VS. §

INTERSTATE QUALITY DATA §
SYSTEMS, INC.; DELOY M. DYE; and §
DAYANANDA JAVARAIAH §

Defendants. §

CIVIL CASE NO. 06-CV-00018 LY

JURY TRIAL REQUESTED

FIRST AMENDED COMPLAINT

For its First Amended Complaint against Defendants Interstate Quality Data Systems, Inc. ("IQD"), Deloy M. Dye, and Dayananda Javaraiah, Plaintiffs ATSER, L.P., and ATSER Research Technologies, Inc. (collectively referred to herein as "ATSER"), state as follows:

NATURE AND STATUTORY BASES OF ACTIONS

1. This is an action based on patent infringement arising under the laws of the United States, as provided for by 35 U.S.C. § 271. Further, this action is based on the Texas state law claims of trade secret misappropriation, breach of fiduciary duty, breach of contract, conspiracy, and the Texas Theft Liability Act which are so related to the patent infringement claim that they form part of the same case or controversy.

THE PARTIES

2. Plaintiff ATSER, L.P. is a limited partnership organized under the laws of the State of Texas with its principal place of business in Houston, Texas.

3. Plaintiff ATSER Research Technologies, Inc. is a corporation organized under the laws of the State of Texas with its principal place of business in Houston, Texas.

4. Defendant Interstate Quality Date Systems, Inc. is a corporation organized under the laws of the State of Utah with its principal place of business in Salt Lake City, Utah.

5. Defendant Deloy M. Dye who currently resides at 4649 Danna Circle, Salt Lake City, Utah 84119-6007.

6. Defendant Dayananda Javaraiah who currently resides at 478 Elizabeth Day Cove, Draper, Utah 84020-5189.

JURISDICTION AND VENUE

7. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1338 and 1331. Plaintiff ATSER requests that this Court assume supplemental jurisdiction over the state law claims of trade secret misappropriation, breach of fiduciary duty, breach of contract, conspiracy, and violations of the Texas Theft Liability Act, pursuant to 28 U.S.C. § 1367.

8. This Court has personal jurisdiction over Defendant IQD based upon its commission of one or more acts of infringement of ATSER's patent, trade secret misappropriation, conspiracy, and violation of the Texas Theft Liability Act in this District and elsewhere in the State of Texas, and its transaction of business within this District and the State of Texas.

9. This Court has personal jurisdiction over Deloy Dye based upon his commission of one or more acts of infringement of ATSER's patent, trade secret misappropriation, breach of fiduciary duty, breach of contract, conspiracy, and violation of the Texas Theft Liability Act in this District and elsewhere in the State of Texas, and his transaction of business within this District and the State of Texas.

10. This Court has personal jurisdiction over Dayananda Javaraiah based upon his commission of one or more acts of infringement of ATSER's patent, trade secret misappropriation, breach of fiduciary duty, breach of contract, conspiracy, and violation of the Texas Theft Liability Act in this District and elsewhere in the State of Texas, and its transaction of business within this District and the State of Texas.

11. Venue is proper in this district under 28 U.S.C. §§ 1391(b)(2) and 1400(b).

COUNT I
PATENT INFRINGEMENT

12. ATSER re-alleges and incorporates by reference herein the allegations contained in the preceding paragraphs of the First Amended Complaint.

13. On November 30, 2004, the United States Patent and Trademark Office duly and legally issued U.S. Patent No. 6,826,498 ("498 Patent"), entitled "Computerized Laboratory Information Management System," to Charles Birkner, Elias ElDahdah, Heather Ann Kirkland, and David Frederick Martinez ("Inventors"). Inventors assigned what became the '498 Patent to ATSER Systems, Inc., on August 27, 2001, who subsequently assigned the '498 Patent to ATSER Research Technologies, Inc. Plaintiff ATSER, L.P. was given an exclusive license on the '498 Patent including the right to enforce the '498 Patent against infringers. A copy of the '498 Patent is attached as Exhibit "A."

14. The '498 Patent is still in force and effect and is presumed valid pursuant to 35 U.S.C. § 282.

15. Defendant IQD has directly infringed, contributed to the infringement of, and/or induced the infringement of at least one claim of the '498 Patent by making, using, offering for sale and/or selling products, without limitation, Engineering Data Manager™ in violation of 35 U.S.C. § 271. Such infringement is continuing.

16. Defendant IQD had knowledge of the '498 Patent claims before it engaged in the infringing activity alleged in paragraph 15 above, and therefore, Defendant IQD's infringing activity was, and continues to be, willful.

17. Defendant Dye has directly infringed, contributed to the infringement of, and/or induced the infringement of at least one claim of the '498 Patent by making, using, offering for sale and/or selling products, without limitation, Engineering Data Manager™ in violation of 35 U.S.C. § 271. Such infringement is continuing.

18. Defendant Dye had knowledge of the '498 Patent claims before he engaged in the infringing activity alleged in paragraph 17 above, and therefore, Defendant Dye's infringing activity was, and continues to be, willful.

19. Defendant Javaraiah has directly infringed, contributed to the infringement of, and/or induced the infringement of at least one claim of the '498 Patent by making, using, offering for sale and/or selling products, without limitation, Engineering Data Manager™ in violation of 35 U.S.C. § 271. Such infringement is continuing.

20. Defendant Javaraiah had knowledge of the '498 Patent claims before he engaged in the infringing activity alleged in paragraph 19 above, and therefore, Defendant Javaraiah's infringing activity was, and continues to be willful.

21. The infringement by Defendants IQD, Dye, and Javaraiah, jointly and severally, has caused, and will continue to cause, ATSER damage and irreparable harm.

COUNT II
TRADE SECRET MISAPPROPRIATION

22. ATSER, L.P. re-alleges and incorporates by reference herein the allegations contained in the preceding paragraphs of the First Amended Complaint.

23. Defendant Deloy Dye was employed by ATSER, L.P. from July 12, 2000, to August 25, 2003, as a manager for transportation design build projects. Mr. Dye's duties in this position included, but was not limited to, (1) marketing transportation projects; (2) identifying design build opportunities; (3) developing client relationships for future projects and teaming opportunities; (4) further developing Construct-It; (5) improving quality and staff development; and (6) managing projects which included project staffing, scheduling, and cost control.

24. Defendant Javaraiah was employed by ATSER, L.P. from September 5, 2001, to August 27, 2002, as a project control specialist for the T-Rex project in Denver. Mr. Javaraiah's duties included (1) performing field and lab testing support for implementation of ATSER technology; (2) assisting all T-Rex project personnel/partners in day-to-day operations of technology; (3) coordinating all on-site customer service activities for T-Rex project; (4) assisting systems group in identifying enhancement and trouble-shooting; (5) performing required data administration and analysis for project data; (6) conducting periodic systems audits to ensure data integrity; (7) providing weekly implementation status reports to systems group; (8) providing network administration support for ATSER, L.P.'s Denver office; (9) assisting in preparing daily, weekly, and monthly reports for T-Rex project team/project website; (10) performing independent verification audits ("IVT") for field and laboratory processes; and (11) assisting Blair Peterson/Lab Manager by performing lab test during peak loading periods.

25. ATSER, L.P. developed and used a confidential, trade secret computer program known as Assure-It, a structural material testing database, a unique hand-held system for efficient recording of test data and transfer to a centralized database, and a checklist for inspection and testing ("ATSER, L.P.'s trade secrets"), each of which were developed by ATSER, L.P. at considerable time and expense.

26. ATSER, L.P.'s trade secrets were only disclosed to employees, such as Defendants Dye and Javaraiah, who had a need to know about them in order to carry out their work for ATSER, L.P.. ATSER, L.P. admonished employees to keep this information confidential in ATSER, L.P.'s policy manual and in periodic meetings. ATSER, L.P.'s data center is a controlled access facility, and viewing rights to ATSER, L.P.'s trade secrets are restricted. Both Defendants Dye and Javaraiah were informed of the confidential, trade secret nature of this material in their job offer letters, and each entered into a non-disclosure agreement with ATSER, L.P. in order to protect ATSER, L.P.'s trade secrets. Furthermore, this trade secret information was not shared with clients or outside third parties.

27. Defendant Dye executed a non-disclosure agreement before starting work with ATSER, L.P. which provided, among other things, that he would not disclose ATSER, L.P.'s trade secrets to others, and he would only use ATSER, L.P.'s trade secrets in the performance of his duties for ATSER, L.P. for so long as ATSER, L.P.'s trade secrets remained secret.

28. Defendant Javaraiah executed a non-disclosure agreement before starting with ATSER, L.P. which provided, among other things, that he would not disclose ATSER, L.P.'s trade secrets to others, and he would only use ATSER, L.P.'s trade secrets in the performance of his duties for ATSER, L.P. for so long as ATSER, L.P.'s trade secrets remained secret.

29. Defendants Dye and Javaraiah formed a business together by the name of Interstate Quality Data Systems which uses ATSER, L.P.'s trade secrets.

30. On information and belief, Defendants Dye and Javaraiah have misappropriated ATSER, L.P.'s trade secrets by using them and disclosing them to third parties without a privilege to do so, all in breach of the confidence reposed in Defendants Dye and Javaraiah by

ATSER, L.P. in disclosing ATSER, L.P.'s trade secrets to each of them and in breach of their non-disclosure agreements.

31. On information and belief, Defendant IQD, acting through its officers and directors, was aware that the information disclosed to it by Defendants Dye and Javaraiah was trade secret information belonging to ATSER, L.P. and that Defendants Dye and Javaraiah's disclosure to Defendant IQD was in violation of Defendants Dye and Javaraiah's contractual and fiduciary duties to ATSER, L.P. Nevertheless, Defendant IQD has utilized ATSER, L.P.'s trade secrets in competition with ATSER, L.P., and continues to do so.

32. Defendants Dye, Javaraiah, and IQD knowingly conspired to misappropriate the trade secrets of ATSER, L.P. to cause injury to ATSER, L.P.'s business.

33. As a result of Defendants Dye, Javaraiah, and IQD's trade secret misappropriation, ATSER, L.P. has been injured in its business.

COUNT III
BREACH OF FIDUCIARY DUTY

34. ATSER, L.P. re-alleges and incorporates by reference herein the allegations contained in the preceding paragraphs of the First Amended Complaint.

35. Defendant Deloy Dye was employed by ATSER, L.P. from July 12, 2000, to August 25, 2003, as a manager for transportation design build projects.

36. Defendant Javaraiah was employed by ATSER, L.P. from September 5, 2001, to August 27, 2002, as a project control specialist for the T-Rex project in Denver.

37. While Defendant Dye was employed by ATSER, L.P., he represented ATSER, L.P. during negotiations with ATSER, L.P.'s potential customers on the SH-130 project. Aside from the formal negotiations, and based on information and belief, Defendant Dye conducted secret meetings with ATSER, L.P.'s potential customers for his own benefit and against the

interests of ATSER, L.P. The result was that ATSER, L.P. was denied the opportunity to work on the SH-130 project, but Defendant Dye was thereafter employed by said potential customers, turned competitors, following his employment with ATSER, L.P.

38. Defendants Dye and Javaraiah formed a business together known as Interstate Quality Data Systems which uses ATSER, L.P.'s trade secrets.

39. The acts of both Defendants Dye and Javaraiah constitute breaches of the following fiduciary duties: duty of loyalty and utmost good faith, duty of candor, duty to refrain from self-dealing, duty to act with integrity of the strictest kind, duty of fair, honest dealing, and duty of full disclosure.

40. As a result of Defendants Dye and Javaraiah's breach of their fiduciary duties, ATSER, L.P. has been injured in its business, and both Defendants Dye and Javaraiah have benefited from their breach of fiduciary duties monetarily and through the creation of their company, namely Defendant IQD, which uses ATSER, L.P.'s trade secret information provided by Defendants Dye and Javaraiah.

COUNT IV
BREACH OF CONTRACT

41. ATSER, L.P. re-alleges and incorporates by reference herein the allegations contained in the preceding paragraphs of the First Amended Complaint.

42. On July 12, 2000, Defendant Dye entered into a non-disclosure agreement with ATSER, L.P. whereby Defendant Dye promised not to disclose ATSER, L.P.'s confidential, trade secret material which was clearly defined. A copy of the signed non-disclosure agreement is attached hereto as Exhibit "B," and it is incorporated by reference.

43. In consideration for the non-disclosure agreement signed by Defendant Dye, ATSER, L.P. employed Dye from July 12, 2000, to August 25, 2003, as a manager for transportation design build projects.

44. On September 5, 2001, Defendant Javaraiah entered into a non-disclosure agreement with ATSER, L.P. whereby Defendant Javaraiah promised not to disclose ATSER, L.P.'s confidential, trade secret material which was clearly defined. A copy of the signed non-disclosure agreement is attached hereto as Exhibit "C," and it is incorporated by reference.

45. In consideration for the non-disclosure agreement signed by Defendant Javaraiah, ATSER, L.P. employed Javaraiah from September 5, 2001, to August 27, 2002, as a project control specialist for the T-Rex project in Denver.

46. Both Defendants Dye and Javaraiah used ATSER, L.P.'s trade secrets for their own, individual endeavors including sharing ATSER, L.P.'s trade secrets with third party competitors. Further, Defendants Dye and Javaraiah formed a business together known as Interstate Quality Data Systems which uses ATSER, L.P.'s trade secrets.

47. As a result of Defendants Dye and Javaraiah's breach of their non-disclosure agreements, ATSER, L.P. has been injured by the loss of business to Dye, Javaraiah, their company IQD, and third party competitors who received ATSER, L.P.'s trade secrets from Dye and Javaraiah. This injury to Plaintiff ATSER, L.P.'s business is a natural, probable, and foreseeable consequence of Defendants Dye and Javaraiah's breach of their non-disclosure agreements.

COUNT V
TEXAS THEFT LIABILITY ACT

48. ATSER, L.P. re-alleges and incorporates by reference herein the allegations contained in the preceding paragraphs of the First Amended Complaint.

49. ATSER, L.P. developed and used a trade secret computer program known as Assure-It, a structural material testing database, a unique hand-held system for efficient recording of test data and transfer to a centralized database, and a checklist for inspection and testing, each of which were developed by ATSER, L.P. at considerable time and expense.

50. On information and belief, Defendants Dye, Javaraiah, and IQD have misappropriated ATSER, L.P.'s trade secrets by using them and disclosing them to third parties without a privilege to do so, all in breach of the confidence reposed in Defendants Dye and Javaraiah by ATSER, L.P. in disclosing ATSER, L.P.'s trade secrets to each of them and in breach of their non-disclosure agreements.

51. On information and belief, Defendants Dye, Javaraiah, and IQD have intentionally deprived ATSER, L.P. of its property through the misappropriation of ATSER, L.P.'s trade secrets with full knowledge that the material was trade secret. ATSER, L.P.'s trade secrets were only disclosed to employees, such as Defendants Dye and Javaraiah, who had a need to know about them in order to carry out their work for ATSER, L.P.. ATSER, L.P. admonished employees to keep this information confidential in ATSER, L.P.'s policy manual and in periodic meetings. ATSER, L.P.'s data center is a controlled-access facility, and viewing rights to these trade secrets are restricted. Both Defendants Dye and Javaraiah were informed of the confidential, trade secret nature of this material in their job offer letters, and each entered into a non-disclosure agreement with ATSER, L.P. in order to protect these trade secrets. Furthermore, this trade secret information was not shared with clients or outside third parties.

52. Defendants Dye, Javaraiah, and IQD have disposed of ATSER, L.P.'s trade secrets in a manner that makes recovery of the property unlikely given that Defendants have already shared these trade secrets with third parties.

53. As a result of Defendants Dye, Javaraiah, and IQD's theft of trade secrets in violation of the Texas Theft Liability Act, which is related to Texas Penal Code § 31.05 making theft of trade secrets a felony offense, ATSER, L.P. has sustained injuries in the form of lost business opportunities and revenue to Defendants and third party competitors with whom Defendants have shared ATSER, L.P.'s trade secrets.

COUNT VI
CONSPIRACY

54. ATSER, L.P. re-alleges and incorporates by reference herein the allegations contained in the preceding paragraphs of the First Amended Complaint.

55. Defendants Dye, Javaraiah, and IQD have conspired in order to misappropriate ATSER, L.P.'s trade secrets and violate the Texas Theft Liability Act.

56. On information and belief, Defendants Dye, Javaraiah, and IQD misappropriated trade secret information from ATSER, L.P. for individual gain and to support a new business, IQD, to compete with ATSER, L.P.

57. Defendants Dye and Javaraiah each misappropriated trade secrets, breached their fiduciary duties to ATSER, L.P., breached their non-disclosure agreements with ATSER, L.P., and stole ATSER, L.P.'s trade secrets in violation of the Texas Theft Liability Act to further their object of using ATSER, L.P.'s trade secret information to steal ATSER, L.P.'s business opportunities. Defendant IQD conspired with Dye and Javaraiah to misappropriate ATSER, L.P.'s trade secrets and steal ATSER, L.P.'s trade secrets in violation of the Texas Theft Liability Act.

58. As a proximate result of Defendants Dye, Javaraiah, and IQD's wrongful acts, ATSER, L.P. has suffered financial losses and loss of reputation.

PRAYER FOR RELIEF

WHEREFORE, ATSER prays this Court to:

1. Decree that ATSER Research Technologies, Inc. is the owner of the '498 Patent, and ATSER, L.P. is the exclusive licensee of the '498 Patent;
2. Decree that Defendants Interstate Quality Data Systems, Inc., Deloy M. Dye, and Dayananda Javaraiah have each infringed, contributed to, and/or induced infringement of the '498 Patent and that such infringement is willful and continuing;
3. Issue an injunction preliminarily and permanently enjoining Defendants Interstate Quality Data Systems, Inc., Deloy M. Dye, and Dayananda Javaraiah, and any entity acting in concert therewith, from infringing the '498 Patent.
4. Award against all Defendants, jointly and severally, ATSER's actual damages suffered on account of the infringement in an amount no less than the reasonable royalty for the infringement;
5. Award treble damages against all Defendants, jointly and severally, pursuant to 35 U.S.C. § 284;
6. Assess interest and costs against all Defendants, jointly and severally, pursuant to 35 U.S.C. § 284;
7. Award ATSER's reasonable attorneys' fees against all Defendants, jointly and severally, pursuant to 35 U.S.C. § 285;
8. Decree that Defendants Interstate Quality Data Systems, Inc., Deloy M. Dye, and Dayananda Javaraiah have misappropriated ATSER, L.P.'s trade secrets;

9. Issue preliminary and permanent injunction enjoining each Defendant, their officers, directors, employees, agents and all those controlled by them, from using or disclosing ATSER, L.P.'s trade secrets;

10. Award compensatory and punitive damages to ATSER, L.P. by reason of Defendants Interstate Quality Data Systems, Inc., Deloy M. Dye, and Dayananda Javaraiah's willful and malicious misappropriation of ATSER, L.P.'s trade secrets, including ATSER, L.P.'s lost profits and Defendants' unjust enrichment, and an increase of up to twice these damages as a result of the willful and malicious nature of each Defendants' conduct;

11. Award costs and attorneys' fees against Defendants Interstate Quality Data Systems, Inc., Deloy M. Dye, and Dayananda Javaraiah for their willful and malicious misappropriation;

12. Decree that Defendants Deloy M. Dye, and Dayananda Javaraiah each breached their fiduciary duties and non-disclosure agreements with ATSER, L.P.;

13. Enter judgment for ATSER, L.P. awarding it the damages and any other monetary relief to which it is entitled under the law as a result of Defendants Dye and Javaraiah's breach of their fiduciary duties and breach of their non-disclosure agreements;

14. Award ATSER, L.P. its attorney's fees and costs against Defendants Dye and Javaraiah, jointly and severally for their breach of fiduciary duties and breach of their non-disclosure agreements with ATSER, L.P.;

15. Decree that all Defendants are liable to ATSER, L.P. pursuant to the Texas Theft Liability Act for the misappropriation of ATSER, L.P.'s trade secrets;

16. Enter judgment for ATSER, L.P. awarding it the damages and any other monetary relief to which it is entitled under the law as a result of Defendants' violation of the Texas Theft Liability Act;

17. Award ATSER, L.P. its attorney's fees and costs against all Defendants, jointly and severally, for their violation of the Texas Theft Liability Act;

18. Decree that all Defendants conspired to misappropriate ATSER, L.P.'s trade secrets and violate the Texas Theft Liability Act;

19. Enter judgment for ATSER, L.P. awarding it the damages and any other monetary relief to which it is entitled under the law as a result of Defendants' conspiracy; and

20. Award such further relief as justice may require and the Court may deem appropriate.

Respectfully submitted,

MEHAFFY WEBER, P.C.



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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

**NOTICE OF DOCUMENT(S) NOT IMAGED
AND CONTAINED IN FOLDER**

Civil Case No. A-06-CV-018-LY

Atser,L.P., et al.

VS.

Interstate Quality Data Systems, Inc., et al.

Attachments to

Document #: 5

Description: exhibits to first amd cmp

Filed By: pltf

File Date: 4/13/06



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