

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

CHEMCAL, INC., AND	§	
H <sub>2</sub> TRONICS, INC.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 3:10-CV-1978
	§	
DELTA WATER TECHNOLOGIES, INC.,	§	
GEORGE C. TULL, AND	§	
JOHN DOE	§	JURY DEMANDED
	§	
Defendants.	§	

PLAINTIFFS’ ORIGINAL COMPLAINT

COME NOW, Plaintiffs ChemCal, Inc. (“ChemCal”) and H<sub>2</sub>trOnics, Inc. (“H<sub>2</sub>trOnics”) (collectively, “Plaintiffs”) and file their Original Complaint against Defendants Delta Water Technologies, Inc. (“Delta”), George C. Tull (“Tull”), and John Doe (“Doe”) (collectively, “Defendants”). In this Complaint, Plaintiffs assert claims against Defendants for patent infringement, trademark infringement, trade dress infringement, trade secret misappropriation, unfair competition, common law misappropriation, and unjust enrichment, all under Texas law. Plaintiffs seek actual and exemplary damages against Defendants as well as attorneys’ fees under Texas Civil Practices and Remedies Code § 38.001 *et seq.*

**PARTIES**

1. Plaintiff ChemCal, Inc. is a Texas corporation that maintains its principal place of business at 635 Westport Parkway, Suite 312, Grapevine, TX 76051.

2. Plaintiff H<sub>2</sub>trOnics, Inc. is a Texas corporation that maintains its principal place of business at 635 Westport Parkway, Suite 312, Grapevine, TX 76051.

3. On information and belief, Defendant George C. Tull is an individual citizen of the state of Texas, who resides at 4807 103rd Street, Lubbock, TX 79424.

4. On information and belief, Defendant Delta Water Technologies, Inc. is a Texas corporation that maintains its principal place of business at 4206 MLK Jr. Blvd., Lubbock, TX 79404, and may be served with process through its registered agent, George C. Tull.

5. On information and belief, Defendant John Doe is an individual or individuals associated with Defendants Delta and/or Tull. The name, citizenship, and residence of Defendant Doe is currently unknown.

#### JURISDICTION AND VENUE

6. The Court has subject-matter jurisdiction over Plaintiffs' claims under 28 U.S.C. §§ 1331 and 1338. The Court also has subject-matter jurisdiction over Plaintiffs' claims under 28 U.S.C. § 1367.

7. The Court has personal jurisdiction over Defendants, directly or through their agents, as Defendants have committed the complained of acts in this District and the State of Texas. Upon information and belief, Defendants otherwise conduct business in this District and the State of Texas, directly or through their agents. Defendants further avail themselves of the laws of this district and the State of Texas by operating an Internet website, [www.deltah2olabs.com](http://www.deltah2olabs.com). Moreover, Defendant Tull is the President and/or an executive officer of Defendant Delta and, in that capacity, has directed the complained of

acts. In addition, upon information and belief, Defendant Doe acted with the authority and/or on behalf of Defendants Delta and/or Tull.

8. Under 28 U.S.C. § 1391(b), venue is proper in this judicial District because a substantial part of the events giving rise to the claims of this action occurred in this District. Venue is also proper under 28 U.S.C. § 1391(c) because Defendant Delta is a corporation and the federal courts in this judicial district have personal jurisdiction over Defendant Delta related to Plaintiffs' claims. Venue is also proper under 28 U.S.C. § 1400(b).

#### FACTUAL BACKGROUND

##### *Plaintiffs' History*

9. Incorporated in 1984, Plaintiff ChemCal is an internationally recognized leader in water treatment science and technology with its headquarters, laboratories, and manufacturing facilities located in Grapevine, Texas. ChemCal provides innovative chemical, equipment, and service products aimed at controlling deposits, corrosion, and biological fouling in water-using systems found in industrial and institutional settings.

10. Plaintiff H<sub>2</sub>trOnics, a wholly owned subsidiary of ChemCal that was incorporated in 2005, offers its customers a full range of industry-recognized water treatment solutions designed using the latest technology and expertise. H<sub>2</sub>trOnics is a leading supplier of water treatment feed and control systems and offers a full line of products ranging from chlorine dioxide generators to web-based data management software.

*Development, Marketing, and Success of the eServiceReport™ Application*

11. In 2000, Plaintiff ChemCal began development of a web-based software application that was and continues to be successfully marketed under the brand eServiceReport™. The eServiceReport™ application is designed to assist water treatment professionals by providing sophisticated (yet user-friendly) data logging, continuous monitoring, and communication/analysis of test results.

12. Water treatment at the commercial and industrial levels relies in large part on the collection of sample data and analysis of such data. The treatments are typically directed to the control of, *inter alia*, deposits, scale, corrosion, and microbiological growth in the commercial and industrial water systems. The data from such treatment may come from different systems, components of those systems, and/or the water and chemicals as they pass through those systems. Management and monitoring of such treatment can quickly become extraordinarily complicated and disorganized, regardless whether a company handles in-house or with the assistance of outside water treatment professionals. Accordingly, successful water treatment requires the measuring and recording of various water and related attributes to ensure, along with later calculations and analysis, that any applied product(s) is serving its purpose and thereby maintaining the affected water in a manner suitable for the water system application. When ChemCal undertook development of the eServiceReport™ application in 2000, it recognized that the success thereof depended on logging the data in an accurate and organized manner and then allowing the user to view and analyze the data in a manner that is easy to access and understand.

13. Since 2002, ChemCal has employed at least one full-time Software Engineer whose primary job duty has been (and continues to be) to develop, refine, and support the eServiceReport™ application.

14. In addition to the full-time Software Engineer, Steve Dumler, Blaine Nagao, and Adam Dumler – executives of ChemCal and H<sub>2</sub>trOnics – have been continuously and integrally involved in development of the eServiceReport™ application throughout the entire process.

15. In the aggregate, Plaintiffs have invested millions of dollars to develop and market the eServiceReport™ application.

16. The eServiceReport™ application was a major step forward in the water treatment industry, effectively replacing the pencil and paper binder traditionally used by most water treatment companies and providing additional easy-to-use analysis tools. With the eServiceReport™ application, ChemCal successfully combined the functional requirements of water treatment professionals in an attractive and user-friendly interface accessible over the web using industry standard Internet browsers. Once logged in, users of the eServiceReport™ application can both create and view multiple report types, graph test results and trends, view controller data, and access product safety information. *See, e.g.,* Exhibit A.

17. Since its launch, the eServiceReport™ application has enjoyed tremendous success in the water treatment industry. The eServiceReport™ application is currently used by over forty (40) water treatment companies worldwide, ranging from small businesses to Fortune 500 companies.

18. The eServiceReport™ application has become a significant and consistent source of revenue for Plaintiffs. Revenue generated by the eServiceReport™ application includes both: (a) direct revenue paid by authorized eServiceReport™ customers to access and use the application; and (b) indirect revenue paid by authorized eServiceReport™ customers to obtain water treatment hardware that can be used for generating test results to be used by the application.

***Plaintiffs' Protectable Rights Relating to the eServiceReport™ Application***

19. Throughout the development and marketing of the eServiceReport™ application, Plaintiffs have diligently developed and obtained proprietary rights relating thereto. In addition to common law rights that have arisen through Plaintiffs' use of the mark eServiceReport™ and the application itself, Plaintiffs have sought and obtained registration for various types of intellectual property relating thereto.

20. Plaintiffs have continuously and carefully restricted access to the source code of the eServiceReport™ application to only authorized personnel and limited use of the eServiceReport™ application to only authorized users. By way of example but not limitation, Plaintiffs have maintained strict user name and password protection for the eServiceReport™ application. Plaintiffs have also disabled the right mouse click "View Source" (or comparable) features of Internet browsers when using the eServiceReport™ application, thereby preventing even authorized users from viewing the compiled code underlying the eServiceReport™ application.

21. Since the eServiceReport™ application was marketed and released in 2001, Plaintiffs have continuously and exclusively used the mark eServiceReport™ as a trademark

to identify their web-based software application. Since 2001, Plaintiffs have extensively marketed the eServiceReport™ application, *inter alia*, in trade magazines, at regional and national trade shows, and on the Internet. *See, e.g.*, Exhibit B. The mark eServiceReport™ has thus become recognized by the relevant consuming public, including but not limited to those in the industry, and has become an indicator of product source associated with Plaintiffs.

22. The eServiceReport™ application has consistently utilized a distinctive overall look and feel that has become recognized by the relevant consuming public, including but not limited to those in the industry. Accordingly, the distinctive overall look and feel of the eServiceReport™ application has become an indicator of product source associated with Plaintiffs.

23. On or about July 20, 2004, Plaintiff ChemCal filed a copyright application for the eServiceReport™ computer program.

24. Plaintiffs have continuously provided copyright notice relating to the eServiceReport™ computer program, with such notice prominently included on the login page when users begin a use session of the eServiceReport™ application.

25. On or about March 24, 2009, U.S. Patent No. 7,509,238 for “Computer Program for Water Treatment Data Management” (“the ’238 Patent”) was issued. *See* Exhibit C. The ’238 Patent names as inventors Stephen Dumler, Blaine Nagao, Adam Dumler, and David Hollabaugh. All right, title, and interest in and to the ’238 Patent was assigned to Plaintiff H<sub>2</sub>trOnics, thus Plaintiff H<sub>2</sub>trOnics is the current owner of the ’238 Patent. The ’238 Patent claims priority to two separate provisional patent applications –

U.S. Provisional Patent Application Serial No. 60/583,210 filed on June 25, 2004 and U.S. Provisional Patent Application Serial No. 60/663,775 filed on March 21, 2005. The '238 Patent has a total of fifty-three (53) issued claims.

26. During pendency of the applications that matured into the '238 Patent, Plaintiffs continuously provided a "Patent Pending" notice prominently included on the login page when users began a use session of the eServiceReport™ application. Since the '238 Patent issued on March 24, 2009, Plaintiffs have continuously provided notice of the patent number prominently included on the login page when users begin a use session of the eServiceReport™ application.

***History of Relationship Between Plaintiffs and Defendants***

27. Plaintiffs and Defendants first became acquainted in or about September 2007 when Plaintiff ChemCal desired to investigate the possibility of acquiring Defendant Delta. In order to perform the necessary due diligence associated therewith, Plaintiff ChemCal and Defendant Delta executed a Nondisclosure and Confidentiality Agreement effective October 1, 2007. See Exhibit D. Some limited discussions between Plaintiff ChemCal and Defendant Delta occurred but it quickly became clear to both parties that mutually agreeable terms could not be reached. As a result, no acquisition occurred.

28. In December 2007, Defendants Delta and Tull contacted Plaintiffs and requested that Delta be set up as a new customer for the eServiceReport™ application. See Exhibit E. In accordance with Defendants' request, on December 6, 2007, Plaintiffs invoiced and Defendants paid for one (1) year of service for the eServiceReport™ application at a cost of \$5,445.00. Plaintiffs also invoiced and Defendants paid a standard

eServiceReport™ application set up fee of \$250.00. On December 1, 2008, Plaintiffs again invoiced and Defendants paid for another one (1) year of service for the eServiceReport™ application at a cost of \$5,445.00. During the second year, Defendants also purchased an SSL Certificate in association with the eServiceReport™ application at a rate of \$350.00 per year. Over the course of two (2) years of licensed use of the eServiceReport™ application, Defendants paid a grand total of \$11,490.00 to Plaintiffs for the right to set up and use the eServiceReport™ application.

29. On December 1, 2009, Plaintiffs once again invoiced Defendants for another one (1) year of service for the eServiceReport™ application. However, soon thereafter, Defendant Tull contacted one or more representatives of Plaintiffs and advised that Defendants would not be renewing their license to use the eServiceReport™ application because they planned to create their own software application to use internally. Notably, Defendant Tull did not mention any intention to market this new software application to third parties - he only mentioned it would be used internally by Defendants.

30. Because Defendants failed to renew their license to use the eServiceReport™ application, Defendants' right to use such application terminated as of December 31, 2009.

***Defendants' Improper Development, Use, and Marketing of Software Application***

31. Although Defendants represented to Plaintiffs in December 2009 that Defendants' new software application was only for internal use, Plaintiffs recently became aware of Defendants' attempts to market and license its software application to third parties. For instance, on Defendants' website [www.deltawaterlabs.com](http://www.deltawaterlabs.com), Defendants state "Delta Water Laboratories is a business providing industrial customers with water

treatment chemical products and related equipment, along with technical services related to industrial water treatment. Our e-business site was developed to supplement our traditional customer services. We offer quality products to online customers, large and small. Through e-services, we are extending the range of quality technical services down the small (often overlooked) water treatment customer.” See Exhibit F.

32. Defendants’ website [www.deltawaterlabs.com](http://www.deltawaterlabs.com) further includes the statement “Now Introducing DeltaH2OLabs.com E-Service Reports” and provides a hyperlink labeled “e-Service via Internet” that opens a second website at [www.deltah2olabs.com](http://www.deltah2olabs.com). See Exhibit F.

33. Defendants’ second website at [www.deltah2olabs.com](http://www.deltah2olabs.com) is titled “Delta H<sub>2</sub>O Labs - Data Logging and Communications” and states “Welcome to Delta H<sub>2</sub>O Labs E-Service Website.” See Exhibit G. The home page of this website includes a blank for entering a Username and Password; however, Plaintiffs do not have access to a Username or Password so Plaintiffs have thus far been unable to gain access to Defendants’ self-described “new DeltaH<sub>2</sub>OLabs online E-Service report system.”

34. Although most menu commands on the website [www.deltah2olabs.com](http://www.deltah2olabs.com) are disabled until a user logs in, the “Website Navigation” command under the “Help” pull-down menu is currently active without the need to log in. The web page for “Website Navigation” provides information regarding Login, Setup, and Reports, as well as sections on “Tips and Tricks,” “About,” “User,” and “Calendar.” See Exhibit G.

35. Notably, the Reports information under “Website Navigation” states that “Once the customer hierarchy has been defined, users can create reports. A report is

associated with one of the objects in the customer hierarchy: *Customer, Facility, Building, or System.*” See Exhibit G. This customer hierarchy corresponds exactly to the customer hierarchy provided in Plaintiffs’ eServiceReport™ application and disclosed in the ’238 Patent (see FIG. 3).

36. Plaintiffs also recently became aware that, during the two years it was licensed by Plaintiffs, Defendant Delta authorized a user name “Coder” to access Plaintiffs’ eServiceReport™ application. Pursuant to Plaintiffs’ user name and password protection policy for the eServiceReport™ application, a licensed customer is permitted to create a certain number of user names to use the application. The licensed customer is allowed to assign varying levels of permissions to access and use the application. Although Plaintiffs currently are unaware of any existing records indicating the overall number of times and/or the frequency at which a person or persons utilizing user name “Coder” accessed the eServiceReport™ application, Plaintiffs’ currently available records do indicate at least the following: (a) user name “Coder” was initially assigned very limited permissions to access and use the eServiceReport™ application to essentially data entry, but was subsequently assigned the broadest permissions possible by Defendant Delta (all available permissions were assigned a value of “yes”) to allow very broad access; (b) user name “Coder” was used at least once in January 2009 from an IP address located in Midland, Texas, using Windows XP with Internet Explorer 6.0; (c) user name “Coder” was used at least once in January 2010 from an IP address located in Atlanta, Georgia, using Mac OS X Snow Leopard with Safari; and (d) the time-stamped click records indicate a wide variety of pages were visited utilizing user name “Coder,” each for less than one minute, which would

be consistent with capturing screenshots of the various pages. Plaintiffs currently have no way to identify a specific person or persons who utilized user name “Coder” (or the frequency of such use) but user name “Coder” was created by and controlled by Defendants Delta and Tull.

37. Upon information and belief, Defendants have improperly copied, used, marketed, and sold a software application in violation of Plaintiffs’ protectable rights, and continue to do so. By way of example, Defendants have, without authorization, used the trademark associated with Plaintiffs’ eServiceReport™ application, copied the customer hierarchy associated therewith, and adopted the distinctive look and feel associated therewith. As further facts are developed through discovery, it is expected that additional unauthorized actions by Defendants will be discovered.

***Plaintiffs’ Pre-Suit Communications with Defendants***

38. In attempt to further investigate the extent of Defendants’ unauthorized actions and/or to amicably resolve this matter without the need for litigation, Plaintiffs scheduled and conducted a conference telephone call with Defendant Tull on the afternoon of Tuesday, September 28, 2010. During this conversation, Plaintiffs indicated that they welcome fair competition but were concerned that Defendants may be engaging in unfair competition and/or other improper activities. Plaintiffs thus requested that Defendants provide additional information regarding their new software application – in particular, Plaintiffs requested that Defendants provide a remote video demonstration of their new software application in an attempt to put to rest their concerns. Plaintiffs also

mentioned the '238 Patent. The discussion was amicable, but Defendant Tull indicated he would like to see a written request.

39. Later in the day on Tuesday, September 28, 2010, Steve Dumler of Plaintiff ChemCal transmitted an email to Defendant Tull thanking him for the conference call and noting Plaintiffs' 10-year investment in the eServiceReport™ application and intellectual property rights relating thereto. *See* Exhibit H. This email also referenced the '238 Patent and attached a copy. Finally, the email specifically requested that Defendants allow Plaintiffs to view Defendants' new software application in operation in order to resolve any concerns:

Based on the limited information we've seen thus far, we do have some concerns - especially considering the fact that Delta was our customer and had access to our product for about 2 years. Of course, if you were willing to show us more about your new product, it may relieve those concerns. We asked if you would mind demonstrating the product for us, but you said you'd like a written request. Note that we are not asking for (and do not want) access to poke around your product. We're simply asking if you could do a demo through WebEx or something similar to show us that the product is not violating any of our rights.

Please confirm when you receive this email and let us know that you're willing to demo your product for us. If so, we'd like to schedule a call for later this week.

40. On the morning of Wednesday, September 29, 2010, Defendant Tull provided a reply email to Steve Dumler of Plaintiff ChemCal. *See* Exhibit H. In relevant part, Defendant Tull's email stated:

I am in receipt of a copy of your United States Patent No. 7,509,238 B1 dated March 24, 2009. ... Our opinion is that we have not violated your rights under this patent. We will examine the matter more thoroughly, and moving forward we will make sure that we do not infringe on any portion of your patent. ...

Through our discussion process, you have convinced me of the value of applying for a patent so that our competitive claims can be looked at by a patent examiner. I am not willing to provide product demonstrations until the patent process is underway. Note, however, that by being willing to go through the patent application process, we will be allowing our claims to be looked at and compared to your competitive claims to make sure that we have respected your rights.

Defendants thus directly refused Plaintiffs' request for additional information regarding the accused software application and rendered it impossible for Plaintiffs to further investigate its claims prior to filing suit.

**CLAIM I**  
**INFRINGEMENT OF U.S. PATENT NO. 7,509,238**

41. Plaintiffs repeat and reallege the factual allegations of paragraphs 1 through 40 above as if set forth at length herein.

42. The United States Patent and Trademark Office issued the '238 Patent on March 24, 2009. Attached as Exhibit C is a true and correct copy of the '238 Patent. Through assignment, Plaintiff H<sub>2</sub>trOnics is the owner of all right, title, and interest in and to the '238 Patent, including all rights to pursue and collect damages for past infringements of the patent.

43. Defendants have infringed, contributed to the infringement, and induced others to infringe the '238 Patent and, unless enjoined, will continue to do so, by manufacturing, importing, using, selling, or offering for sale products and services that infringe one or more claims of the '238 Patent and by contributing to or inducing others to infringe one or more claims of the '238 Patent without a license or permission from Plaintiffs.

44. Plaintiffs have been damaged by Defendants' infringement of the '238 Patent and will suffer additional irreparable damage and impairment of the value of their patent rights unless Defendants are enjoined from continuing to infringe the '238 Patent.

45. Defendants are and have been willfully infringing one or more claims of the '238 Patent.

46. Plaintiffs are entitled to recover damages from Defendants to compensate them for the infringement.

**CLAIM II**  
**TRADEMARK INFRINGEMENT UNDER § 43(A) OF THE LANHAM ACT**

47. Plaintiffs repeat and reallege the factual allegations of paragraphs 1 through 46 above as if set forth at length herein.

48. This cause of action arises under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

49. Plaintiffs' mark eServiceReport™ has attained secondary meaning in the minds of the relevant consumers and has therefore become protectable.

50. Defendants' unauthorized manufacture, importation, distribution and sale in interstate commerce of Defendants' new software application using a mark confusingly similar to Plaintiffs' mark eServiceReport™ is likely to cause confusion, mistake or deception of purchasers and potential purchasers as to the origin, sponsorship or approval of the goods by Plaintiffs. Defendants' unauthorized manufacture, importation, distribution and sale in commerce of their new software application using a mark confusingly similar to Plaintiffs' mark eServiceReport™ falsely designates the origin of

Defendants' software application and is likely to cause confusion, mistake or deception about the origin of Defendants' software application.

51. Plaintiffs have suffered and continue to suffer substantial injury, resulting in damages to Plaintiffs, including loss of sales and profits, which Plaintiffs would have realized but for the above-described wrongful activities of Defendants.

52. Plaintiffs have suffered and continue to suffer substantial injury to their goodwill and reputation as a result of the above-described wrongful activities of Defendants.

53. Plaintiffs seek all remedies available under the Lanham Act, including but not limited to those provided by 15 U.S.C. §§ 1116(a) and 1117(a).

54. Plaintiffs have suffered and will continue to suffer irreparable injury unless this Court enjoins Defendants. Plaintiffs have no adequate remedy at law.

**CLAIM III  
COMMON LAW TRADEMARK INFRINGEMENT UNDER TEXAS LAW**

55. Plaintiffs repeat and reallege the factual allegations of paragraphs 1 through 54 above as if set forth at length herein.

56. This cause of action arises under the Common Law of the State of Texas.

57. Defendants, by their acts, have infringed upon Plaintiffs' common law rights in their mark eServiceReport™ and will continue to do so unless enjoined by this Court.

58. Defendants' acts have caused and will continue to cause Plaintiffs irreparable harm unless enjoined by this Court. Plaintiffs have no adequate remedy at law.

**CLAIM IV**  
**TRADE DRESS INFRINGEMENT UNDER § 43(A) OF THE LANHAM ACT**

59. Plaintiffs repeat and reallege the factual allegations of paragraphs 1 through 58 above as if set forth at length herein.

60. This cause of action arises under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

61. The trade dress of Plaintiffs' eServiceReport™ application has attained secondary meaning in the minds of the relevant consumers.

62. The trade dress of Plaintiffs' eServiceReport™ application is primarily nonfunctional in nature.

63. Defendants' unauthorized manufacture, importation, distribution and sale in interstate commerce of Defendants' new software application having trade dress copied from and identical to the trade dress of Plaintiffs' eServiceReport™ application is likely to cause confusion, mistake or deception of purchasers and potential purchasers as to the origin, sponsorship or approval of the goods by Plaintiffs. Defendants' unauthorized manufacture, importation, distribution and sale in commerce of their new software application having trade dress identical to the trade dress of Plaintiffs falsely designates the origin of Defendants' software application and is likely to cause confusion, mistake or deception about the origin of Defendants' software application.

64. Plaintiffs have suffered and continue to suffer substantial injury, resulting in damages to Plaintiffs, including loss of sales and profits, which Plaintiffs would have realized but for the above-described wrongful activities of Defendants.

65. Plaintiffs have suffered and continue to suffer substantial injury to their goodwill and reputation as a result of the above-described wrongful activities of Defendants.

66. Plaintiffs seek all remedies available under the Lanham Act, including but not limited to those provided by 15 U.S.C. §§ 1116(a) and 1117(a).

67. Plaintiffs have suffered and will continue to suffer irreparable injury unless Defendants are enjoined by this Court. Plaintiffs have no adequate remedy at law.

**CLAIM V  
COMMON LAW TRADE DRESS INFRINGEMENT UNDER TEXAS LAW**

68. Plaintiffs repeat and reallege the factual allegations of paragraphs 1 through 67 above as if set forth at length herein.

69. This cause of action arises under the Common Law of the State of Texas.

70. Defendants, by their acts, have infringed upon Plaintiffs' common law rights in their trade dress for the eServiceReport™ application and will continue to do so unless enjoined by this Court.

71. Defendants' acts have caused and will continue to cause Plaintiffs irreparable harm unless enjoined by this Court. Plaintiffs have no adequate remedy at law.

**CLAIM VI  
TRADE SECRET MISAPPROPRIATION UNDER TEXAS LAW**

72. Plaintiffs repeat and reallege the factual allegations of paragraphs 1 through 71 above as if set forth at length herein.

73. Plaintiffs' technology embodied in the eServiceReport™ application was not generally known or available to the public. Plaintiffs allowed Defendants limited access to the eServiceReport™ application pursuant to the payment of license fees – such

access and use was limited pursuant to Plaintiffs' long-standing policy. Defendants knew or should have known that their limited access to the eServiceReport™ application was subject to obligations of confidentiality both during and after their license.

74. Defendants used and disclosed Plaintiffs' trade secrets in violation of the confidential relationship with Plaintiffs by developing, using, marketing, and/or selling their new software application.

75. Defendants have acquired Plaintiffs' confidential technology by improper means and have improperly used it in violation of the parties' agreement and their duty of confidentiality.

76. Plaintiffs are entitled to actual damages from the injury they suffered from the misappropriation of their trade secrets and Defendants' ill-gotten profits. Plaintiffs also lost profits based on Defendants' misappropriation of their trade secrets. Due to the deliberate, willful, and malicious nature of Defendants' actions, Plaintiffs are entitled to recover exemplary damages from Defendants.

**CLAIM VII**  
**COMMON LAW UNFAIR COMPETITION**

77. Plaintiffs repeat and reallege the factual allegations of paragraphs 1 through 76 above as if set forth at length herein.

78. This cause of action arises under the Common Law of the State of Texas.

79. Defendants, by their acts, have unfairly competed with Plaintiffs in violation of the Common Law of the State of Texas. Defendants have committed one or more torts or other illegal conduct, including but not limited to infringing Plaintiffs' common law rights in their trade dress and their trademark.

80. Defendants' acts, *inter alia*, permit and accomplish confusion and mistake, mislead and deceive the public as to the source of Defendants' software application, permit and accomplish palming off of Defendants' software application as that of Plaintiffs, falsely suggest a connection between Defendants' software application and that of Plaintiffs, disparage or damage the reputation and goodwill of Plaintiffs and its products or services, and falsely represent the qualities, characteristics, or source of Defendants' software application, thus constituting acts of unfair competition with Plaintiffs in violation of the Common Law of the State of Texas.

81. Defendants' acts of unfair competition are fraudulent, deliberate, willful and malicious, and have been committed with the intent to cause injury to Plaintiffs. These wrongful acts have proximately caused and will continue to cause Plaintiffs substantial injury, including injury to their reputation and loss of customers and sales.

82. Defendants' acts have caused and will continue to cause Plaintiffs irreparable harm unless enjoined by this Court. Plaintiffs have no adequate remedy at law.

**CLAIM VIII  
COMMON LAW MISAPPROPRIATION UNDER TEXAS LAW**

83. Plaintiffs repeat and reallege the factual allegations of paragraphs 1 through 82 above as if set forth at length herein.

84. As established above, Plaintiffs' invested significant time and money into devising the novel idea underlying the eServiceReport™ application, developing such application, and successfully marketing such application.

85. Upon information and belief, as of December 2007 when Defendants first purchased a license to use Plaintiffs' eServiceReport™ application, Defendants had not

developed, used, sold, or offered for sale any software application comparable to Plaintiffs' eServiceReport™ application.

86. Defendants were granted a limited right to use Plaintiffs' eServiceReport™ application pursuant to their payment of license fees. When Defendants affirmatively chose to discontinue their license as of December 31, 2009, Defendants no longer had any right to use Plaintiffs' eServiceReport™ application or any protectable rights relating thereto.

87. In violation of Plaintiffs' rights in the eServiceReport™ application and the termination of Defendants' rights for failure to renew their license, Defendants have improperly developed, used, marketed, and sold their new software application. Therefore, Defendants benefited and profited from their improper use of Plaintiffs' protectable rights.

88. Defendants' misappropriation has injured Plaintiffs, thereby entitling Plaintiffs to actual damages. Due to the deliberate, willful, and malicious nature of Defendants' actions, Plaintiffs are entitled to recover exemplary damages from Defendants.

**CLAIM IX  
UNJUST ENRICHMENT**

89. Plaintiffs repeat and reallege the factual allegations of paragraphs 1 through 88 above as if set forth at length herein.

90. Plaintiffs' technology embodied in the eServiceReport™ application was not generally known or available to the public. Plaintiffs allowed Defendants limited access to the eServiceReport™ application pursuant to the payment of license fees – such access and use was limited pursuant to Plaintiffs' long-standing policy. Defendants knew or

should have known that their limited access to the eServiceReport™ application was subject to obligations of confidentiality both during and after their license.

91. Defendants obtained a benefit from Plaintiffs by the taking of an undue advantage. Defendants have joined in the profits made by selling their new software application that, in large part, are a product of the technology of Plaintiffs.

92. Defendants did not have to expend the time, energy, and resources to develop the technology licensed by Plaintiffs.

93. Defendants have been unjustly enriched by the taking of Plaintiffs' technology, thereby entitling Plaintiffs to actual damages.

#### REQUEST FOR ACCOUNTING

94. Plaintiffs request that Defendants be required to make an accounting to Plaintiffs for all sales and profits made due to the above described wrongful conduct and that Plaintiffs have judgment against Defendants for damages.

#### ATTORNEYS' FEES

95. Plaintiffs repeat and reallege the factual allegations of paragraphs 1 through 94 above as if set forth at length herein.

96. This is an exceptional case and, as such, Plaintiffs are entitled to an award of reasonable attorneys' fees and costs on equitable grounds.

#### JURY REQUEST

97. In accordance with Federal Rule of Civil Procedure 38, Plaintiffs hereby request a trial by jury on their claims alleged against Defendants.

**PRAYER FOR RELIEF**

For these reasons, Plaintiffs respectfully request the Court to:

- A. With respect to Plaintiffs' patent infringement claim,
  - i. Award damages adequate to compensate Plaintiffs for the patent infringement that has occurred from the date infringement of the '238 Patent began, but in no event less than a reasonable royalty pursuant to 35 U.S.C. § 284;
  - ii. Award increased damages as permitted under 35 U.S.C. § 284 to compensate Plaintiffs for Defendants' willful infringement of the '238 Patent;
  - iii. Enter a permanent injunction prohibiting Defendants, their subsidiaries, affiliates, officers, directors, agents, servants, employees, and all persons in active concert or participation with them, from infringing, contributing to the infringement of, and inducing infringement of the '238 Patent; and
  - iv. Find that this case is exceptional and award to Plaintiffs their attorneys' fees and costs as provided by 35 U.S.C. § 285;
- B. With respect to Plaintiffs' trademark and trade dress infringement claims,
  - i. Award damages for injury to Plaintiffs' trademark and trade dress rights resulting from Defendants' infringement;
  - ii. Enter judgment that Defendants, their agents, servants, employees, attorneys, related companies and those in active participation with

them, be preliminarily and thereafter permanently enjoined from (a) using Plaintiffs' mark or trade dress either alone or in combination with any other words, names, or symbols, on or in connection with, or in relation to the sale or offer for sale of goods and services related to, (b) otherwise infringing upon any trademark or trade dress rights of Plaintiffs, (c) performing or committing any other acts falsely representing Defendants' goods or services, or which are likely to cause confusion or mistake in the minds of the purchasing public or to lead purchasers or the trade to believe that Defendants' goods and services are from or are the goods and services of Plaintiffs, or are somehow sponsored by or connected with Plaintiffs, or that there is some connection between Plaintiffs and Defendants, and (d) using Plaintiffs' mark or trade dress, or such other similar variants thereof, as a means for attracting users of the Internet to Defendants' products and services;

- iii. Order Defendants to deliver up to the Court for destruction, pursuant to 15 U.S.C. § 1118, any and all products, displays, labels, signs, circulars, packages, wrappers, receptacles, advertisements, sales ads, contracts and other matters in their possession or under their control which bear and depict any designation, which are colorable imitations of Plaintiffs' mark or trade dress, as well as all means for reproducing, counterfeiting, copying or otherwise imitating

Plaintiffs' mark, or trade dress or to show proof of said destruction;  
and

- iv. Find that this case is exceptional and award to Plaintiffs their attorneys' fees and costs as provided by 15 U.S.C. § 1117;

C. With respect to Plaintiffs' misappropriation, unfair competition and unjust enrichment claims,

- i. Award Plaintiffs their actual damages caused by Defendants' misappropriation, unfair competition and unjust enrichment, including but not limited to recovery of Defendants' wrongful profits resulting from Defendants' misappropriation, unfair competition and unjust enrichment;
- ii. Award Plaintiffs exemplary damages under Chapter 41 of the Texas Civil Practices and Remedies Code; and
- iii. Enter judgment that Defendants, their agents, servants, employees, attorneys, related companies and those in active participation with them, be preliminarily and thereafter permanently enjoined from otherwise unfairly competing with Plaintiffs;

D. Order Defendants to provide an accounting of all sales, revenues, and profits related to Defendants' products and services that infringe upon Plaintiffs' rights;

E. Award Plaintiffs pre-judgment and post-judgment interest at the maximum allowable interest rate; and

F. Grant Plaintiffs such other and further relief, at law or in equity, to which they are justly entitled.

DATED this 30th day of September, 2010.

Respectfully submitted,

By: /s/ Kelly J. Kubasta

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