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8 AMERICAN ARBITRATION ASSOCIATION
9 COMMERCIAL TRIBUNAL, LOS ANGELES

10 ASR DATA ACQUISITION & ANALYSIS,) AAA Case No: 72 117 01269
11 LLC, a Texas limited liability) 98
12 company,)
13 Claimant,)
14 v.)
15 GUIDANCE SOFTWARE, INC.,)
16 Respondent and Cross-)
17 Claimant.)

18 INJUNCTION

19 Upon good cause so appearing, Respondent GUIDANCE
20 SOFTWARE, INC., a California corporation, its principals,
21 owners, agents, successors and assigns (hereinafter referred
22 to as GUIDANCE) are hereby enjoined as follows:

23 1. GUIDANCE is prohibited from selling, distributing or
24 marketing the software which it has been improperly selling
25 under the INCASE trademark or any other Computer Software, as
26 defined below, unless all such sales, distribution, or
27 marketing are in full and complete compliance with the October
28 15, 1997 Exclusive Licensing Agreement (hereinafter referred

1 to as "Agreement") including, but not limited to, RECITAL D
2 thereof and Sections 1.2, 1.5, 1.6, 2.3, 2.5, 3.1(A and B),
3 3.2, 3.3, 4.5, 4.5(a), 4.5(c) thereof. The term "Computer
4 Software" shall mean all Windows versions of software which
5 assist in analyzing all or a portion of a computer's software,
6 operating systems, internal codes, file structure, directory
7 structure, computer hardware markings and/or identifiers so as
8 to determine the state of the computer, its storage media and
9 its software on a given date and time of examination. Such
10 concept includes the ability to prevent changes to the
11 computer's software and/or internal components and developing
12 a "snapshot" of the computer software and operating systems as
13 of the date and time of examination.

14 2. GUIDANCE is prohibited from selling, distributing or
15 marketing any Computer Software (as defined above in paragraph
16 1) under the trademark ENCASE or any other trademark other
17 than EXPERT WITNESS

18 3. GUIDANCE is prohibited from committing any acts
19 which would slander, libel or constitute trade disparagement
20 of Claimant ASR DATA ACQUISITION & ANALYSIS, LLC, a Texas
21 limited liability company, its principals, owners, successors
22 and assigns (hereinafter referred to as "ASR DATA") or ASR
23 DATA's trademark EXPERT WITNESS.

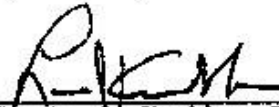
24 4. GUIDANCE is ordered to provide to ASR DATA with
25 copies of the current and all future versions of the Computer
26 Software (which it has been improperly selling under the
27 trademark ENCASE) in accordance with section 2.5 of the
28 Agreement.

1 5. This injunction shall continue for the term of the
2 Agreement in accordance with section 5.2 (Term) thereof.

3 Respectfully submitted,

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5 Dated:

July 20, 1995


Louis J. Knobbs, Esq.
Arbitrator

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1 The arbitration was conducted over three days during
2 which testimony was presented and documentary evidence was
3 introduced. The arbitrator, having considered the entire
4 record and the legal argument of counsel, including the
5 June 4, 1999 letter and enclosure from Respondent's counsel
6 and the June 23, 1999 letter and enclosures from Claimant's
7 counsel, finds and determines as set forth hereinafter.

8 DISCUSSION

9 A. The Claims

10 This matter arises out of the relationship between the
11 parties as evidenced by the Agreement, to be discussed
12 hereinafter. Both parties made claims of breach of contract
13 against each other and seek damages and injunctive relief
14 based upon these alleged breaches.

15 B. The Agreement

16 The evidence shows that Claimant established a business
17 for a specialized data acquisition and forensic analysis
18 software product for use with a Macintosh computer operating
19 system. This software was sold under the trademark EXPERT
20 WITNESS. Claimant offered Respondent and Respondent accepted
21 an exclusive license to create and market Windows-based
22 software products utilizing the same concept and in the
23 Agreement, Respondent agreed, inter alia, that it:

- 24 1. "Shall use and put forth its reasonable best efforts
25 to (i) promote the Expert Witness Concept and sales of
26 the Product throughout the entire world; (ii) act in a
27 manner designed to maximize benefit to both Parties to
28 this Agreement; (iii) update, supplement, and further

1 develop the Expert Witness concept, products, materials
2 and marketing tools in furtherance of the parties' mutual
3 interest; and (iv) devote such time efforts to the
4 fulfillment of the parties' obligations and objectives
5 under this Agreement as are reasonable and appropriate.
6 (See Section 4.5 of the Agreement).

7 2. Pay a license fee to claimant pursuant to Article
8 III of the Agreement.

9 3. Provide Claimant with a "copy of any version (past,
10 present, or future) of or modification or enhancement to
11 said executable program immediately upon" Claimant's
12 written request therefor (see Section 2.5 of the
13 Agreement).

14 C. Breaches Of The Agreement By Respondent

15 The arbitrator finds, as more specifically set forth
16 hereinafter, that Claimant has shown by a preponderance of the
17 evidence that Respondent breached the Agreement.

18 1. Breach Of The Best Efforts Clause

19 The evidence is overwhelming that Respondent is in breach
20 of the best efforts clause. Beginning less than a year after
21 the October 15, 1997 date of the Agreement, Respondent ceased
22 promoting the Expert Witness Concept and changed the name of
23 the software product to Respondent's trademark ENCASE. Since
24 the fall of 1998, Respondent has totally failed to "act in a
25 manner designed to maximize benefit to both parties." Rather,
26 the evidence is overwhelming that all of Respondent's efforts
27 have been to maximize Respondent's benefits to the detriment
28 of Claimant and Claimant's principal Andrew S. Rosen.

1 The evidence, moreover, is overwhelming that not only did
2 Respondent cease all efforts to benefit Claimant but did just
3 the opposite and disparaged the reputation of Claimant and
4 Andrew S. Rosen.

5 2. Breach Of The Obligation To Pay A License Fee

6 The preponderance of evidence shows that the Respondent
7 failed since October, 1998 to pay to Claimant the license fees
8 due for software subject to Article III of the royalty terms
9 of this Agreement.

10 The preponderance of evidence is that the damages owed to
11 Claimant by Respondent are at least \$ [REDACTED]

12 3. Breach Of The Failure To Provide Versions Of The
13 Windows Software

14 The preponderance of evidence shows that Respondent has
15 refused since October, 1998 to respond to requests from
16 Claimant for the updated versions of the WINDOWS software as
17 Respondent is obligated to provide pursuant to Section 2.5 of
18 the Agreement.

19 D. Respondent's Defenses

20 Respondent asserts that it rightfully terminated the
21 Agreement because of material breaches by Claimant of the
22 Agreement. The Respondent's position is that (a) the
23 Agreement requires the mark EXPERT WITNESS to be registrable
24 as a trademark in the U.S. Patent and Trademark Office; (b)
25 that the trademark EXPERT WITNESS must be free of any possible
26 trademark infringement claims (including any possible criminal
27 liability for using a counterfeit mark) and (c) Respondent is
28 damaged by being associated with Mr. Andrew S. Rosen.

1 E. Alleged Breaches Of The Agreement By Claimant

2 The arbitrator finds, as more specifically set forth
3 hereinafter, that Respondent has not shown that Claimant has
4 breached the Agreement.

5 1. Registrability Of The EXPERT WITNESS Trademark

6 The unambiguous language of the Agreement does not
7 require that the EXPERT WITNESS mark be registrable. The
8 Agreement merely recites that "an application for federal
9 trademark registration with respect to the mark "EXPERT
10 WITNESS for use with such software, idea and concept is
11 anticipated to be filed within ninety (90) days after the date
12 on which this Agreement is executed." (Emphasis added.) The
13 preponderance of evidence proves that Claimant has fulfilled
14 this obligation. The recent Office Action by the Examining
15 Attorney, Vanessa J. Cooper, of the U.S. Patent and Trademark
16 Office, is not relevant. In fact, even if registrability was
17 required by the Agreement (which it does not), this initial
18 refusal would not be relevant. Such refusals are commonplace
19 and the Examining Attorney states in her refusal that
20 "although the Examining Attorney has refused registration, the
21 applicant may respond to the refusal to register by submitting
22 evidence and arguments in support of registration."

23 2. Civil And/Or Criminal Liability

24 Respondent's expert witness, Antonio R. Sarabia, II,
25 Esq., opined that the termination by Respondent was justified
26 because of potential civil and criminal liability for using
27 the mark EXPERT WITNESS on the Windows-based software. The
28 arbitrator fails to find any tenable basis for Mr. Sarabia's

1 conclusion. The Lanham Act, the California Business and
2 Profession Code § 14320 and Penal Code § 350 all have in
3 common the requirement that the mark in dispute be confusingly
4 similar to another's mark. No credible evidence of likelihood
5 of confusion was presented. Respondent's trademark expert,
6 Mr. Sarabia, was specifically queried as to whether the EXPERT
7 WITNESS software might overlap the services provided by a
8 third party, Expert Witness Services, Inc. Mr. Sarabia opined
9 that "Lawyers might, yes." (Emphasis added). Even if the
10 Agreement required that the mark be free of civil liability
11 (which the Agreement does not), the evidence of what "might"
12 occur is wholly deficient in proving likelihood of confusion.
13 The arbitrator further notes that the Agreement specifically
14 includes an indemnity for civil damages. As to the potential
15 for criminal liability, no credible evidence was produced by
16 Respondent or Respondent's expert witness. Besides requiring
17 that the mark at issue be confusingly similar, California
18 Penal Code 350 requires that this mark be a "counterfeit of a
19 mark" and defines counterfeit as "a spurious mark that is
20 identical with, or confusingly similar to, a registered mark
21 and is used on or in connection with the same type of goods or
22 services." (Emphasis added). No evidence was offered that
23 provides any basis for concluding that the use of EXPERT
24 WITNESS mark could be an infraction of the Penal Code.

25 3. Respondent Is Damaged By Mr. Rosen's Reputation

26 The arbitrator fails to find any basis for termination of
27 the Agreement by Respondent on this (or any other ground).
28 Respondent was represented by counsel during the negotiation

1 of the Agreement. There is no evidence that Respondent's
2 counsel ever attempted to include any "disclosure" provision
3 in the Agreement that would have required Mr. Rosen to reveal
4 the things which Respondent now contends provide a basis for
5 its termination of the Agreement.

6 Even if relevant (such relevance not having been proven)
7 there is no credible evidence that Respondent's principal,
8 Shawn McCreight, was misled by Claimant's principal. What is
9 clear from the testimony, however, is that Mr. Shawn
10 McCreight, on March 31, 1999, deliberately smeared and
11 disparaged Claimant's principal, Andrew Rosen, to at least one
12 potential customer of the EXPERT WITNESS software, namely
13 [REDACTED].

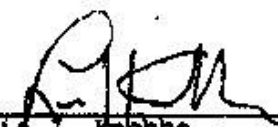
14 F. Respondent's Counterclaims

15 Respondent counterclaimed for Breach of Contract, Rescission,
16 and Permanent Injunction. The arbitrator finds, after
17 considering all of the evidence, that Respondent has not
18 proven any counterclaims against Claimant.

19 G. Summary

20 In summary, the arbitrator finds that Claimant is
21 entitled to an Order of Injunction, money damages, interest,
22 the administrative fees, the arbitrator's compensation and its
23 attorney's fees. The arbitrator has not attempted to outline
24 all of the evidence as to any particular claim or issue, nor
25 has the arbitrator attempted to address herein all positions
26 taken by the parties. The arbitrator has considered all of
27 the evidence and has weighed the credibility of the witnesses
28 in reaching the determinations herein.

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3 Dated: July 20, 1995
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Louis J. Knobbe
Sitting as Arbitrator

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