

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

ECIMOS, LLC.	:	CIVIL ACTION NO. 2:15-cv-2726-JPM-cgc
Plaintiff	:	
v.	:	MOTION FOR CONTEMPT AND
	:	ENFORCEMENT OF COURT ORDER
	:	ECF 613
CARRIER CORPORATION,	:	MOTION TO MEMORIALIZE DSA
	:	SOLUTION
Defendant	:	MOTION TO ISSUE SUBPOENA ON
	:	LOGICAL SYSTEMS, INC. AND
	:	COMPASS AUTOMATION
	:	OBJECTION TO SPECIAL MASTER
	:	REPORT ECF 681
	:	NOTICE OF CONSULTATION

Comes now ECIMOS, LLC, by counsel, and submits this Motion for Contempt and Enforcement of Court Order ECF 613, Motion to Memorialize Version 1.0.0.3 DSA Solution, Motion to Issue Subpoena on Logical Systems, Inc. and Compass Automation, Objection to the June 28, 2021, Special Master Report ECF 681 and Notice of Consultation.

MOTION FOR CONTEMPT AND ENFORCEMENT OF COURT ORDER ECF 613

After Consultation with Carrier Counsel, there are factually undisputed actions by Carrier that violate Court Order ECF 613. The Court ordered that Carrier complete the rollout of the non-infringing software and database by midnight on August 17, 2020, in accordance with the Rollout plan. ECF 613 PageID 13985. The Court clearly indicated in the Order that the Rollout of the non-infringing software should be completed and final. In ECF 588 PageID 13673, the Court specifically stated Carrier “shall only install the version of the non-infringing run-test software and database developed by DSA during testing. Should additional software bugs necessitate an update, Carrier may follow the procedure used during testing and set forth during the conference held on Mary 7, 2020 for reporting issues to DSA and receiving updates.” Id. Carrier has not complied. First, the Special Master filed his Report of the Progress of the

Non-infringing runtest solution since Impoundment on September 16, 2020. ECF 634. Specifically, the Special Master states he was going to conduct the first audit of the completed implementation on September 28, 2020. ECF 634 Page Id. 14692. Thus, Carrier has not complied by not having a complete and final runtest solution rolled out by the August 17, 2020. Then, the Special Master found in October 15, 2020 Second Report of the Special Master Regarding Progress of the Non-Infringing Runtest Solutions since Impoundment ECF 640, that Carrier did not download DSA software version 1.0.0.3 until October 7, 2020. The Special Master noted the DSA software version 1.0.0.3 addressed 314 “bugs” and stated, “all of the 314 previously identified software bugs have now been marked resolved.” ECF 640 PageId. 14824. Therefore, for a second time and second Special Master Report, Carrier had not complied with the Court’s Order ECF 613 by August 17, 2020. Finally, on October 30, 2020, ECF 644, Report of the Special Master Regarding the First Audit of the Non-Infringing Runtest Solution found in paragraph 26 that it “appears” that Carrier completed its implementation of the runtest solution with DSA software version 1.0.0.3. This certification on October 19, 2020, and October 20, 2020, is nine weeks after the required completion date set by the Court in ECF 613 of August 17, 2020.

But we are not finished, Carrier does not have the final DSA software version 1.0.0.3 running in their factory. The June 28, 2021, Report of the Special Master Regarding the Status of the non-infringing runtest solution and Hardware are updated between the First and Final Audit, ECF 681, states one of the documents included in the RFP is a document labeled “C-331 NGIP run test changes after software version 48.docx”. ECF 681 PageId15358. Thus, Carrier has 44 different versions of runtest software that have been installed and running in its factory since version 1.0.0.3. These 44 different versions are after Carrier resolved all 314 software bugs as represented to the Special Master on October 15, 2020. Therefore, the June 28, 2021,

report of the Special Master informs the court that Carrier is not running the Special Master certified version of the DSA and is in violation of Court Order ECF 613.

ECIMOS believes Carrier is performing a ruse replacement of the run test hardware with duplicate hardware of the ECIMOS protected property, with the purpose of a second chance at the development of a ECIMOS comparable runtest software. First, in the special master report dated February 23rd, 2021 (ECF 663) indicates in Section II (2) that Carrier is finalizing a draft RFP to replace the run test hardware. The Special Master noted that replacing the run test cabinets will alter the run test system as a whole and will likely result in some modification to the new non-infringing software implementation from DSA. ECF 663 PageID 15269. However, Carrier acknowledges they would consider vendor proposal for replacing both hardware and software as part of the hardware replacement. Undersigned Counsel communicated with Carrier by email stating ECIMOS's objections to the continued development and replacement of the non-infringing runtest solution. Notwithstanding our objection and ECF 613, Carrier indicated, by email, on April 29, 2021, that it would consider proposals that would replace both the hardware cabinets and software, at its discretion.

Now the Special Master has filed his report on June 28th, 2021, concerning the progress of Carrier in replacing the "hardware cabinets". ECF 681. The Special Master's report list 18 separate files included to prospective bidders concerning the replacement of the hardware files. ECIMOS has not been provided a copy of the current RFP nor been able to review the 18 attachments. However, based solely on the descriptions provided in the Special Master's report, ECIMOS contends that Carrier has provided RFP with the attachments so that the runtest software and database structure will hopefully be redeveloped to an ECIMOS comparable version. Carrier could have easily replaced the hardware cabinets based solely on the attachment labeled "Control" containing drawings prepared by Tristate Armature. The purpose of providing the additional 17 documents was to provide any bidder with the information necessary to design

a new runtest system. Carrier submitted the RFP and accepted a proposal from DSA, and Carrier is waiting final internal approval. ECF 681 PageId 15361. The DSA proposal essentially gave three levels for repairing or replacing increasing amounts of the hardware and software. Email with Special Master on July 11, 2021. Therefore, Carrier is now in the internal business process of gathering approval for the project (ECF 681 Page id 15361), thus memorializing its ongoing violation of ECF 613.

In ECF 588 PageId 13673, the Court specifically stated Carrier “shall only install the version of the non-infringing run-test software and database developed by DSA **during testing**. Should additional **software bugs** necessitate an update, Carrier may follow the procedure used during testing and set forth during the conference held on May 7, 2020 for reporting issues to DSA and receiving updates.” Id. Then, the Court set a strict timeline of August 17, 2020 for the completion of implementation of the non-infringing software by Carrier. ECF 613 page id 13985. The Court state “no additional extensions are contemplated”. Id. At PageId. 13985. Finally, Carrier represented to the Special Master that on October 7, 2020, it has a final “bug free” runtest solution. ECIMOS asks the Court to hold Carrier in contempt and order a sanction commensurate with Carrier’s violation of the Court’s Order ECF 613 from August 31, 2020, until this filing July 13, 2021.

In ECF 613, the Court ordered Carrier to pay \$250,000 for Carrier’s failure to comply with the Court’s Order the Rollout for the week of August 17, 2020. ECF 613 PageId. 13985. Additionally, the Court provided in that Order that if Carrier did not comply with the Order by August 24, 2020, Carrier was required to pay an additional \$250,000. ECF 613 PageId. 13985. The Court specifically noted in the Order, “No additional extensions are contemplated”. Id At PageId. 13985. It is important to note that the Court’s Order, ECF 613, had two requirements of Carrier, impounding all ECIMOS’s intellectual property and **complete the rollout of the non-**

infringing software and database. ECF 613 PageId. 13985. Carrier contends it completed, (although not timely) impounding ECMOS’S intellectual property, but thumbed its nose at the Court’s order to complete a rollout of the runtest system by August 17, 2020. Carrier continues well beyond the 90 to 120 days it first informed the court it needed to comply with the permanent injunction, without regard for the orders set forth by this Court. Since August 17, 2020, Carrier has been rolling out its runtest software, over 47 weeks, with 48 different versions and now appears to have abandoned its effort and is going to start over. Carrier cannot claim these changes are associated with software bugs as contemplated by ECF 588, because they certified to the special master that all known software bugs were resolved on October 15, 2020 and have not followed the procedure of ECF 567 PageId. 13127. Carrier is in the internal business process to move forward and abandon Version 1.0.0.3 DSA runtest solution. Carrier has not complied with the Order.

The Court already set the measure of damages for Carrier’s contempt at \$250,000 per week. ECF 610 & ECF 613. The Court considered the “character and magnitude of the harm” and probable effectiveness of any suggested sanction in its Order. (ECF 610 P.13825). The Court found that Carrier earns approximately \$247,500,000 in gross revenue from its Collierville plant each month. (ECF No. 577 at PageID 13252:15-21). Thus, even the Court noted that a \$250,000 civil contempt sanction would be miniscule. (ECF 610 Page ID 13826). Clearly, the civil contempt sanction has not deterred Carrier’s defiance of the Court’s Order.

Carrier’s current conduct of violating the Court’s orders is not remedied by civil contempt sanctions. The Court never contemplated an extension of its Order ECF 613, and Carrier never moved for an extension after the Order ECF 613. At this point, the Court cannot impose a civil contempt fine that is coercive, because the violation is already committed. Thus, the Court should issue criminal contempt sanction because the conduct cannot be avoided or

abbreviated through later compliance. (ECF 610 Page ID 13828) (quoting Bagwell, 512 U.S. at 828-829). Thus, ECIMOS states that the Court's civil contempt sanctions against Carrier did not deter the actions of Carrier and thus cannot be expected to deter them in the future. Carrier's violation of the Court Order ECF 613 from August 31, 2020, until this filing on July 13, 2021, cannot be ignored and or abbreviated by later compliance. Therefore, ECIMOS asks the Court to enforce its Order ECF 613 to impose the weekly \$250,000 fine as a criminal sanction for Carrier's violation from August 31, 2020, until July 13, 2021. Carrier should be found in contempt for the 47 weeks, total \$11,750,000 in criminal contempt sanctions. In summary, the resulting sanction is a criminal contempt charge against Carrier for its failure to complete a non-infringing software rollout pursuant to the Court's order ECF 613 by midnight August 17, 2020.

For the post July 13, 2021, ongoing violations of the Court Order ECF 613, ECIMOS is asking for the \$250,000 fine that escalates each week (ECF 588) and include not only the Corporate Defendant, but also its representatives. In support, ECIMOS states that a criminal contempt sanction as a fine against the Corporation, Defendant, has not been sufficient, and requests that criminal contempt sanctions be imposed on Corporate Representative, J.C Stewart and/or the Carrier CEO David Gitlin which include personal fines and/or incarceration.

MOTION TO MEMORIALIZE VERSION 1.0.0.3 DSA SOLUTION

Carrier is causing this Court, the Special Master, and ECIMOS to continue to babysit and examine their actions without an end in sight. The Court stated Carrier "shall only install the version ... developed by DSA during testing. ECF 588. The purpose of the Court's Order Denying the Extension of Time (ECF 610) and Order Clarifying (ECF 613) was to create an end to this case and for a permanent solution to be established. Carrier represented to the Special Master on October 15, 2020, that DSA version 1.0.0.3 was their completed runtest software solution. ECF 640 PageID 14825. Carriers continued actions and RFP's are causing the Court to continue to have to deal with this matter. ECIMOS is being forced to continue to incur

attorney's fees, expert fees and other costs associated with protecting its intellectual property. ECIMOS is still awaiting the Court's decision on awarding their expert costs associated with prior contemptuous actions of Carrier. ECIMOS asks the Court to Order that Carrier implement DSA version 1.0.0.3 as its completed runtest software solution, deleting all 44 non-certified versions. This prophylactic injunction is authorized under Schenek v. Pro-Choice Network of Western NY, 519 US 357. (1997).

**MOTION TO ISSUE SUBPOENA ON LOGICAL SYSTEMS, INC. AND
COMPASS AUTOMATION, INC.**

Carrier through its counsel refuses to retrieve the ECIMOS IP from LSI (Logical Systems Inc.) and Compass Automation Inc., companies that are both located in Shelby County, Tennessee.

The Special Master discussed the recovery of the protected information from proposed Vendors. (ECF 681 p. 15361) The Special Master has indicated that Viewpoint Systems and G2Tek has received materials but have provided Affidavits that they have removed the materials from their computer systems. ECIMOS does not see that Logical Systems Inc. nor Compass Automation was ever contacted concerning the recovery of the protected information. ECIMOS discussed with Carrier, it's request to have LSI sign an affidavit that the protected information was removed, however, Carrier does not believe such recovery is appropriate. In the February 23, 2021, Special Master report (RE 663), the Special Master states that Carrier would not involve previous developers and included LSI as a previous developer. Specifically, he states "Carrier has indicated that they will not involve previous developers who were potentially exposed to ECIMOS protected information including, Amtec, Bloomy, LSI, PVI, G2Tek and Viewpoint."

ECIMOS contends that the LSI affidavit is critical for several reasons. First, ECIMOS believes that LSI is providing ECIMOS IP support services to the Carrier Tyler Texas and the

Carrier Monterrey Mexico locations which are allegedly still using the copyright infringing property. Thus, Carrier and LSI cannot execute any affidavit returning the property because it is still in use in other Carrier locations. Second, LSI has presumably distributed the protected property to other Carrier competitors for use and thus, they cannot return such property that is being supported at other HVAC facilities. The Court has ordered Carrier to secure the retrieval of ECIMOS's protected intellectual property. ECF 610 & ECF 613. Carrier has not made any attempt and does not believe it should recover ECIMOS's information from LSI. Thus, ECIMOS is turning to the Court to provide relief in the form of a subpoena to LSI to return the property referenced by the Special Master.

Carrier remains unwilling to comply even in light of the fact that ECIMOS has presented to the Special Master from Carrier's own Bates Labeled documents that identify both LSI and Compass Automation as providing runtest solution quotes to Carrier using ECIMOS IP to assist in its quoting preparation that included among other things ECIMOS Assembled Hardware Drawings. Exhibit 1, Carrier Discovery Response Bates No. C001515-001529, C001660, C001661, C003280, C003281, C003839, C008806.

ECIMOS contends that this willful refusal is based on Carrier's foreknowledge that LSI is a co-conspirator with Carrier as it relates to the theft of the ECIMOS Intellectual Property for the IPCS, including the runtest and pump down and charge still in corporate use by Carrier at the Carrier Collierville, TN, the Carrier Tyler Texas and Monterrey Mexico plants that among other things use the copyrighted schema. ECIMOS first installed the IPCS in Carrier's Collierville, Tennessee, facility in 1992. Transcript, RE 365, PageID # 8156 (Olita) Portions of the system were already in operation in Carrier's plant in Tyler, Texas. Id.

Due to this conflict which would result in Carrier providing the Court with incriminating evidence, ECIMOS moves this Court to subpoena directly from LSI and Compass Automation the ECIMOS IP that it has in its possession specifically as it relates to the ECIMOS IPCS

Copyrighted Schema and Assembled Hardware drawings. For the Court's review ECIMOS has included the proposed subpoenas as Exhibit 2 and Exhibit 3.

NOTICE OF OBJECTION TO THE SPECIAL MASTER'S REPORT OF JUNE 28, 2021

ECIMOS objects to the Special Master report and specifically relies on the arguments as set forth above. Additionally, ECIMOS contends that the Court empowered the Special Master to protect the Court's Orders and ECIMOS's intellectual property. Notwithstanding the Court's Orders to be finished by August 17, 2020, Carrier is circumventing the Special Master's protections. The Court adopted the recommendation of the Special Master on August 15, 2019 and set forth a procedure for the implementation of the impoundment of the protected property and the rollout of the non-infringing runtest solutions. ECF 512 and ECF 588. As this process has dragged along, Carrier is not following the procedures set forth by the Court and not seeking any prior approvals or permissions of the Special Master. ECIMOS objects to the current process of RFP which has already been approved by Carrier before this report was ever filed with the Court. Therefore, ECIMOS objects to the report, based upon the independent actions of Carrier. The abandonment of seeking permission strips the Special Master of his ability to protect the Court's order and ECIMOS's protected property.

NOTICE OF CONSULATION

ECIMOS consulted with Carrier on April 16, 2021 regarding the issues raised in these Motions. Counsel communicated by follow-up email on April 29th, 2021. Carrier indicated they would be providing the draft RFP, and it was provided May 5. ECIMOS consulted with Carrier concerning the remaining issues in this motion through email sent on July 12, 2021 through counsel and responses on July 13, 2021. The parties still disagree.

Respectfully submitted,

/s/ Hon. Dan Thompson
Joseph Daniel Thompson
P.O. Box 851
Somerset, Kentucky 42502
(606) 679-5297 – Phone
dan@jdtinc.com
Counsel for ECIMOS

CERTIFICATE OF SERVICE

I certify that a copy hereof was filed electronically via the CM/ECT system on the 12th,day of July 2021, and served via e-mail upon the following:

Counsel and parties in the Records through the ECF system

/s/Hon. Dan Thompson