

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|-------------------------------------|---|-------------------------|
| INSTALLATION SOFTWARE TECHNOLOGIES, |) | |
| INC. d/b/a INSTALLSHIELD SOFTWARE |) | |
| CORPORATION, |) | Case No. 03 C 4502 |
| |) | |
| Plaintiff, |) | Judge Coar |
| |) | |
| v. |) | Magistrate Judge Denlow |
| |) | |
| WISE SOLUTIONS, INC., |) | |
| |) | |
| Defendant. |) | |

PLAINTIFF'S MOTION FOR AN ORDER PRESERVING EVIDENCE

Plaintiff, INSTALLATION SOFTWARE TECHNOLOGIES, INC. d/b/a
INSTALLSHIELD SOFTWARE CORPORATION ("InstallShield"), moves this court for the
entry of an order preserving evidence. In support of its motion, plaintiff states as follows:

1. This action arises out of an ongoing investigation by the United States Attorney,
the Federal Bureau of Investigation, and InstallShield based upon defendant Wise Solutions,
Inc.'s ("Wise") long-term, ongoing criminal conduct, whereby it has engaged in electronic
espionage, on approximately 900 occasions, to circumvent InstallShield's computer password
protections in order to acquire and use InstallShield confidential information for unfair
competitive purposes.

2. On June 27, 2003, InstallShield filed its Verified Complaint for Injunctive and
Other Relief, seeking equitable and legal relief under the Digital Millennium Copyright Act, 17
U.S.C. §§ 1201 *et seq.*, the Copyright Act of 1976, 17 U.S.C. §§ 301 *et seq.*, the Computer Fraud
and Abuse Act, 18 U.S.C. §§ 1030 *et seq.*, and the Illinois Trade Secrets Act, 765 ILCS 1065/1
et seq. The facts relevant to InstallShield's motion are set forth in detail in InstallShield's

Verified Complaint, and in the attached sworn declarations of Viresh Bhatia, InstallShield's president, and Conal Gallagher, an InstallShield employee.

3. The unique nature of this case—electronic espionage, carried out, to the best of InstallShield's knowledge, entirely through the use of computers and other electronic media—significantly increases the likelihood that relevant evidence may be destroyed, either inadvertently or on purpose, due to the nature of electronic data and the common practices used to maintain such data and computer networks. An order from this Court, directing that all evidence be preserved throughout the pendency of this litigation, will preclude any threat of spoliation.

4. Although the filing of a complaint normally gives rise to an obligation to preserve evidence, InstallShield is concerned that ordinary computer maintenance procedures may cause defendant to inadvertently overwrite necessary evidence. It is axiomatic that in most companies today, particularly computer-savvy corporations such as the parties to this action, computer data is routinely backed up and rewritten pursuant to a pre-determined schedule. *See Applied Telematics, Inc. v. Sprint Communications Co., L.P.*, No. 94-4603, 1996 U.S. Dist. LEXIS 14053, at *5, (E.D. Pa. Sept. 17, 1996) ("In accordance with defendant's normal operating procedures, every week the computer system is backed up and saved, thereby deleting the backup from the prior week. After one week, therefore, historical information is unavailable from the computer system."). Unless this Court issues an order specifically directing defendant to cease such operations, there is a very real danger that relevant evidence will be forever destroyed.

5. There is no question that a party has a duty to preserve evidence when this Court enters a non-destruction/preservation order, and there is equally no question that this Court

possesses broad authority to impose sanctions for any violation of such an order. Marrocco v. General Motors Corp., 966 F.2d 220, 221 (7th Cir. 1992) (affirming the district court's decision to dismiss plaintiff's complaint as a sanction for plaintiff's failure to preserve evidence as mandated by court order); MPCT Solutions Corp. v. Methe, 1999 U.S. Dist. LEXIS 10703, at *2 (N.D. Ill. July 2, 1999) (granting preliminary injunction as sanction for computer evidence destruction in violation of evidence preservation order).

6. Furthermore, this motion is necessary because if relevant evidence is not preserved, this case presents a great risk of engendering needless satellite litigation over evidence destruction issues. There is an increased risk in cases such as this, where electronic discovery issues are involved, that if an order preserving evidence is not entered immediately, costly, time-consuming and needless satellite litigation will result. RKI, Inc. v. Grimes, 177 F. Supp. 2d 859 (N.D. Ill. 2001) (finding that disloyal employees destroyed computer evidence after litigation commenced); Illinois Tool Works, Inc. v. Metro Mark Prods., Ltd., 43 F. Supp. 2d 951, 952 (N.D. Ill. 1999) (sanctions awarded to plaintiff where defendant's efforts to avoid producing certain files on its computers "led to substantial motion practice and discovery totally unrelated to the merits of the case"); Gates Rubber Co. v. Bando Chem. Indus., 167 F.R.D. 90, 100 (D. Colo. 1996) (after receiving a preliminary injunction and expedited discovery, plaintiffs became suspicious that defendants had destroyed relevant computer files, which led to four years of "sanctions" discovery, where "discovery on the merits of the case was put aside").

7. Plaintiff has attached as Exhibit A its proposed Order Preserving Evidence.

WHEREFORE, plaintiff prays that this Court enter an Order:

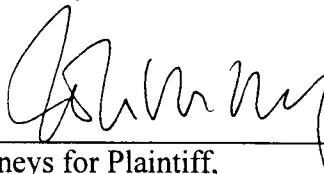
- (a) prohibiting defendant from destroying or concealing, and requiring defendant to otherwise preserve any documents and tangible items – in any medium – that directly or indirectly concern or reflect the claims and allegations in plaintiff's Verified Complaint, including, but not limited to

all evidence of (i) defendant's accessing of InstallShield's computers; (ii) all evidence of defendant's use or disclosure of data taken from InstallShield's computers; and

- (b) granting such further or alternative relief the Court deems appropriate under the circumstances.

Dated: June 30, 2002

Respectfully submitted,



Attorneys for Plaintiff,
INSTALLATION SOFTWARE
TECHNOLOGIES, d/b/a INSTALLSHIELD
SOFTWARE CORPORATION

#28

William Lynch Schaller
John M. Murphy
Charles R. Topping
Hillary P. Krantz
BAKER & McKENZIE
One Prudential Plaza
130 East Randolph Drive
Chicago, IL 60601
(312) 861-8858

CHIDOC02, 581793.1