HARVARD | BUSINESS | SCHOOL

MICHAEL J. ROBERTS

TODD THEDINGA

Sheila Mason & Craig Shepherd

It was October 17, 2002, and Sheila Mason was driving home from her job as vice president of sales and marketing at American Telecommunications Software, Inc. (ATS). It would be yet another late evening, as Mason would have a quick dinner with her husband and children, and then head over to Craig Shepherd's house to continue work on their plan to start a new company in the software industry. This potential new venture—tentatively named Intelisoft—would develop and sell a software "translation engine" that would convert software programs written for one operating system into programs suitable for use in other operating environments. In particular, the engine was capable of converting programs written for older operating systems into programs that could run on a variety of UNIX-based operating systems. As these UNIX-based systems were becoming popular platforms in corporate settings, and as many corporations had old software—"legacy systems"—that they were rewriting to run on UNIX-based systems, the translation engine could save these companies considerable time and expense. Mason and Shepherd had been working together since Labor Day, and their meeting this evening was scheduled to resolve several important issues that had come up regarding their decisions to leave their existing employers and actually start the business. In Mason's words:

> The prospect of leaving a good job is pretty scary, especially when this still seems so risky. But it is already feeling uncomfortable to be at ATS while I am working on this, and making progress is going to require us to be much more public about our ideas—with VCs, potential partners, and customers. I don't want my colleagues here to learn I am leaving from anyone but me.

Background: Craig Shepherd

Mason's prospective cofounder and business partner, Craig Shepherd, 42, was manager of documentation and support at Nova Software Company. He had a master's degree in computer science from Cal Tech, and had spent his career in the software business. Early on Shepherd had been a programmer, and had ultimately become a manager at a large software company—Riverhead Systems—running complex software development efforts. Riverhead sold software that helped other programmers write application programs. In 1990, Shepherd felt that he had "burned out" and requested a transfer to the documentation and support area: "I always liked thinking about software

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from the end user's perspective, and I felt that my technical background would allow me to see all the functionality available in a product. I liked the challenge of capturing that information and explaining it so other developers could utilize it. And, the hours seemed more manageable." Shepherd enjoyed the work, was good at it, and progressed at Riverhead. During this time, he also had an idea that would form the basis of the translation engine:

> As I worked more closely with customers, I saw that they were using Riverhead's products to basically port applications from one operating system to another. I realized that programmers had old applications on their desks, and were essentially rewriting them from scratch. I thought—why not write a piece of software that could perform this translation task?

In 1992, Shepherd and his wife decided to move to Virginia to be closer to their families. Shepherd found a job with Nova as manager of documentation and support. He directed the nine-person department that provided technical descriptions of how Nova's software worked and also supported customers' post-purchase technical questions. Nova's products were similar to Riverhead's in that they were used by other software developers—at both software firms as well as the IT department of non-software companies—as development tools to create end-user software applications. Nova's products supplied an entire programming development environment that facilitated both development and support of applications utilizing a UNIX operating system. The documentation developed by Shepherd's department was published in the firm's manuals and product bulletins, and was provided to developers who purchased and used Nova software in their application development efforts.

In the ten years that Shepherd had been at Nova he had done well, receiving a promotion and solid raises. However, he began to feel like his career was stagnating, and he had periodically continued to work on his idea for a translation engine:

> For several years, I would just kind of noodle in my head—you know, waiting for a bus or driving somewhere—and just think about how to do this. In 2001, I finally had one of those "eureka" moments when my wife and I were on vacation at the shore. It came to me how I could write a piece of code that would actually do this translation. It took me about nine months of playing with it on nights and weekends, but I finally wrote a little prototype of the software on my home computer that basically worked. I knew that a real product would take a lot more work—and money—but I felt that this prototype pretty well proved the concept.

Because Shepherd did not work in product development, and because Nova did no research on translation engines and sold no similar products, Shepherd felt confident that Nova held no claim on his idea. He began to think about starting a company to develop and sell the product, and as a result of his networking efforts, met Sheila Mason through a mutual acquaintance:

> I went to a few of these "venture fairs" that the local business and engineering schools run, and would talk to people who were starting companies—and also to the people who were financing them—just to get a feel for how this process worked. I never said much about my idea, and basically tried to make some contacts so that when I felt ready, I would have more of a clue what I was doing.

Background: Sheila Mason

Sheila Mason had worked at ATS for five years, having graduated from Harvard Business School in 1994. She spent the first three years of her post-MBA career at a large consulting firm, working

primarily in the high-tech practice. Frustrated by the more analytical nature of her job, Mason sought an operating role with a company in the software space, preferably a start-up. Through a former client she was introduced to several software veterans who were developing "killer apps" for UNIX in mission-critical operations, and who were starting a company that intended to develop software applications for telecommunications firms: "Telecom was a really hot space, and it is a business that requires lots of specialized software—billing and customer support systems, for instance." ATS had developed a successful suite of products that served telecom customers, as well as a significant "services" business that included helping customers implement software solutions. Mason signed on as director of business development, drawing on her analytical skills and contacts in the industry to develop relationships with partners and customers of ATS. The company had been a great success, had gone public in late 1999, and Mason's early equity stake and subsequent option grants had left her with approximately $2 million in equity in the company. At the time of the IPO, Mason had exercised a tranche of options and gained $1 million in cash from the sale. The remaining $1 million in options was scheduled to vest over the succeeding three years, on an annual basis. Moreover, she had risen to VP of sales and marketing in the company, reporting to the company's chief operating officer, Dave Hatfield.

But the CEO of ATS was only 44, and Mason knew she was unlikely to rise much higher in the company. So, for the past year or so, Mason had been considering her options and likely next career steps: "I thought if I could come up with an idea of my own, I'd start a company, but I was having trouble coming up with anything that I thought really had a lot of potential." Mason had several HBS classmates who were venture capitalists and with whom she had kept in contact since her graduation eight years earlier. As she began to think seriously about leaving ATS, she contacted several of her friends, saying she was interested in joining a start-up. One venture capitalist, Fred Thysen, put her in touch with Craig Shepherd, who Thysen had met at a "venture fair." Thysen said Shephard had an interesting idea and could use some help. Mason commented:

> I met Craig for coffee one morning at Fred's suggestion. He had developed what I thought was a great idea, and had a prototype of the translation engine that he could demo on his laptop. I knew from my role at ATS that customers would value this product, if it was for real, and that my contacts would give us great entrée into potential customers and partners. It was clear that this would be a product that would be sold to CIOs (chief information officers), and my Palm is chock full of these people.

Pursuing the Translation Engine Concept

Mason and Shepherd had pursued the idea for the previous six weeks, working nights and weekends to flesh out some likely applications of the technology, potential markets, and the scale of the opportunity, as well as to sort through the capabilities of potential competitors.

By the end of the six weeks, Mason thought the idea had the potential she needed to make her leave what was an attractive position at a solid company. And she felt that she could work well with Shepherd. Still, Mason knew that leaving ATS to start a new venture posed significant risks.

One issue that she knew was important, but didn't know how to get her hands around, was the technology. When Shepherd first described the key concepts behind the engine, Mason thought it was too simple to work. As she became convinced that it was, in fact, the simplicity of the concepts that made the idea so attractive, she began to worry about how they would prevent competitors from copying the concepts. She knew the first thing the venture capitalists (VCs) would want to know is

why the big companies wouldn't simply take a free ride after Mason and Shepherd did all the hard work to prove the market.

Mason talked about leaving ATS and other issues that were keeping her awake at night, including her concern about competing with her current employer:

> First, I was concerned with competing with ATS—it just didn't seem right. So one of the first things I tried to sort out with Craig was what products we were likely to develop, and whether they would compete with ATS. I concluded that ATS created applications software, and that the "translation engine" was such a generic product that it would not compete at all with ATS's product. Moreover, ATS had never sold a product remotely like a translation engine and, as far as I know, had never even considered developing such a thing. Although the translator might be used by customers to create products that could compete with ATS offerings, the translator itself was not something that would ever be marketed in direct competition with any ATS product. In fact, the availability of the translator could be a great boost to ATS's efforts to enhance the reputation of UNIX-based systems as the preferred platform for mission-critical software. The more applications that are available for these systems, the more robust the service and support offerings would become. We always assumed that anything that furthered UNIX-based systems was a good thing for ATS no matter where it came from.

> Once I convinced myself of this, I felt a lot better. I began really spending a lot of time on nights and weekends working with Craig, and believing that it was going to happen. Craig and I finished a business plan around October 1, and we wanted to show it around town to a few VCs we knew. We left out my name and the exact description of ATS, but I knew that the VCs I planned to contact would know it was me. I planned on asking them to agree to keep my involvement confidential until I officially gave notice to ATS. Basically, I wanted to get a round of feedback from some VCs I trusted that this was a good idea, and that money could be raised before I left my job. And I have my last tranche of options vesting in six weeks and don't want to leave this on the table if I can help it.

Planning to Start a Business

During the first week of October, Shepherd and Mason agreed it was time "to put a toe in the water," and that Mason would send a draft business plan for Intelisoft to two or three of her close friends in the VC business:

> First, I decided to talk to some of my former classmates who were entrepreneurs, and they advised us to get the VCs to sign a non-disclosure agreement (NDA). A friend gave us a copy of the one that he had used, and we changed a few words but basically copied it (see **Exhibit 1** for NDA). But when I talked to my VC friends about signing a confidentiality agreement before sending the plan, they all refused. They said that they meet with people all the time, and that they couldn't guarantee that whatever my idea was, it wasn't something that was already cooking in one of their portfolio companies. They couldn't subject themselves to the risk of a lawsuit with every entrepreneur they met.

> So I figured that these were friends, and that we could revisit the issue once we were circulating a final plan more broadly. So, I sent the plan to the three VCs I knew who I would also describe as good friends. Now they had more questions. I met with one, Jay Wright, and

he asked me about my relationship with ATS: Would the company come after me and sue me? So I dug out a copy of my employment contract (see **Exhibit 2** for copy of employment agreement signed by Sheila Mason), and I also talked to Paul Bagatell, ATS's former VP of business development who was a friend, and who had left the company to join a competitor 18 months ago. He told me that I should not assume that ATS would see things the way I did, that they had been burned before by people who left. He said they would tend to assume the worst and act accordingly. He faxed me a copy of a letter that ATS's lawyers sent to him soon after his resignation. (See **Exhibit 3** for copy of letter from ATS's law firm to Bagatell.)

Jay also asked about the protectability of the idea: Was it patentable? Had we sought a patent? I confessed that we hadn't really gone down this road yet—that we had hoped to get a better read on whether the deal was really fundable and to what extent our product would rely on the patent—before we spent that kind of money. But I suppose if the VCs wanted this buttoned up, then we were going to have to do it.

Finally, the VCs also mentioned that they would want to talk to potential customers to evaluate the business opportunity, so Shepherd and I discussed which ATS customers I should "warm up" in the event that the VCs might call. I figured we might as well talk to a potential customer ourselves to see what they would say, so I scheduled a meeting with a potential customer—someone I knew well from my time at ATS who was also an HBS section-mate. Again, I wanted to test our idea and learn a bit more about the process. We sent them basically the same NDA we had prepared for the VCs, and I got a fax yesterday where they refused to sign it without some changes. (See **Exhibit 4** for letter, requesting inclusion of a "residuals clause.")

As Mason drove towards Shepherd's home, she began to think harder about some of the concerns that she had put off thinking about all day:

I know that we are right on the verge of taking a big step here—talking to VCs and potential partners—and that it is a small world. And it is hard for me at work; these are people I have been with for five years, whom I consider to be friends, yet I can't be forthright about my plans. We are in the annual planning cycle, and we sit around the table saying "we should do this" and I commit to my pieces of the plan, and I am beginning to feel disingenuous. So for the first time, I am really starting to think about walking into my boss (COO Dave Hatfield) and letting him know what is going on. But then I wonder, is this the right way to do it? Should I make it formal, like a letter of resignation? That seems so stiff. I could just be up front with him about what I am doing and seek his advice.

The longer Mason waited to announce her departure, however, the more she ran into potentially awkward situations at work. For example, during a recent round of golf with a subordinate—ATS's director of business development—he mentioned that if Mason ever saw an interesting opportunity for a new venture, to include him in it. Knowing that she had signed an employment agreement with a non-solicitation clause, Mason was unsure whether she could mention her potential new venture with Shepherd to her colleague. (See **Exhibit 2** for Mason's employment agreement.)

As the prospect of leaving became more of a reality, Mason became increasingly concerned about all of the potential legal issues surrounding her prospective departure from ATS. She was worried about the fact that she frequently used her personal laptop for business so she could travel efficiently. As a result, she "synched" her desktop computer at ATS with her personal computer, thus moving many of her work files, including her entire contact database, onto her home computer and

Blackberry. Indeed, she'd opened up the contact file on her Blackberry and shown it to Shepherd during a recent meeting to see if he knew any of her contacts. Was this a problem, she wondered?

Finally, there was the issue of hiring an attorney. It did seem like it was getting to be that time. ATS worked with attorneys at a large, prestigious, "downtown" law firm, some of whom Mason had worked with on various negotiations over the past few years; she could certainly call one of these attorneys. On the other hand, she knew that there were smaller firms that were generally less expensive that worked with smaller start-ups. Mason was sure that her VC friends could provide her with the names of the law firms they liked to worked with, but this seemed to her to be a potential conflict—wouldn't she be sitting across the table negotiating with the VCs? Did she want to use lawyers who depended on the VCs for business—i.e., where would their loyalties lie? Finally, Shepherd had a programmer friend who occasionally consulted with an intellectual property "boutique" firm and who had offered to introduce them to an attorney there.

As Mason pulled into Shepherd's driveway, Shepherd walked out the front door and met Mason near her car:

Sheila, I didn't want to talk about this over the phone from work today, but we have a problem. My boss came into the office today and told me that I was being considered for a promotion, and he wanted to make sure I wanted it before he went to bat for me. I felt I had to tell him that I was thinking about leaving and why, and when I did so, he just said, "I think this could be a problem" and left my office. An hour later, the company's general counsel walked into my office and handed me this letter.

He handed Mason a copy of the letter, in which Nova claimed all rights to Shepherd's invention. (See **Exhibit 5** for a copy.)

Exhibit 1   Draft Non-Disclosure Agreement

<u>CONFIDENTIALITY AGREEMENT</u>

THIS CONFIDENTIALITY AGREEMENT (the "Agreement") is made this _____ day of October, 2002, by and between Intelisoft Software Systems, Inc. (INTELISOFT) and _____ ("Venture Capitalist").

<u>Background</u>

Venture Capitalist proposes to evaluate a potential business that INTELISOFT is currently discussing with certain other parties. In order to facilitate same, INTELISOFT proposes to share certain proprietary and confidential information with Venture Capitalist relating to the Venture. The parties are entering into this Agreement in order to restrict Venture Capitalist's use and disclosure of such information.

<u>Terms</u>

In consideration of the premises and mutual covenants contained herein and intending to be legally bound, the parties hereto agree as follows:

1.   <u>Information</u>. "Information" means all data or information, whether oral or written, about the Venture (including without limitation the fact of its potential existence, the occurrence of negotiations and the identities of the potential parties thereto) furnished or available to, or otherwise obtained by, Venture Capitalist or its Associates (defined below) which is not otherwise generally available to the public. Information includes, without limitation, all specifications, drawings, sketches, models, samples, reports, plans, forecasts, current or historical data, computer programs or documentation, and all other technical, financial or business data. Unless INTELISOFT acknowledges in writing to the contrary, all Information obtained by Venture Capitalist and its Associates shall be presumed to be confidential and proprietary and shall be so treated by Venture Capitalist and its Associates.

2.   <u>Non-Disclosure</u>. Venture Capitalist shall not directly or indirectly disclose Information to any third party (including without limitation to its officers, employees, representatives, investors, portfolio companies, advisors, agents, subcontractors and the like [collectively, its "Associates"]) without the prior written consent of INTELISOFT, and shall provide INTELISOFT with a written list of all persons to whom such information is disclosed.

3.   <u>Non-Use</u>. Neither Venture Capitalist nor any of its Associates shall directly or indirectly use any Information for any purpose other than in connection with evaluation of the proposed Venture and only for purposes directly related to the purpose for which such Information was provided or obtained. Venture Capitalist shall retain full responsibility and shall be fully accountable to INTELISOFT for any use of Information by Venture Capitalist's Associates which is not in accordance with the terms hereof (regardless of whether such Associate is a party hereto).

4.   <u>No License</u>. Nothing contained in this Agreement shall be construed as granting or conferring any rights by license or otherwise to Venture Capitalist or its Associates in or to any Information.

5.   <u>Return of Information</u>. All Information shall remain the property of INTELISOFT and shall be returned by Venture Capitalist to INTELISOFT upon request. Any abstracts, notes, memoranda, or other documents containing any Information or any description, summary, or analysis of any Information shall

be destroyed by Venture Capitalist upon such request, which destruction shall be certified in writing by Venture Capitalist.

6.   Limitation of Agreement. This Agreement is entered into in contemplation of the negotiation of the possible investment by the Venture Capitalist in the Venture. Nothing contained herein shall obligate or be deemed to obligate INTELISOFT (including, without limitation, the Venture entity) to accept any investment from Venture Capitalist.

7.   Entire Agreement. This Agreement constitutes the entire agreement between the parties and supersedes any prior or contemporaneous oral or written representations with regard to the subject matter hereof.

8.   Amendment and Waiver. This Agreement may not be amended, modified or waived except by a specific writing signed by both parties. No waiver hereunder shall constitute an ongoing waiver, or a waiver in any other context, unless such waiver specifically so states.

9.   Governing Law. This Agreement shall be governed by and construed under and in accordance with the laws of the State of Delaware, without regard to principles of conflicts of laws.

10.   Execution and Delivery. This Agreement may be executed and delivered either originally or by facsimile and in counterparts, each of which shall constitute an original but taken together shall constitute one and the same instrument.

IN WITNESS WHEREOF and intending to be legally bound hereby, the parties have duly executed this Agreement on the date first above written.

By: _____

Title: _____   [VENTURE CAPITALIST]

By: _____

Title:_____   [INTELISOFT]

Exhibit 2   ATS Employment Agreement Signed By Sheila Mason

EMPLOYEE NONCOMPETITION, NONSOLICITATION, NONDISCLOSURE AND DEVELOPMENTS AGREEMENT

In consideration and as a condition of my employment and/or continued employment by AMERICAN TELECOMMUNICATIONS SOFTWARE, INC. and/or any of its subsidiaries, subdivisions, affiliates, successors, assigns and/or duly authorized representatives (collectively the "Company"), I hereby agree with the Company as follows:

1. <u>Non-competition</u>. During the period of my employment by the Company and for one year thereafter (the "Non-competition Term"), regardless of the reasons for my termination, I shall not, directly or indirectly, alone or as a consultant, partner, officer, director, employee, joint venturer, lender or stockholder of any entity, (a) accept employment with any business that is in competition with the products or services being created, developed, manufactured, marketed, distributed or sold by the Company, or (b) engage in any business or activity that is in competition with the products or services being created, developed, manufactured, marketed, distributed or sold by the Company.

2. <u>Non-solicitation of Customers</u>. During the Non-competition Term, regardless of the reasons for my termination, I will not (except on the Company's behalf), directly or indirectly, alone or as a consultant, partner, officer, director, employee, joint venturer, lender or stockholder of any entity, solicit or do business with any customer of the Company or any potential customer of the Company (i) with whom I have had contact or (ii) about whom I obtained, or became familiar with through, Confidential Information (as defined herein) during the course of my employment with the Company.

3. <u>Non-solicitation of Employees</u>. During the Non-competition Term, regardless of the reasons for my termination, I will not (except on the Company's behalf), directly or indirectly, alone or as a consultant, partner, officer, director, employee, joint venturer, lender or stockholder of any entity, employ, attempt to employ or knowingly permit any company or business organization by which I am employed or which is directly or indirectly controlled by me to employ, any Company employee, agent, representative or consultant, or any such person whose employment with the Company has terminated within six months of my departure from the Company, or in any manner seek to solicit or induce any such person to leave his or her employment with the Company, or assist in the recruitment or hiring of any such person.

4. <u>Nondisclosure</u>. I shall not at any time, whether during or after the termination of my employment, reveal to any person or entity any Confidential Information except to employees of the Company who need to know such Confidential Information for the purposes of their employment, or as otherwise authorized by the Company in writing. The term "Confidential Information" shall include, without limitation, any information concerning the organization, business or finances of the Company or of any third party which the Company is under an obligation to keep confidential or that is maintained by the Company as confidential. Such Confidential Information shall include, but is not limited to, trade secrets or confidential information respecting inventions, products, designs, methods, know-how, techniques, systems, processes, engineering data, software programs, software code, works of authorship, customer lists, customer information, supplier lists, supplier information, marketing or sales information, financial information, financial projections, pricing information, business plans, projects, plans and proposals. I shall keep confidential all matters entrusted to me and shall not use or attempt to use any Confidential Information except as may be required in the ordinary course of performing my duties as an employee of the Company, nor shall I use any

Confidential Information in any manner which may injure or cause loss or may be calculated to injure or cause loss to the Company, whether directly or indirectly.

5. <u>Company Property</u>. I agree that during my employment I shall not make, use or permit to be used any Company Property otherwise than for the benefit of the Company. The term "Company Property" shall include all notes, memoranda, reports, lists, records, files, drawings, sketches, specifications, designs, software programs, software code, data, computers, cellular telephones, pagers, credit and/or calling cards, keys, access cards, documentation or other materials of any nature and in any form, whether written, printed, electronic or in digital format or otherwise, relating to any matter within the scope of the business of the Company or concerning any of its dealings or affairs and any other Company property in my possession, custody or control. I further agree that I shall not, after the termination of my employment, use or permit others to use any such Company Property. I acknowledge and agree that all Company Property shall be and remain the sole and exclusive property of the Company. Immediately upon the termination of my employment I shall deliver all Company Property in my possession, and all copies thereof, to the Company.

6. <u>Assignment of Developments</u>.

(a) If at any time or times during my employment, I shall (either alone or with others) make, conceive, create, discover, invent or reduce to practice any Development that (i) relates to the business of the Company or any customer of or supplier to the Company or any of the products or services being developed, manufactured or sold by the Company or which may be used in relation therewith; or (ii) results from tasks assigned to me by the Company; or (iii) results from the use of premises or personal property (whether tangible or intangible) owned, leased or contracted for by the Company, then all such Developments and the benefits thereof are and shall immediately become the sole and absolute property of the Company and its assigns, as works made for hire or otherwise. The term "Development" shall mean any invention, modification, discovery, design, development, improvement, process, software program, work of authorship, documentation, formula, data, technique, know-how, trade secret or intellectual property right whatsoever or any interest therein (whether or not patentable or registrable under copyright, trademark or similar statutes (including, but not limited to, the Semiconductor Chip Protection Act) or subject to analogous protection). I shall promptly disclose to the Company (or any persons designated by it) each such Development. I hereby assign all rights (including, but not limited to, rights to inventions, patentable subject matter, copyrights and trademarks) I may have or may acquire in the Developments and all benefits and/or rights resulting therefrom to the Company and its assigns without further compensation and shall communicate, without cost or delay, and without disclosing to others the same, all available information relating thereto (with all necessary plans and models) to the Company.

(b) Excluded Developments. I represent that the Developments identified in the Appendix, if any, attached hereto comprise all the Developments that I have made or conceived prior to my employment by the Company, which Developments are excluded from this Agreement. I understand that it is only necessary to list the title of such Developments and the purpose thereof but not details of the Development itself. If there are any such developments to be excluded, the undersigned should initial here _____; otherwise it will be deemed that there are no such exclusions.

7. <u>Further Assurances</u>. I shall, during my employment and at any time thereafter, at the request and cost of the Company, promptly sign, execute, make and do all such deeds, documents, acts and things as the Company and its duly authorized officers may reasonably require:

(a) to apply for, obtain, register and vest in the name of the Company alone (unless the Company otherwise directs) patents, copyrights, trademarks or other analogous protection in any country

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throughout the world relating to a Development of the Company and when so obtained or vested to renew and restore the same;

(b) to assist in the defense of any judicial, opposition or other proceedings in respect of such applications and any judicial, opposition or other proceeding, petition or application for revocation of any such patent, copyright, trademark or other analogous protection; and

If the Company is unable, after reasonable effort, to secure my signature as required by this paragraph on any application for patent, copyright, trademark or other analogous registration or other documents regarding any legal protection relating to a Development, whether because of my physical or mental incapacity or for any other reason whatsoever, I hereby irrevocably designate and appoint the Company and its duly authorized officers and agents as my agent and attorney-in-fact, to act for and in my behalf and stead to execute and file any such application or applications or other documents and to do all other lawfully permitted acts to further the prosecution and issuance of patent, copyright or trademark registrations or any other legal protection thereon with the same legal force and effect as if executed by me.

8. Consent to Use Name/Likeness. I hereby consent to the use of my name, picture, signature, voice, image, and/or likeness by the Company during the term of this Agreement and at any time thereafter. Further, I waive all claims I may now have or may ever have against the Company and its officers, employees, and agents arising out of the Company's use, adaptation, reproduction, modification, distribution, exhibition or other commercial exploitation of my name, picture, signature, voice, image and/or likeness, including, but not limited to, right of privacy, right of publicity and celebrity, use of voice, name or likeness, defamation and copyright infringement. I represent and warrant that I have not made any contract or commitment in conflict with this consent and waiver.

9. Representations.

(a) I represent that my employment with the Company and my performance of all of the terms of this Agreement do not and will not breach any agreement to keep in confidence proprietary information acquired by me in confidence or in trust prior to my employment by the Company, nor will it violate any nonsolicitation and/or noncompetition agreements entered into prior to my employment with the Company. I have not entered into, and I shall not enter into, any agreement either written or oral in conflict herewith.

(b) I further agree that any breach of this Agreement by me will cause irreparable damage to the Company and that in the event of such breach the Company shall have, in addition to any and all remedies of law, the right to an injunction, specific performance or other equitable relief to prevent the violation of my obligations hereunder.

10. Waiver; Amendments. Any waiver by the Company of a breach of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach of such provision or any other provision hereof. In addition, any amendment to or modification of this Agreement or any waiver of any provision hereof must be in writing and signed by the Company's Chief Executive Officer.

11. Severability. I agree that each provision and the subparts of each provision herein shall be treated as separate and independent clauses, and the unenforceability of any one clause shall in no way impair the enforceability of any of the other clauses of the Agreement. Moreover, if one or more of the provisions contained in this Agreement shall for any reason be held to be excessively broad as to scope, activity, subject or otherwise so as to be unenforceable at law, such provision or provisions shall be construed by the appropriate judicial body by limiting or reducing it or them, so as to be

enforceable to the maximum extent compatible with the applicable law as it shall then appear. I hereby further agree that the language of all parts of this Agreement shall in all cases be construed as a whole according to its fair meaning and not strictly for or against either of the parties.

12. <u>Survival</u>. This Agreement shall be effective as of the date entered below. My obligations under this Agreement shall survive the termination of my employment regardless of the manner of such termination and shall be binding upon my heirs, executors, administrators and legal representatives.

13. <u>Assignment</u>. The Company shall have the right to assign this Agreement to its successors and assigns, and all covenants and agreements hereunder shall inure to the benefit of and be enforceable by said successors or assigns. I will not assign this Agreement.

14. <u>Governing Law</u>. This Agreement shall be governed by and construed in accordance with the laws of Delaware and shall in all respects be interpreted, enforced and governed under the internal and domestic laws of Delaware, without giving effect to the principles of conflicts of laws of such state. Any claims or legal actions by one party against the other arising out of the relationship between the parties contemplated herein (whether or not arising under this Agreement) shall be governed by the laws of Delaware. I further agree that any claims or legal actions by one party against the other arising out of the relationship between the parties contemplated herein (whether or not arising under this Agreement) shall be governed by the laws of Delaware and shall be commenced and maintained in any state or federal court located in such state, and I hereby submit to the jurisdiction and venue of any such court.

15. <u>Entire Agreement</u>. This Agreement sets forth the complete, sole and entire agreement between the parties with respect to the subject matter herein and supersedes any and all other agreements, negotiations, discussions, proposals, or understandings, whether oral or written, previously entered into, discussed or considered by the parties.

IN WITNESS HEREOF, I have executed this Agreement as of the date first written below.

Signature: <u>(signed) Sheila Mason</u>

Date: <u>November 12, 1994</u>

Appendix: List of Developments and Purpose:

-- NONE --

Exhibit 3   Letter from ATS's counsel to Paul Bagatell, former director of business development and friend of Sheila Mason

March 22, 2001

<u>**Via Federal Express and First Class Mail**</u>

Mr. Paul Bagatell

RE: ATS, Inc.

Dear Mr. Bagatell:

This firm represents American Telecommunications Software, Inc. ("ATS" or the "Company"). I write regarding your obligations under your Employee Noncompetition, Nonsolicitation, Nondisclosure and Developments Agreement (the "Agreement") which you executed as a condition of your ATS employment. ATS has serious concerns that you may be violating this Agreement, as well as certain common law and statutory obligations.

It is our understanding that effective Friday, March 17, 2001 you resigned as ATS's Vice-President of Business Development, and that on the very next business day—Monday, March 20, 2001—you began employment with Jaguar Systems, a company in direct competition with ATS. It further is our understanding that when asked by the Company where you were going to work, you refused to provide the name of your new employer but repeatedly represented to ATS that you were not going to work for one of ATS's competitors.

ATS has significant concerns that you are breaching two key contractual obligations that you owe to ATS by virtue of your Jaguar employment. First, you agreed in paragraph 1 of the Agreement that you would not, for one year from the termination of your ATS employment, directly or indirectly "engage in any business activity that is in competition with the products or services being created, developed, manufactured, marketed, distributed or sold by the Company." Your Jaguar Systems employment appears to breach this provision.

Second, you expressly agreed in paragraph 2 of the Agreement that you would not, for one year from the termination of your ATS employment, "solicit or do business with any customer of the Company, or any potential customer of the Company (i) with whom I have had contact or (ii) about whom I obtained, or became familiar with through, Confidential Information (as defined herein) during the course of my employment with the Company." To the extent that you are conducting such prohibited business with ATS's clients or prospective clients, you are violating this provision. And without limiting the generality of the foregoing, please be advised that ATS will consider you to have violated this provision (and possibly other provisions) to the extent that you make any statements to Jaguar Systems with respect to ATS's business dealings with its clients, whether actual or prospective.

Exhibit 3 (continued)

Irrespective of whether you are violating your noncompete and nonsolicit obligations to ATS, our client nonetheless has serious concerns that, during your employment with Jaguar Systems, you may reveal, use or inevitably disclose ATS's confidential, proprietary and/or trade secret information. As you know, during your ATS employment you were exposed to and entrusted with a considerable amount of the Company's confidential, proprietary, and trade secret information, including, but not limited to, the Company's proprietary sales database, customer contact list, pricing plans, pricing methodologies, customer demand, order and pipeline information, product architecture, development and roadmaps, and marketing strategies. In your capacity as the Company's Vice President of Business Development, you had frequent contact with and intimate knowledge of ATS's customers. The Agreement expressly forbids you from improperly using or disclosing such Company Confidential Information and goodwill. In addition, you have common law and statutory obligations (including such obligations pursuant to the Federal Economic Espionage Act of 1996) that prohibit such conduct.

Similarly, paragraph 5 of the Agreement prohibits you from using or retaining any Company Property. You are violating that Agreement to the extent that you have retained any Company Property, including, but not limited to, any Company Property that may reside on any home computer. Please return all Company Property immediately.

The Company takes its contractual, common law, and statutory rights very seriously and will not tolerate any conduct on your part that would violate such rights. In order to avoid escalating this matter, please describe (in writing) your current position with Jaguar Systems, including the exact nature and extent of your duties (both present and contemplated), the customers and/or accounts to whom you have been assigned, and the products or services that you are marketing, selling and/or distributing. In addition, please provide a written representation to the undersigned that you are abiding by your obligations in the Agreement. The requested information and representations should be submitted to this office no later than Friday, March 24, 2001. If you fail to submit this information, the Company will have no alternative but to take all actions necessary to safeguard its rights.

ATS expects you to scrupulously abide by your obligations. I suggest that you carefully review the Noncompetition, Nonsolicitation, Nondisclosure and Developments Agreement to reacquaint yourself with your contractual obligations and ATS's rights when faced with your violation or threatened violation of the Agreement. ATS will continue to monitor this situation closely and will not tolerate any unfair and deceptive trade practices. If such conduct occurs, ATS may initiate appropriate legal proceedings including, but not limited to, seeking injunctive relief. At this point, ATS is reserving all rights pending receipt of your assurances as outlined above.

I look forward to your prompt response.

Very truly yours,

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Exhibit 4   Customer Letter Requesting "Residuals" Clause Language In NDA

Sheila:

Got your proposed NDA. We are comfortable signing as long as you insert the following language:

> Residuals. Notwithstanding anything herein to the contrary, either party may use Residuals for any purpose, including without limitation use in development, manufacture, promotion, sale and maintenance of its products and services; provided that this right to Residuals does not represent a license under any patents, copyrights or other intellectual property rights of the disclosing party. The term "Residuals" means any information retained in the unaided memories of the receiving party's employees who have had access to the disclosing party's Confidential Information pursuant to the terms of this Agreement. An employee's memory is unaided if the employee has not intentionally memorized the Confidential Information for the purpose of retaining and subsequently using or disclosing it.

Let me know.

Thanks,

John Hammersmith

Exhibit 5   Nova Letter to Craig Shepherd, including copy of his employment agreement

Dear Craig:

On July 14, 1992, Nova hired you to work for our firm as Manager of documentation and support and you and Nova entered into an Agreement Regarding Assignment of Inventions and Non-Disclosure (see Exhibit A, hereinafter, "the Agreement") at the onset of this employment relationship. The terms of the Agreement speak to two types of inventions: (1) those conceived prior to your employment by Nova and (2) those conceived during your employment with Nova. With respect to the first, you declared you had none. With respect to the second, the Agreement clearly obligates you to "…communicate to an officer of the Company promptly and fully all inventions (including but not limited to all matters subject to patent, i.e., processes, machines, computer programs, etc.) made or conceived by me (whether made solely by me or jointly with others) from the time of entering the Company's employ until I leave (1) which are along the lines of the business, work or investigations of the Company or of companies which it owns or controls at the time of such inventions, or (2) which result from or are suggested by any work which I may do for or on behalf of the Company."

Nova is a corporation engaged in the business of developing software that solves its customers technology problems. Over your ten years with the company you were employed in various positions, each providing you with insight into the company's products and customers. As you know from your own experience, Nova's customer's are often engaged in the frustrating and time-consuming task of porting legacy software applications to the UNIX operating environment. As such, there would be great commercial advantage to Nova to be able to provide to its customers a more cost-efficient method of performing porting tasks or to offer a cost-effective legacy application porting service to its customers. Such a product offering would not only generate direct revenue, but would also result in follow-on revenue from support services or utilities to maintain and upgrade the ported applications.

To state our position succinctly, during and as a result of your employment at Nova, you became aware of the enormous resources currently invested in legacy applications, as well as the difficulties that currently exist in porting and updating this code. Having learned these facts, during and as a result of your employment at Nova, you realized how valuable an automated translation process would be and you conceived and developed this invention, to which Nova holds the "sole and exclusive" right.

The field of software is highly competitive. Inventions, new concepts, ideas, and trade secrets are among the most valuable assets of companies like Nova. By this letter, we are notifying you of our claim on this invention, and request that you sign below and return to Nova, indicating your agreement with this letter, and that you deliver, in writing, to Nova your notes, drawings, and prototypes of this product, along with whatever other explanation is required to reduce this invention to practice.

Craig, it is our sincere hope that we can resolve this situation amicably.

Sincerely,

Catherine Klein
Nova Software Company, General Counsel

ATTACHMENT: Exhibit A

Nova Software Company

AGREEMENT REGARDING ASSIGNMENT OF INVENTIONS AND NON-DISCLOSURE

Name: **CRAIG SHEPHERD**

In consideration of my employment (or continued employment in the event I am already in the employ of the Company at the time of execution hereof) with Nova Software Company or any subsidiary or affiliate thereof (the "Company") and of the salary or wages paid for my services in such employment, the Company and I agree as follows:

(A) I will communicate to an officer of the Company promptly and fully all inventions (including but not limited to all matters subject to patent, i.e., processes, machines, computer programs, etc.) made or conceived by me (whether made solely by me or jointly with others) from the time of entering the Company's employ until I leave, (1) which are along the lines of the business, work or investigations of the Company or of companies which it owns or controls at the time of such inventions, or (2) which result from or are suggested by any work which I may do for or on behalf of the Company.

(B) I will assist the Company and its nominees during or subsequent to such employment in every proper way (entirely at its or their expense) to obtain for its or their own benefit patents for such inventions in any and all countries (including the assignment of any inventions to the Company), and said inventions will remain the sole and exclusive property of the Company or its nominees whether patented or not.

(C) In accordance with Company policy as in effect from time to time, I will make and maintain adequate records of all such inventions, in the form of notes, sketches, drawings, or reports relating thereto, which records shall be and remain the property of, and available to, the Company at all times.

(D) Except as the Company may otherwise consent in writing, I will not disclose at any time (except as my Company duties may require) either during or within a period of (2) years subsequent to the term of employment, any information, knowledge, or data of the Company I may receive or develop during the course of my employment, relating to trade secrets, formulas, business processes, methods, machines, inventions, discoveries, computer programs, customer records, lists, accounts or other matters which are of a private, secret or confidential nature.

(E) I will notify the Company in writing before I make any disclosure or perform or cause to be performed any work for or on behalf of the Company, which might conflict with (1) the rights I claim in any invention or idea (a) conceived by me or others prior to my employment or (b) otherwise outside the scope of this Agreement, or (2) rights of others arising out of obligations incurred by me (a) prior to this Agreement or (b) otherwise outside the scope of this Agreement. In the event of my failure to give notice under the circumstances specified in (1) the foregoing, the Company may assume that no such conflicting invention or idea exists, and I agree that I will make no claim against the Company with respect to the use of any such invention or idea in any work or the product of any work which I perform or cause to be performed for or on behalf of the Company. All discoveries owned or controlled by me, in whole or in part, as of the date of this Agreement are listed below.

Discoveries owned or controlled: (If none, so state. Attach separate sheet if necessary.)

----------------------NONE----------------------------

(F) I will allow the Company, without charge, fee, license or other arrangement and free from any allegation of infringement whatsoever to make full use of any matter developed by me (whether developed or written solely by me or jointly with others) during the course of my employment along the lines of the business, work or investigations of the Company or of companies which it owns or controls at the time of such development and/or which result from or are suggested by any work which I may do for or on behalf of the Company.

This Agreement may not be changed, modified, released, discharged, abandoned or otherwise terminated, in whole or in part, except by an instrument in writing signed by me and by an officer or other authorized executive of the Company.

This Agreement shall be binding upon my heirs, executors, administrators or other legal representatives or assigns. Any reference to the Company shall include the Company's subsidiaries, successors and assigns.

Except as stated below, I have no agreements with or obligations to others in conflict with the foregoing. (If "none," so state.)

Arrangements with or obligations to others: (If none, so state. Attach separate sheet if necessary.)

--------------NONE----------------------------------

The Company and I acknowledge that this Agreement does not constitute a contract of employment and that either the Company or I can terminate the employment relationship at any time subject to any applicable employment policies of the Company then in effect. However, my agreement not to use or disclose the Company's proprietary data or information and to protect the Company's interest in any inventions shall survive termination of my employment.

Employee
Name: (signed) **CRAIG SHEPHERD**
Date: **JULY 14, 1992**

Nova Software Company
By: (signed) **STEVEN JOBSON**
Title: VP, Human Resources