NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission,

Plaintiff,

vs.

Coast Energy Management, Inc., et al.

Defendants.

No. CV01-1352-PHX-SRB

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

ISSUE PRESENTED

The sole issue remaining to be decided in this case is whether Defendant DGB Technologies, Inc. (DGB) has successor liability under the Consent Decree entered September 22, 2004, establishing the liability of Defendant Coast Energy Management, Inc. (CEM) for $225,000.00 to be paid to certain former employees of CEM. That Consent Decree, to which DGB was a party, specifically provided that if CEM and/or its principal Daniel Bach failed to timely pay the $225,000.00 judgment, trial would ensue on the issue of whether DGC was liable as a successor to CEM for this judgment. CEM and Bach failed to timely pay the judgment and a bench trial on the issue of successor liability was held on September 29 and October 1, 2004.

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FINDINGS OF FACT

1. CEM was incorporated in 1993 by Daniel Bach and Lee Eslick. Its business was the manufacturing and distribution of energy-saving devices. During all material times Bach and Eslick were officers and directors of CEM.

2. Daniel Bach invented an energy-saving device for which he obtained a patent in 1994. In March 1994, he and CEM entered into a license and assignment agreement wherein Bach granted CEM "an exclusive license under software, technology, copyrights, patents, copyright applications, patent applications and other intellectual property developed by or for [Bach] to make, have made, use, sell, or distribute energy management controllers on a worldwide basis." The license was royalty free and not subject to termination as long as patent rights existed. This license to Bach's inventions was CEM's only significant asset. The license does not refer to any specific patent or patent application but arguably applied to future inventions developed by or for Bach relating to energy management controllers.

3. CEM leased facilities for the manufacturer of the energy-saving devices and since at least 1998 operated out of leased facilities at 470 North 56th Street in Chandler, Arizona.

4. In 1996, Bach and Eslick incorporated ES Management Services, Inc. The company never actively engaged in any business under that name. On April 14, 2000, ES Management Services, Inc. changed its name to DGB[1] Technologies, Inc.

5. CEM has never had adequate working capital. Bach determined that taking the company public would be the best way to raise the capital needed by the company to fully realize its potential for the manufacture and marketing of energy-saving devices. But CEM had not kept its books and records in such a way that it could obtain the necessary audited financial statements in order to satisfy the requirements for a public offering.

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[1]DGB are the initials of its principal shareholder Daniel Gene Bach.

6. Bach embarked upon a plan to use the existing corporation, ES Management Inc., as the corporation to take public. His plan included the name change in April 2000 to DGB. He hoped that after two years of audited financial statements, DGB would be in a position to make the necessary filings for a public offering. His plan also included DGB purchasing the assets of CEM, CEM relinquishing its exclusive license for the energy-saving devices and Bach's assignment of his rights in the technology to DGB.

7. At a special meeting of the board of directors of CEM on November 11, 2000, Bach explained some of the financial problems facing CEM. Bach reported that he had assigned his ownership interest in his patent to DGB as well as his interest in a patent application filed in July 2000 for an energy management controller. The board acknowledged that CEM owed almost $600,000.00 to DGB and had a debt to Bach personally of $375,000.00. DGB and Bach had been providing CEM's working capital since sometime in 1999. The directors authorized CEM to borrow up to $2 million from Bach and/or DGB, to be unsecured and to bear interest at 2% over the prime lending interest rate of the Bank of America. The minutes recognized corporate liabilities of approximately $5.5 million and the directors' concern that the corporation could not continue to operate without continued borrowing or new equity capital. The meeting concluded with the directors agreeing to consider a bulk sale of the assets of the corporation to DGB.

8. At a February 24, 2001 special meeting, CEM's board directed the officers of the corporation to develop a summary of terms to submit for shareholder approval for the proposed sale of the assets of CEM to DGB. At a June 2, 2001 shareholders meeting, CEM's board recommended the asset sale to its shareholders. The proposed sale included its distributor and dealer agreements and relinquishment of its licenses. The shareholders voted to approve the sale. On March 27, 2002, the directors of DGB approved an asset purchase agreement between DGB and CEM. DGB's officers were authorized and directed to execute the agreement upon their approval of the schedules to be attached thereto and to take all other action necessary to consummate the transaction. That there may not have been follow

through on all of the sale documentation by either corporation was typical of the lack of compliance by both corporations with corporate formalities. But Bach acknowledged that DGB made out a promissory note and that an asset schedule and list of liabilities were drawn up.

9. In April and July of 2000 and in contemplation of the ultimate takeover by DGB of the ongoing business of CEM, Bach assigned his ownership rights in U.S. Patent No. 5.592,062 and a second patent application in exchange for some 45 million shares of DGB stock. In September 2000, CEM shareholders began entering into agreements with Bach to exchange their CEM stock for DGB stock. All but a few of the shareholders entered into these exchange agreements with Bach because, according to Bach, they wanted to continue to be part of the patented technology and of the company that held the technology. While some shareholders did not enter into the stock exchange agreement, this was explained largely by the inability by Bach to locate them. Agreements with distributors also began to be renegotiated in the name of DGB or in the names of both CEM and DGB in preparation of the eventual purchase by DGB of CEM's assets.

10. On March 29, 2002, just two days after DGB approved the purchase of CEM's assets, CEM filed a statement of change of known place of business with the Arizona Corporation Commission changing from the North 56th Street address to the address of its statutory agent. The Court infers that this was done because of CEM's plan to discontinue doing business upon the sale of its assets to DGB. DGB's known place of business has always been the North 56th Street address.

11. In the year 2000 and thereafter, dealers and distributors began making payments to DGB or to both DGB and CEM. Moreover, Bach informed dealers that they would eventually be doing business solely with DGB because of the intended future sale. The exhibits introduced at trial reflected numerous payments by distributors and dealers to DGB pursuant to license and assignment agreements.

12. During this transitional period, employees and independent contractors of CEM were told that they were now working for DGB. The checks issued to employees and independent contractors did not assist employees and independent contractors in knowing by whom they were paid since Bach used another company called ES Management to issue checks to employees and independent contractors. The funds in ES Management's account came from CEM, DGB, and possibly Bach.

13. A business continues to operate from the North 56th Street facility engaging in the same manufacturing and marketing activities CEM performed since the middle 1990's.

14. DGB's claim that the assets were never transferred and that CEM merely continued in its operation and continues in its operation today is not credible. By the time of the board's approval of the asset transfer DGB had essentially already taken over the operations of CEM, such that the two were indistinguishable to their employees, independent contractors and distributors. DGB cannot separate itself now from CEM for purposes of this litigation.

15. Bach was an officer and director of DGB at the time the charges of discrimination were filed, during the EEOC investigation, and through the filing of the litigation. Bach provided an affidavit to the EEOC during its investigation on September 12, 2000. He was the majority shareholder in both corporations at this time.

16. Eslick was also an officer and director of both corporations during the pertinent times. In April 2000, he was interviewed about the charges by an EEOC investigator and admitted knowledge of the litigation since shortly after its filing.

CONCLUSIONS OF LAW

1. Federal common law successorship doctrine applies to almost all federal employment cases including Title VII employment discrimination cases. Steinbach v. Hubbard, 51 F3d 843, 845 (9th Cir. 1995) (collecting cases). To impose liability on a corporation based on successorship liability the EEOC must prove the alleged successor is

a bona fide successor to the predecessor corporation, the successor had notice of the predecessor's potential liability for damages and the predecessor is unable to provide adequate relief. *Id.* at 845-846.

2. Bona fide successorship is determined primarily by continuity in business operations. *Id.* DGB continued the business operations of CEM without substantial interruption, or change in location, method of operation, employees or independent contractors. DGB took over the contracts with distributors. Whether all formal incidents of transfer exist, the evidence showed that as a practical matter DGB, beginning prior to the approval of the sale of assets and continuing thereafter, stepped into the shoes of CEM and that the corporations operated, in essence, as a single entity such that its own officers, directors, employees and distributors could not distinguish between the two.

3. The second requirement is notice of the predecessor's potential liability. DGB had notice of the claims against CEM from the time those claims were made. Bach and Eslick were officers and directors of both corporations. Both were involved in the investigation of the charges by Plaintiff. Bach was the majority shareholder of DGB when the claims arose, were investigated and litigation commenced.

4. CEM is unable to provide adequate relief. It is unable to pay the damages award. As evidenced by the motion filed by Plaintiff to hold CEM and Bach in contempt for failure to pay the consent judgment, the subsequent bankruptcy of Daniel Bach, and corporate records of CEM demonstrating its dire financial straits, it is apparent that CEM no longer has assets or an ability to to pay the Consent Judgment.

5. Successor liability is an equitable doctrine. Baker v. Delta Airlines, Inc., 6 F3d 632, 637 (9th Cir. 1993). The balance of the equities in this case favors a finding of successor liability. Only by holding DGB liable will an effective remedy be available to the victims of CEM's and Bach's sexual harassment. DGB has control of all the valuable assets formerly held by CEM. CEM is effectively an insolvent, if not defunct, corporation.

ORDER

IT IS THEREFORE ORDERED that judgment be entered in favor of Plaintiff and against Defendant DGB Technologies, Inc. in the amount of $225,000.00.

DATED this 18 day of February, 2005.

Susan R. Bolton
United States District Judge