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PHOENIX TECHNOLOGIES LTD.

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SANTA CLARA
12 (UNLIMITED CIVIL CASE)

13 PHOENIX TECHNOLOGIES LTD., a
Delaware corporation,

14 Plaintiff,

15 vs.

16 DEVICEVM, a Delaware corporation, and
BENEDICT CHONG, an individual,

17 Defendants.
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ENCLOSURE
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C. EDWARDS

Case No. 109CV147626

**FIRST AMENDED COMPLAINT FOR (1)
BREACH OF CONTRACT, (2)
INTERFERENCE WITH CONTRACT, (3)
TRADE SECRET MISAPPROPRIATION,
(4) UNFAIR BUSINESS PRACTICES, (5)
CONVERSION; AND (6)
CONSTRUCTIVE TRUST**

JURY TRIAL DEMAND

1 Plaintiff Phoenix Technologies Ltd. ("Phoenix"), for its first amended complaint against
2 Defendants DeviceVM, Inc. ("DeviceVM") and Benedict Chong ("Chong") (collectively,
3 "Defendants"), alleges as follows:

4 **THE PARTIES**

5 1. Phoenix Technologies Ltd. is a Delaware corporation with its principal place of
6 business in Milpitas, California.

7 2. Founded in 1979, Phoenix designs, develops and supports system software and
8 related applications and services for personal computers ("PCs") and other computing devices.
9 Phoenix's products support and enable the compatibility, performance, connectivity, security and
10 management of the various components and technologies used in such devices. Phoenix established
11 industry leadership and effectively created the PC clone industry with its original BIOS product for
12 Compaq in 1983.

13 3. Phoenix sells its products primarily to computer and component device
14 manufacturers. The company also provides training, consulting, maintenance and engineering
15 services to its customers.

16 4. DeviceVM Inc. is a Delaware corporation with its principal place of business in San
17 Jose, California. On information and belief, DeviceVM is a privately held software company
18 headquartered in Silicon Valley with offices in Taiwan and China. On information and belief,
19 DeviceVM was founded in 2006 and is funded by various venture capital firms and private
20 investors based in China and the United States.

21 5. On information and belief, DeviceVM markets, sells, distributes and offers for sale a
22 product named Splashtop®, which it alleges is an instant-on pre-boot environment, developed by
23 DeviceVM, that allows a user to rapidly access the Web and key applications without the need to
24 boot the main operating system.

25 6. Phoenix is informed and believes, and based thereon alleges that Chong, an
26 individual, works and resides in San Jose, California. Chong is a former Phoenix employee who,
27 Phoenix is informed and believes, and based thereon alleges, has worked for and is still employed
28 by DeviceVM.

BACKGROUND ALLEGATIONS

1
2 7. Chong worked as an employee of Phoenix for eight years, from approximately
3 November 1996 until November 2004. During his tenure at Phoenix, he worked as a “Principal
4 Software Engineer” and/or “Team Lead.” Generally speaking, these titles describe a senior level
5 engineer who serves as the technical leader of a specific team, manages a group of engineers
6 working on that team, and serves a role as an individual contributor in the development of a product
7 line.

8 8. In 1996, Phoenix hired Chong to play a significant role in Phoenix’s engineering
9 group responsible for Phoenix’s development of core systems technology.

10 9. Since Chong had access to Phoenix’s most sensitive information, on or about
11 November 1996, Phoenix presented and Chong signed an Employee Inventions and Proprietary
12 Information Agreement (the “Agreement”) as a condition of Chong’s employment by Phoenix. A
13 true and correct copy of the Agreement is attached hereto as Exhibit A, and is incorporated herein
14 by reference.

15 10. The Agreement is valid and fully enforceable against Chong.

16 11. Pursuant to Paragraph 3 of the Agreement, Chong agreed that all Innovations that:
17 (a) are not developed entirely on Employee’s own time; (b) are developed using equipment,
18 supplies, facilities, confidential and proprietary information or trade secrets of Phoenix; (c) result
19 from work performed by Employee for Phoenix; or (d) relate at the time of conception or reduction
20 to practice to the business or the actual or demonstrably anticipated research or development of
21 Phoenix, will be the sole and exclusive property of Phoenix. Chong also agreed to assign to
22 Phoenix any rights that he may have in any such Innovations and in any associated patents, patent
23 applications, copyrights, trade secret rights, mask work rights, rights of priority and other
24 intellectual property rights.

25 12. Pursuant to Paragraph 4 of the Agreement, Chong agreed to assist Phoenix in every
26 proper way to obtain for Phoenix and enforce patents, copyrights, mask work rights and other legal
27 protections for Innovations belonging to Phoenix in any and all countries.

28 13. Pursuant to Paragraph 5 of the Agreement, Chong agreed to irrevocably transfer and

1 assign to Phoenix, and forever waive and agree never to assert, any right to claim authorship or be
2 identified as the author of any Innovation, to object to any modification of, or other action in
3 relation to, any Innovation, or any similar right, existing under judicial or statutory law of any
4 country in the world, or under any treaty.

5 14. Pursuant to Paragraph 6 of the Agreement, Chong acknowledged that his
6 employment with Phoenix created a relationship of confidence and trust with respect to any
7 information of a confidential and proprietary or secret nature that was disclosed to him by Phoenix,
8 or that he learned in the course of employment by Phoenix and that related to the business, products,
9 supplier, customers, research or development of Phoenix and its products. Such Proprietary
10 Information includes but is not limited to Innovations, marketing plans, product plans, business
11 strategies, financial information, forecasts, personnel information, customer lists and any other
12 nonpublic technical or business information that Employee knows or has reason to know Phoenix
13 would like to treat as confidential for any purpose, such as product development, maintaining a
14 competitive advantage, or avoiding undesirable publicity (hereinafter "Proprietary Information").

15 15. Pursuant to Paragraph 7 of the Agreement, Chong agreed at all times, both during
16 and after his employment, to keep all such Proprietary Information in confidence and trust, and
17 agreed not to use or disclose any such Proprietary Information without the written consent of
18 Phoenix, except as may be necessary to perform his duties as an employee of Phoenix and for
19 Phoenix's benefit.

20 16. In 2000, Phoenix began developing its FirstWare product line. Phoenix formed an
21 internal team that worked on the development of Phoenix's own Operating System for all related
22 products. The team was called the "Firmware OS Team" that was referred to internally as the "FOS
23 Team." The FOS Team worked on the FirstWare product line and Chong was a member of the FOS
24 Team. Chong was also a member of Phoenix's "Appliance Platform Engineering Group" between
25 approximately 2002 and the date of his departure from Phoenix.

26 17. In 2001, Phoenix announced the availability of FirstView Connect product line. This
27 product contained, *inter alia*, technology that was an "instant on" web browser appliance that
28 provided instant-on Internet access and browsing capability for Internet TV, Internet Video Players,

1 interactive screen phones, game consoles, direct from memory set top boxes and handheld
2 appliances.

3 18. Chong was involved in various aspects of the development of FirstView Connect and
4 served as Team Lead for the product development efforts.

5 19. During 2002, while Chong was still a member of the FOS Team, Phoenix developed
6 another product called FirstSight which was a graphic user interface used to access applications
7 residing on the hard disk and could be incorporated into the BIOS.

8 20. In addition, in the Fall of 2002, Phoenix's development team began working on the
9 Tripoli project which was focused on the development of a product called "cME Console." The
10 Tripoli project involved a Linux-based operating system environment upon which other applications
11 could run. The cME Console product could run applications or boot stand-alone Protected Service
12 Areas ("PSAs").

13 21. In 2003, Chong, along with two other Phoenix engineers, conceived of a new boot
14 loader methodology which stored the bootloader in the BIOS and used the BIOS as the operating
15 system bootloader. The Phoenix project incorporating this methodology was called Raptor. The
16 invention was disclosed in United States Patent Application No. 10/842,780 entitled "Media Boot
17 Loader" (the "'780 Application"), filed on May 11, 2004, which names Chong as the first named
18 inventor.

19 22. Likewise, during 2003, other members of the Phoenix FOS Team were continuing to
20 develop the technology to be utilized as the platform for the Console product referenced in
21 Paragraph 20. In connection with their development, on September 24, 2004 Phoenix prepared and
22 filed United States Patent Application No. 10/950,199 entitled "Operating System Transfer and
23 Launch Without Performing POST" (the "'199 Application"). The inventions in the '199
24 Application could be utilized to rapidly boot a second OS from a first OS without going through
25 Power on Self Test ("POST").

26 23. In connection with its ongoing FirstWare product development, Phoenix publicly
27 introduced its FirstWare Assistant product in September of 2003. FirstWare Assistant provided
28 instant-on access to personal information management (PIM) data from Microsoft Outlook without

1 needing to first launch the Windows operating system. The product utilized a Phoenix customized
2 Windows NT bootloader that gave users a “hot key” option during boot to either load FirstWare
3 Assistant or the default operating system. Chong was the author for all revisions of the Product
4 Requirements Document (“PRD”) for FirstWare Assistant 1.0.0.1.

5 24. In addition to the PRD, Chong also authored at least the following documents: (a)
6 PRD for FirstWare Assistant 1.1; (b) PRD for FirstWare Assistant Challenger (i.e., FirstWare
7 Assistant 2.x); (c) Functional Specification for FirstWare Assistant Challenger Release 1B,
8 FirstWare Assistant Challenger Release 2 and FirstWare Assistant 2.0.1; (d) the Functional
9 Specification for FirstWare Assistant Challenger Release 2; (e) a detailed technical disclosure in a
10 FirstWare Assistant PowerPoint; and (f) other related technical documents.

11 25. As Chong’s involvement with the FirstWare Assistant was so substantial, he was
12 made Team Lead for the engineers working on the product line. In that capacity, he oversaw the
13 FirstWare Assistant product development efforts and worked closely with engineers working in
14 tandem on related Phoenix development projects directed at running various appliances in an
15 instant-on setting and Phoenix’s “Always On” technology.

16 26. In connection with his extensive involvement with the various Phoenix projects and
17 products identified above, Chong developed, had access to, and had substantial involvement with
18 Phoenix Proprietary Information during his eight years of employment by Phoenix. Chong’s last
19 day as a Phoenix engineer was November 19, 2004.

20 27. On information and belief, DeviceVM hired Chong as a Director, Program
21 Management, in January 2007.

22 28. Not long after Chong joined DeviceVM, it filed United States Provisional Patent
23 Application No. 60/890,121 on February 15, 2007 entitled “Instant-On Appliances” (the “’121
24 Provisional Application”). Chong is a named inventor on the ’121 Provisional Application.

25 29. On July 2, 2007, DeviceVM filed United States Patent Application No. 11/772,700
26 entitled “Method and Apparatus for Virtualization of Appliances” (the “’700 Application”). Chong
27 is a named inventor on the ’700 Application. The ’700 Application claimed priority to, *inter alia*,
28 the ’121 Provisional Application and ultimately issued as U.S. Patent No. 7,441,113 (the “’113

1 Patent”) on October 21, 2008. Upon information and belief, Device VM’s Spashtop® product
2 practices the inventions claimed in the ’113 Patent.

3 30. On July 3, 2007, DeviceVM filed international application no. PCT/US07/72778
4 entitled “Method and Apparatus for Virtualization of Appliances” (the “PCT Application”). The
5 PCT Application claims priority to, *inter alia*, the ’121 Provisional Application and the ’700
6 Application (which ultimately issued as the ’113 Patent). Chong is a named inventor on the PCT
7 Application.

8 31. On August 1, 2008, DeviceVM filed United States Application no. 12/184,374
9 entitled “Integration Model for Instant-On Environment” (the “’374 Application”). Chong is a
10 named inventor on the ’374 Application.

11 32. On August 28, 2008, DeviceVM filed United States Application no. 12/200,758
12 entitled “Method and Apparatus for Virtualization of Appliances” (the “’758 Application”) as a
13 continuation of the ’113 Patent. Chong is a named inventor on the ’758 Application.

14 33. Finally, on September 26, 2008, DeviceVM filed United States Application no.
15 12/239,701 entitled “Installation of a Virtualization Environment” (the ’701 Application”) as a
16 continuation-in-part of the ’758 Application. Chong is a first named inventor on the ’701
17 Application. The ’121 Provisional Application, the ’374 Application, the ’700 Application, the
18 ’758 Application, the ’701 Application, and the PCT Application are collectively referred to as the
19 “DeviceVM Patent Applications.”

20 34. On information and belief, Chong has disclosed Phoenix Proprietary Information to
21 DeviceVM. DeviceVM has included Phoenix Proprietary Information in the DeviceVM Patent
22 Applications and such information is contained in the ’113 Patent. Upon information and belief,
23 DeviceVM has incorporated Phoenix Proprietary Information in its Spashtop® product and this
24 product contains inventions misappropriated from Phoenix through Chong.

25 35. On information and belief, based in part on the misappropriated Phoenix Proprietary
26 Information, DeviceVM has misled Phoenix’s potential customers and the public about the true
27 nature of its business and the purported independent development of its Spashtop® product.

28 36. Phoenix only became aware of DeviceVM’s and Chong’s unlawful activities in June

1 2009. In addition, Phoenix recently discovered evidence of the use of an anti-forensic wiping tool
2 on the Phoenix computer that was assigned to Chong while employed at Phoenix. Upon
3 information and belief, Chong used such a tool to conceal information from Phoenix or destroy
4 evidence of misappropriation of Phoenix Proprietary Information.

5 **FIRST CAUSE OF ACTION**

6 **BREACH OF CONTRACT**

7 **(AGAINST CHONG)**

8 37. Phoenix incorporates by reference the above paragraphs as though set forth fully
9 herein.

10 38. As a condition of his employment, Chong signed the Agreement with Phoenix,
11 Phoenix has performed every promise and condition required to be performed by it pursuant to the
12 Agreement except any which were or would be excused or prevented by the breaches of Chong as
13 set forth herein.

14 39. On information and belief, Chong breached his obligations to Phoenix under the
15 Agreement by, among other things, engaging in the following activities: (a) misappropriating
16 Proprietary Information of Phoenix and using this information to develop products for DeviceVM
17 and submit in DeviceVM Patent Applications; (b) failing to keep Proprietary Information of
18 Phoenix in trust and confidence; (c) using and disclosing Phoenix's Proprietary Information on
19 behalf of DeviceVM without the written consent of Phoenix; (d) failing to return and deliver
20 Phoenix's Proprietary Information upon termination of employment with Phoenix; and (e) failing to
21 inform the PTO and other parties that the specific inventions that were conceived while Chong was
22 employed at Phoenix, and which are the subject of this Action, had already been assigned to
23 Phoenix or were otherwise owned by Phoenix.

24 40. By reason of the foregoing, Phoenix has been damaged in an amount to be proven at
25 trial.

26 **SECOND CAUSE OF ACTION**

27 **INTERFERENCE WITH CONTRACT AGAINST DEVICEVM**

28 41. Phoenix incorporates by reference the above paragraphs as though set forth fully

1 herein.

2 42. At all times referenced herein the Agreement was and is a valid contract between
3 Phoenix and Chong.

4 43. On information and belief, DeviceVM either knew or should have known of the
5 existence of the Agreement between Phoenix and Chong.

6 44. On information and belief, DeviceVM induced Chong to breach the Agreement.

7 45. By reason of DeviceVM's inducement, Phoenix has been damaged by the failure of
8 Chong to perform and complete his obligations in accordance with the terms of the Agreement, in a
9 sum to be proven at trial.

10 46. DeviceVM's conduct has been willful, oppressive, and malicious, and done with the
11 intent to injure DeviceVM and deprive Phoenix of its property and legal rights. Phoenix is therefore
12 entitled to exemplary and punitive damages in an amount sufficient to deter future wrongful
13 conduct.

14 **THIRD CAUSE OF ACTION**

15 **CONSTRUCTIVE TRUST**

16 47. Phoenix incorporates by reference the above paragraphs as though set forth fully
17 herein.

18 48. On information and belief, DeviceVM and Chong received a benefit from Phoenix
19 through its acquisition and retention of Phoenix's confidential and Proprietary Information and
20 inventions that Chong either assisted in conceiving and developing or had access to while employed
21 at Phoenix.

22 49. DeviceVM and Chong's retention of these benefits is manifestly unjust, and is at the
23 expense of Phoenix. All of these benefits, including the inventions conceived by Chong, or with his
24 assistance, while employed at Phoenix, are owned by Phoenix pursuant to the Agreement with
25 Chong. Since these inventions and other confidential and Proprietary Information were exclusively
26 assigned to Phoenix under the Agreement, any retention of these inventions would be unjust.

27 50. By virtue of the illegal activities by DeviceVM and Chong as alleged herein,
28 DeviceVM and Chong each hold certain property as a constructive trustee for Phoenix's benefit.

1 including but not limited to the following:

2 a. The inventions claimed and/or disclosed in the DeviceVM Patent
3 Applications;

4 b. The '113 Patent;

5 c. All profits, royalties, and other benefits resulting from the exploitation of the
6 inventions claimed and/or disclosed products that incorporate the inventions conceived by Chong at
7 Phoenix or derived by Phoenix confidential information and Proprietary Information while
8 employed at Phoenix, and the Device VM Patent Applications, and the '113 Patent, including all
9 profits and royalties resulting from the manufacture, sale, distribution, and marketing of each
10 version of DeviceVM's products;

11 d. All software or other products derived from Defendants' illegal activities;

12 e. Any United States or foreign patents or patent applications that claim priority
13 to the DeviceVM Patent Applications, the '113 Patent and/or that are supported by the disclosures
14 in any DeviceVM Patent Application or the '113 Patent; and

15 f. The confidential and/or Proprietary Information that was misappropriated
16 from Phoenix by DeviceVM and Chong.

17 **FOURTH CAUSE OF ACTION**

18 **UNFAIR BUSINESS PRACTICES AGAINST ALL DEFENDANTS**

19 51. Phoenix incorporates by reference the above paragraphs as though set forth fully
20 herein.

21 52. In the course of the wrongful conduct alleged herein, the Defendants, and each of
22 them, engaged in unfair and unlawful business practices in violation of the common law and
23 Sections 17200 et seq. of the California Business and Professions Code including, but not limited
24 to, the misappropriation of confidential and Proprietary Information of Phoenix.

25 53. The continuing activities of the Defendants in developing and exploiting the
26 confidential and Proprietary Information stolen from Phoenix constitute an on-going pattern and
27 practice of unfair competition.

28 54. The continuing activities of Defendants to mislead Phoenix's customers and the

1 public by representing that Splashtop® was independently developed through its own intellectual
2 property constitute an on-going pattern and practice of unfair competition.

3 55. By reason of this activity, Phoenix has been harmed in an amount to be proven at
4 trial, and the public has been misled about the true nature of DeviceVM's business. Injunctive
5 relief is necessary to prevent further irreparable injury to Phoenix, and to put an immediate halt to
6 DeviceVM and Chong's on-going practice and pattern of wrongful conduct. DeviceVM has
7 obtained benefits from its unlawful activity, for which DeviceVM is required to disgorge or to make
8 restitution.

9 **FIFTH CAUSE OF ACTION**

10 **CONVERSION**

11 56. Phoenix incorporates by reference the above paragraphs as though set forth fully
12 herein.

13 57. Phoenix is the owner of the confidential and Proprietary Information
14 misappropriated by DeviceVM and Chong as found in certain DeviceVM Patent Applications
15 and/or the '113 Patent. Under the Agreement and Chong's legal obligations to Phoenix, this
16 information is exclusively owned by Phoenix. Phoenix is the owner of this information and has the
17 exclusive right to possession of it.

18 58. DeviceVM and Chong converted Phoenix's property by a series of wrongful acts.
19 On information and belief, Phoenix's property was converted by: (a) misappropriating the
20 confidential and Proprietary Information containing Phoenix's inventions; (b) taking the
21 confidential and Proprietary Information and the inventions contained therein to DeviceVM; and (c)
22 utilizing the confidential and Proprietary Information and the inventions contained therein to
23 prosecute patent applications for DeviceVM and to develop technology based on the information
24 and inventions.

25 59. By converting the confidential and Proprietary Information and inventions that are
26 exclusively owned by Phoenix, DeviceVM and Chong have caused great damage to Phoenix, in an
27 amount to be proven at trial.

28 60. DeviceVM's conduct has been willful, oppressive, and malicious, and done with the

1 intent to injure DeviceVM and deprive Phoenix of its property and legal rights. Phoenix is therefore
2 entitled to exemplary and punitive damages in an amount sufficient to deter future wrongful
3 conduct.

4
5 **SIXTH CAUSE OF ACTION**

6 **TRADE SECRET MISAPPROPRIATION AGAINST ALL DEFENDANTS**

7 61. Phoenix incorporates by reference the above paragraphs as though set forth fully
8 herein.

9 62. Upon information and belief, Defendants have misappropriated, and are using
10 Phoenix's trade secret information related to Phoenix's technology and business, without Phoenix's
11 consent, and in order to compete directly with Phoenix.

12 63. Defendants' conduct violates California's Uniform Trade Secrets Act.

13 64. Phoenix has been irreparably harmed.

14 65. Phoenix has suffered damages in an amount to be proven at trial.

15 **PRAYER FOR RELIEF**

16 Wherefore, Phoenix prays judgment against Defendants as follows:

17 A. For compensatory damages against Defendants to be proven at trial;

18 B. For disgorgement and restitution from Defendants to be proven at trial;

19 C. An award to Phoenix of punitive damages in a sum according to proof;

20 D. An award to Phoenix of its costs, expenses and reasonable attorneys' fees incurred in
21 bringing and prosecuting this action, pursuant to the Agreement;

22 E. An order directing the Defendants to correct the records of the PTO to reflect that all
23 intellectual property rights to the inventions conceived by Chong are owned by Phoenix, including
24 but not limited to all rights to all DeviceVM Patent Applications or issued patents arising from
25 Phoenix's confidential or Proprietary Information;

26 F. A declaration that Phoenix was assigned all rights to the inventions conceived by
27 Chong while employed at Phoenix under the terms of the Agreement, and therefore that these
28 inventions are exclusively owned by Phoenix;

1 G. Preliminarily and permanently enjoin the Defendants from:

2 (1) disclosing, obtaining or using, or attempting to disclose, obtain or use any of
3 Phoenix's confidential or Proprietary Information misappropriated from Phoenix,

4 (2) disseminating or destroying any documents, material or things now in their
5 possession that originated at Phoenix, that belong to Phoenix, or that embody or are derived from
6 Phoenix's confidential or Proprietary Information, or that are otherwise relevant to the subject
7 matter of this lawsuit,

8 (3) manufacturing, selling, offering to sell, licensing, creating source code for,
9 marketing, or advertising, any product that incorporates or performs any of the inventions
10 misappropriated from Phoenix, or that is derived from any inventions or confidential or Proprietary
11 Information misappropriated by the Defendants.

12 H. An order imposing a constructive trust for the benefit of Phoenix over:

13 (1) the inventions claimed and/or disclosed in the Patents, and all DeviceVM
14 products based on and/or incorporating those inventions;

15 (2) all profits, royalties, and other benefits resulting from the exploitation of the
16 inventions claimed and/or disclosed in the Patents, including all profits and royalties resulting from
17 the manufacture, sale, distribution, and marketing of each version of DeviceVM's products,

18 (3) all software or other products that incorporate the inventions conceived by
19 Chong while employed at Phoenix, and any products derived from DeviceVM's illegal activities;

20 (4) any United States or foreign patents or patent applications that claim priority
21 to the '113 Patent and/or that are supported by the disclosures in the DeviceVM Patent
22 Applications,

23 (5) the confidential and/or Proprietary Information that was misappropriated
24 from Phoenix by DeviceVM and Chong,

25 (6) any profits, revenues, or other benefits obtained by the Defendants as a result
26 of their utilization of the inventions contained in the '113 Patent or DeviceVM Patent Applications;
27 and

28 I. For such other and further relief as may be awarded at the trial of this matter

1 according to proof.

2 Dated: August 31, 2009

Respectfully submitted,

3 MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO, P.C.

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5 

6 By: KARINEH KHACHATOURIAN
7 BRYAN J. SINCLAIR
8 JEFFREY M. RATINOFF

9 Attorneys for Plaintiff,
10 PHOENIX TECHNOLOGIES LTD.

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EXHIBIT A

PHOENIX TECHNOLOGIES, LTD.
California Operations
Employee Invention Assignment and
Proprietary Information Agreement

Benedict Chong
(Hand Delivered)

In consideration of my employment or continued employment by Phoenix Technologies Ltd. ("Phoenix"), I hereby represent and agree as follows:

1. Employee understands that Phoenix is engaged in a continuous program of research, development, production and marketing in connection with its business and that, as an essential part of Employee's work with Phoenix, Employee is expected to make new contributions to and create inventions of value for Phoenix.

2. Employee agrees to promptly disclose in writing in confidence to Phoenix all inventions, improvements, and other innovations of any kind, whether or not patentable or copyrightable or protectable as trade secrets or mask works, that are made or conceived or first reduced to practice or created by Employee, either alone or jointly with others, during the period of Employee's employment, whether or not in the course of such employment ("Innovations"). Examples of Innovations include but are not limited to original works of authorship, computer programs, formulas, processes, databases, trade secrets, mechanical and electronic hardware, computer languages, user interfaces, documentation, marketing and new product plans, production processes, packaging and marketing techniques, and improvements to anything.

3. Employee agrees that all Innovations that (a) are not developed entirely on Employee's own time, (b) are developed using equipment, supplies, facilities or trade secrets of Phoenix, (c) result from work performed by Employee for Phoenix, or (d) relate at the time of conception or reduction to practice to the business or the actual or demonstrably anticipated research or development of Phoenix, will be the sole and exclusive property of Phoenix, and Employee hereby assigns to Phoenix any rights that Employee may have in any such Innovations and in any associated patents, patent applications, copyrights, trade secret rights, mask work rights, rights of priority and other intellectual property rights.

Employee is hereby notified by Phoenix that the provisions of this Section 3 do not apply to any innovation that qualifies fully under the provisions of Section 2870 of the California Labor Code, which states as follows:

(a) ANY PROVISION IN AN EMPLOYMENT AGREEMENT WHICH PROVIDES THAT AN EMPLOYEE SHALL ASSIGN, OR OFFER TO ASSIGN, ANY OF HIS OR HER RIGHTS IN AN INVENTION TO HIS OR HER EMPLOYER SHALL NOT APPLY TO AN INVENTION THAT THE EMPLOYEE DEVELOPED ENTIRELY ON HIS OR HER OWN TIME WITHOUT USING THE EMPLOYER'S EQUIPMENT, SUPPLIES, FACILITIES, OR TRADE SECRET INFORMATION EXCEPT FOR THOSE INVENTIONS THAT EITHER:

(1) RELATE AT THE TIME OF CONCEPTION OR REDUCTION TO PRACTICE OF THE INVENTION TO THE EMPLOYER'S BUSINESS, OR ACTUAL OR DEMONSTRABLY ANTICIPATED RESEARCH OR DEVELOPMENT OF THE EMPLOYER; OR

(2) RESULTS FROM ANY WORK PERFORMED BY THE EMPLOYEE FOR THE EMPLOYER.

(b) TO THE EXTENT A PROVISION IN ANY EMPLOYMENT AGREEMENT PURPORTS TO REQUIRE AN EMPLOYEE TO ASSIGN AN INVENTION OTHERWISE EXCLUDED FROM BEING REQUIRED TO BE ASSIGNED UNDER SUBDIVISIONS (a), THE PROVISION IS AGAINST THE PUBLIC POLICY OF THIS STATE AND IS UNENFORCEABLE.

Accordingly, Employee may request a written waiver from his or her manager which will act to formally acknowledge that Phoenix has no right, title or interest in Employee's Innovations that (a) are developed entirely on Employee's own time, (b) are developed using equipment, supplies, facilities or trade secrets not belonging to Phoenix, (c) result from work not performed by Employee for Phoenix, or (d) relate at the time of conception or reduction to practice to no business or actual or demonstrably anticipated research or development of Phoenix. Such written waiver must be signed by Employee's manager and Phoenix's Corporate Counsel and will be placed in Employee's personnel file with an original copy retained by Employee.

4. Employee agrees to assist Phoenix in every proper way to obtain for Phoenix and enforce patents, copyrights, mask work rights and other legal protections for Innovations belonging to Phoenix in any and all countries. Employee will execute any documents that Phoenix may reasonably request for use in obtaining or enforcing such patents, copyrights, mask work rights and other legal protections. Employee's obligations under this Section will continue beyond the termination of Employee's employment with Phoenix, provided that Phoenix will compensate Employee at a reasonable rate after such termination for time actually spent by Employee at Phoenix's request on such assistance.

5. Employee hereby irrevocably transfers and assigns to Phoenix, and forever waives and agrees never to assert, any and all "Moral Rights" (as defined below) that Employee may have in or with respect to any Innovation. "Moral Rights" mean any right to claim authorship or be identified as the author of any Innovation, to object to any modification of, or other action in relation to, any Innovation, or any similar right, existing under judicial or statutory law of any country in the world, or under any treaty, regardless of whether or not such right is denominated or generally referred to as a "moral right."

6. Employee understands that Employee's employment with Phoenix creates a relationship of confidence and trust with respect to any information of a confidential or secret nature that may be disclosed to Employee by Phoenix or that Employee may learn in the course of employment by Phoenix and that relates to the business, products, supplier, customers, research or development of Phoenix and its products ("Proprietary Information"). Such Proprietary Information includes but is not limited to Innovations, marketing plans, product plans, business strategies, financial information, forecasts, personnel information, customer lists and any other nonpublic technical or business information on that Employee knows or has reason to know Phoenix would like to treat as confidential for any purpose, such as maintaining a competitive advantage or avoiding undesirable publicity.

7. At all times, both during and after Employee's employment, Employee will keep all such Proprietary Information in confidence and trust, and will not use or disclose any of such Proprietary Information without the written consent of Phoenix, except as may be necessary to perform Employee's duties as an employee of Phoenix and for Phoenix's benefit. Upon termination of Employee's employment with Phoenix, Employee will promptly deliver to Phoenix all documents and materials of any nature pertaining to Employee's work with Phoenix, and Employee will not take with Employee any documents or materials or copies thereof containing any Proprietary Information.

8. Employee represents that Employee's performance of this Agreement and of Employee's duties as an employee with Phoenix will not breach any invention assignment or proprietary information or similar

agreement with any former employer or other party. Employee represents that employee will not bring with Employee to Phoenix or use in the performance of Employee's duties for Phoenix any documents, materials or information of a former employer that are not generally available to the public.

9. During, and for a period of one (1) year after termination of, Employee's employment with Phoenix, Employee will not directly or indirectly attempt to call on, solicit or take away suppliers, customers, employees or consultants of Phoenix for Employee's own benefit or for anyone else's.

10. Employee hereby authorizes Phoenix to notify others, including but not limited to customers of Phoenix and Employee's future employers, of the terms of this Agreement and Employee's responsibilities hereunder.

11. In the event of any violation of this Agreement by Employee, and in addition to any relief or remedies to which Phoenix may otherwise be entitled, Employee agrees that Phoenix shall have the right to an immediate injunction, and shall have the right to recover the reasonable attorneys' fees and court costs expended in connection with any litigation instituted to enforce this Agreement. **"No waiver of any condition or covenant in this Agreement or failure to exercise a right or remedy shall be considered to imply or constitute a further waiver of the same or any other covenant, condition, right, or remedy."**

12. **"If any provision of this Agreement is declared invalid by any tribunal, such provision shall be deemed automatically adjusted to conform to the requirements for validity as declared at such time and, as so adjusted, shall be deemed a provision of this Agreement as though originally included herein. If the provision invalidated is of such a nature that it cannot be so adjusted, the provision shall be deleted from this Agreement as though it had never been included herein. In either case, the other provisions of this Agreement shall remain in effect."**

13. Employee understands and agrees that this Agreement does not constitute a contract of employment or obligate Phoenix to employ employee for any stated period of time. Employee understands that Employee's employment with Phoenix is at will, and may be terminated by Phoenix at any time and for any reason, with or without cause.

This Agreement shall be effective as of the first day of Employee's employment with Phoenix: namely: end August, 1996. or for current employees: on _____, 1996.

Signature of Employee:

R. G. C.

Accepted and acknowledged by Phoenix Technologies Ltd.:

Signature:

Tina Randhawa
(Please Print)

Title:

Staffing Coord 7/24/03

**SUMMONS
(CITACION JUDICIAL)**

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

**NOTICE TO DEFENDANTS:
(AVISO AL DEMANDADO):**

DEVICEVM, INC., a Delaware corporation, and BENEDICT CHONG, an individual

**YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):**

PHOENIX TECHNOLOGIES LTD., a Delaware corporation

2009 AUG 31 10 09 AM
2009 AUG 31 10 09 AM
2009 AUG 31 10 09 AM

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **¡AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es):

Superior Court of California, County of Santa Clara
191 North First Street, San Jose, CA 95113

CASE NUMBER
(Número del Caso)

109 CV 147 020

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

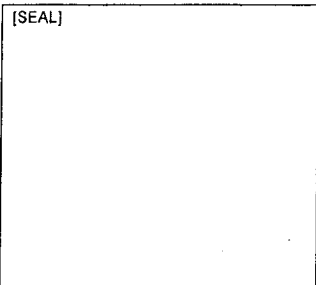
Karineh Khachatourian (SBN 202634)
MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO, P.C.
5 Palo Alto Square - 6th Floor, 3000 El Camino Real, Palo Alto, CA 94306-2155
Phone: (650) 251-7700

DATE: August 31, 2009
(Fecha)

DAVID H. YAMASAKI
Chief Executive Officer, Clerk

Clerk, by _____, Deputy
(Secretario) (Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).



NOTICE TO THE PERSON SERVED: You are served

- as an individual defendant, Benedict Chong.
- as the person sued under the fictitious name of (specify):
- on behalf of (specify): **DeviceVM, Inc.**
under:

<input checked="" type="checkbox"/> CCP 416.10 (corporation)	<input type="checkbox"/> CCP 416.60 (minor)
<input type="checkbox"/> CCP 416.20 (defunct corporation)	<input type="checkbox"/> CCP 416.70 (conservatee)
<input type="checkbox"/> CCP 416.40 (association or partnership)	<input type="checkbox"/> CCP 416.90 (authorized person)
<input type="checkbox"/> other (specify):	
- by personal delivery on (date):

**SUMMONS
(CITACION JUDICIAL)**

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

2009 AUG 31 P 2:49
G. FUJIMURA
2009 AUG 31 P

**NOTICE TO DEFENDANTS:
(AVISO AL DEMANDADO):**

DEVICEVM, INC., a Delaware corporation, and BENEDICT CHONG, an individual

**YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):**

PHOENIX TECHNOLOGIES LTD., a Delaware corporation

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The name and address of the court is:
(El nombre y dirección de la corte es):

Superior Court of California, County of Santa Clara
191 North First Street, San Jose, CA 95113

CASE NUMBER
(Número del Caso)
109 CV 147626

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Karineh Khachatourian (SBN 202634)
MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO, P.C.
5 Palo Alto Square - 6th Floor, 3000 El Camino Real, Palo Alto, CA 94306-2155
Phone: (650) 251-7700

DATE: August 31, 2009
(Fecha)

DAVID H. YAMASAKI
Chief Executive Officer, Clerk

Clerk, by
(Secretario)

G. FUJIMURA

Deputy
(Adjunto)

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(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

[SEAL]

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- as the person sued under the fictitious name of (specify):
- on behalf of (specify):
under:

<input type="checkbox"/> CCP 416.10 (corporation)	<input type="checkbox"/> CCP 416.60 (minor)
<input type="checkbox"/> CCP 416.20 (defunct corporation)	<input type="checkbox"/> CCP 416.70 (conservatee)
<input type="checkbox"/> CCP 416.40 (association or partnership)	<input type="checkbox"/> CCP 416.90 (authorized person)
<input type="checkbox"/> other (specify):	
- by personal delivery on (date):