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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NETBULA, LLC,

No. C06-00711 MJJ

Plaintiff,

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' 12(b)(6) MOTION TO DISMISS; DENYING MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

v.

BINDVIEW DEVELOPMENT CORPORATION ET AL,

Defendants.

**INTRODUCTION**

Before the Court is Defendants Bindview Development Corporation (“Bindview”), Symantec Corporation (“Symantec”), and Eric Pulaski’s (“Pulaski”) (collectively “Defendants”) Motion to Dismiss Pursuant to Rule 12(b)(6).<sup>1</sup> Also before the Court is Pulaski’s Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to Rule 12(b)(2).<sup>2</sup> These motions are opposed by Plaintiff Netbula, LLC (“Netbula”, “Plaintiff”). For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants’ 12(b)(6) motion, **GRANTING** Plaintiff leave to amend the complaint. The Court **DENIES** Pulaski’s Motion to Dismiss for Lack of Personal Jurisdiction.

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<sup>1</sup>Docket No. 17, Filed June 15, 2006.

<sup>2</sup>Docket No. 19, Filed June 15, 2006.

**FACTUAL BACKGROUND**

1  
2 Plaintiff Netbula is a corporation that develops computer software and is headquartered in  
3 California.<sup>3</sup> Defendant Bindview, headquartered in Texas, also develops computer software. Among  
4 Plaintiff's products is a copyrighted piece of software called "RPC" which contains a computer file  
5 named "pwrpc32.dll." ("PowerRPC"). In 1998, a company named Netect Inc. ("Netect") acquired  
6 licenses to use Plaintiff's PowerRPC product. In 1999 Bindview purchased the Netect corporation.  
7 Subsequently, Bindview incorporated Netect's software into its own products. The incorporated  
8 software contained Plaintiff's PowerRPC product.

9 In September 2005, Bindview informed Plaintiff that it had been using and distributing  
10 Plaintiff's software without authorization following the acquisition of Netect. Bindview sought to  
11 acquire a license from Plaintiff based upon this use. Until that point, Plaintiff had not been aware of  
12 Bindview's use of their products. In response to the September 2005 licensing inquiry, Plaintiff  
13 requested a detailed PowerRPC usage report from Bindview. On October 10, 2005, Plaintiff's  
14 Chief Sales and Marketing Officer, Don Yue ("Yue") sent correspondence directly to Bindview's  
15 chief executive officer, Pulaski, requesting a detailed "royalty report" of Bindview's usage and  
16 distribution of PowerRPC. According to the complaint, Plaintiff specified the precise data that it  
17 needed in its report, including the dates of each unauthorized copy made of the PowerRPC product,  
18 the total number of computers to which the software had been copied, samples of Bindview's  
19 software products, standard license agreements for Bindview software, and monetary amounts of  
20 sales of Bindview products incorporating PowerRPC. Bindview allegedly responded by confirming  
21 that it had been using Plaintiff's PowerRPC product in some of its software and promising that it  
22 would produce a royalty report as requested.

23 On October 25, 2005, Bindview informed Plaintiff that it had been using Plaintiff's  
24 PowerRPC product in its "Hackershield" software and emailed Plaintiff a royalty report. According  
25 to the complaint, Bindview's report did not provide data to support the usage information asserted.  
26 In response, Plaintiff contacted Bindview and requested more detailed information substantiating the  
27 data contained within the report. Plaintiff also began conducting its own investigation to discover  
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<sup>3</sup>Factual background is based upon the allegations contained within the complaint, filed January 31, 2006.

1 the extent to which Bindview was using Plaintiff's PowerRPC product. On November 2, 2005,  
2 Plaintiff contacted Pulaski, and indicated that based upon its own research, Plaintiff had discovered  
3 that Bindview's use of PowerRPC was more extensive than had been indicated in the royalty report.  
4 Plaintiff also discovered that Bindview was in the process of being acquired by the Symantec  
5 corporation, and allegedly informed Symantec about the legal claims.

6 On November 7, 2005, Pulaski contacted Yue to discuss a licensing agreement concerning  
7 Bindview's use of the PowerRPC product. During this conversation, Pulaski allegedly promised to  
8 deliver Plaintiff a complete and accurate report on all of Bindview's usage of PowerRPC, including  
9 "site-licensing" and free downloads. Upon Pulaski's inquiry, Yue informed Pulaski that the  
10 licensing fee for the PowerRPC product had been roughly \$50 per copy in the year 2000. Pulaski  
11 allegedly promised that Bindview would pay royalties and interest charges for each copy of  
12 PowerRPC that Bindview had used, and agreed to do so pursuant to Netbula's standard license and  
13 pricing agreement. In that same conversation, Yue noted the timing of the licensing negotiations  
14 with respect to Symantec's impending acquisition of Bindview, and discussed the potential for  
15 Bindview's alleged copyright violations to disrupt the acquisition under the terms of the merger  
16 agreement. According to the complaint, Pulaski stood to personally gain more than \$32 million  
17 dollars upon the consummation of the merger with Symantec.

18 On November 11, 2005, Bindview promised Netbula that a "reasonably complete" royalty  
19 report would be provided the following week, and Bindview reiterated that it would license the  
20 software according to Netbula's standard licensing terms and prices. On November 21, 2005,  
21 Bindview provided a second royalty report. Upon examination, Netbula determined that Bindview's  
22 report was incomplete since it had omitted significant portions of the data previously requested;  
23 Plaintiff informed Bindview of these omissions. On November 23, 2005, Yue and Pulaski conferred  
24 regarding the latest royalty reports. Pulaski allegedly refused to provide further information than  
25 what was contained in the November 21 report. On January 6, 2006, Symantec completed its  
26 acquisition of Bindview.

27 On January 31, 2006, Plaintiff filed this action against Bindview, Symantec, and Pulaski for:  
28 (1) copyright infringement under 17 U.S.C. § 101 et seq; (2) intentional fraud under California Civil

1 Code Section 1709; (2) breach of contract under California law; (4) statutory unfair competition  
 2 under California Business and Professions Code § 17200 et seq. Plaintiff seeks damages, equitable  
 3 accounting, and the imposition of a constructive trust.

4 Defendants filed the instant motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules  
 5 of Civil Procedure. Defendant Pulaski concurrently filed a motion to dismiss for lack of personal  
 6 jurisdiction pursuant to Rule 12(b)(2).

## 8 LEGAL STANDARD

9 A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim. *Navarro*  
 10 *v. Block*, 250 F.3d 729, 732 (9<sup>th</sup> Cir. 2001). Because the focus of a 12(b)(6) motion is on the legal  
 11 sufficiency, rather than the substantive merits of a claim, the Court ordinarily limits its review to the  
 12 face of the complaint. *See Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9<sup>th</sup> Cir.  
 13 2002). Generally, dismissal is proper only when the plaintiff has failed to assert a cognizable legal  
 14 theory or failed to allege sufficient facts under a cognizable legal theory. *See SmileCare Dental*  
 15 *Group v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 782 (9<sup>th</sup> Cir. 1996); *Balisteri v. Pacifica*  
 16 *Police Dep't*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1988); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d  
 17 530, 534 (9<sup>th</sup> Cir. 1984). Further, dismissal is appropriate only if it appears beyond a doubt that the  
 18 plaintiff can prove no set of facts in support of a claim. *See Abramson v. Brownstein*, 897 F.2d 389,  
 19 391 (9<sup>th</sup> Cir. 1990). In considering a 12(b)(6) motion, the Court accepts the plaintiff's material  
 20 allegations in the complaint as true and construes them in the light most favorable to the plaintiff.  
 21 *See Shwarz v. United States*, 234 F.3d 428, 435 (9<sup>th</sup> Cir. 2000).

## 23 ANALYSIS

### 24 I. 12(b)(6) Motion to Dismiss

#### 25 A. Fraud Claim

26 Defendants first challenge the sufficiency of Plaintiff's fraud claim. To establish a fraud  
 27 claim under California law, a plaintiff must show: (1) a misrepresentation (false representation,  
 28 concealment, or non-disclosure); (2) knowledge of falsity (or 'scienter'); (3) intent to defraud, i.e., to

1 induce reliance; (4) justifiable reliance; and (5) resulting damage. *Lazar v. Superior Court*, 12 Cal.  
2 4th 631, 638 (1996).

3 Defendants argue that Plaintiff's own allegations establish the absence of justifiable reliance.  
4 Defendants assert that the fraud claims are rooted in the two allegedly incomplete licensing reports,  
5 and that Plaintiff admits knowing that the reports were inaccurate soon after receiving them.  
6 Therefore, Defendants argue, Plaintiff cannot establish justifiable reliance, as it would have been  
7 unreasonable for Plaintiff to rely on licensing reports that it knew were false. (Complaint ¶¶ 30-32).  
8 The Court finds this argument unavailing. Defendants mischaracterize Plaintiff's fraud claims. The  
9 complaint does not allege that Plaintiff *knew* that the first licensing report was false when it  
10 received it. Rather, the complaint states, "Bindview's report...did not provide any supporting data  
11 from which Netbula could understand how Bindview arrived at the numbers in the report...that same  
12 day, Mr. Yue reiterated Netbula's request for detailed information that would allow it to have some  
13 confidence in the figures presented..." In other words, Plaintiff does not allege that the report was  
14 obviously false when received, but that Plaintiff wanted supporting information to verify the report  
15 data. Furthermore, Defendants' argument focuses on "statements" made within the royalty reports,  
16 which are inapposite for the purposes of Plaintiff's fraud claim. The relevant representations are  
17 Bindview's alleged promises to fully report their use of the PowerRPC product— not the factual  
18 assertions contained in the reports themselves. Plaintiff sufficiently alleges reliance on these  
19 promises. The complaint states that "Defendant Pulaski...represented to...Netbula that Bindview  
20 would provide a complete and accurate informational accounting of all licenses and other  
21 distributions of Netbula's RPC technology..." (Complaint ¶ 66). Plaintiff alleges that based upon  
22 this promise it, among other things, refrained for several months from filing its copyright action.  
23 (Complaint ¶ 71). Accordingly, the Court finds that Plaintiff has sufficiently alleged justifiable  
24 reliance on the representations that Bindview would fully report its usage of Plaintiff's product.

25 Defendants next argue that Plaintiff has failed to allege actionable fraud damages. The  
26 complaint alleges that "as a...result of Defendants' fraud...Plaintiff has been forced to expend a  
27 substantial amount of time, energy, resources, and finances in attempting to discover the true facts  
28 regarding the number and scope of its works used and distributed by Defendants." (Complaint ¶ 72).

1 Defendants contend that the money expended in investigating the scope of the copyright  
2 infringement can not be considered damages arising from Defendants' alleged fraud. The Court  
3 agrees. In order to be actionable, fraud damages must come about from Plaintiff's *reliance* upon  
4 Defendants' misrepresentations. *Lazar*, 12 Cal. 4th 638. Here, there is no "but-for" causation  
5 between Plaintiff's *reliance* on Defendant's representations and Plaintiff's investigatory damages.  
6 While Defendants' representations may have aroused Plaintiff's suspicions and precipitated its  
7 investigation, it was not Plaintiff's *reliance* on those numbers which caused Plaintiff to incur  
8 investigatory costs. Plaintiff did not rely on the factual assertions contained within Bindview's  
9 reports to their detriment. If anything, Plaintiff's investigation would indicate their non-reliance on  
10 Plaintiff's reports. Accordingly, the Court finds that Plaintiff cannot assert damages premised upon  
11 investigatory expenditures as part of their fraud claim; these costs were not incurred in reliance on  
12 Plaintiff's statements.

13 The complaint also alleges that as a result of Defendants' misrepresentations, Plaintiff was  
14 forced to "delay the legal vindication of its right to its detriment." (Complaint ¶ 72). "California law  
15 has long recognized the principle that induced forbearance can be the basis for tort liability." *Small*  
16 *v. Fritz Companies, Inc.*, 30 Cal.4th 167, 174 (2003). However, "recovery in a tort action for fraud  
17 is limited to the actual damages suffered by the plaintiff." *Id.* at 195. In principle, Plaintiff's alleged  
18 reliance and decision to forgo immediately filing a lawsuit is enough to establish actionable  
19 damages. However, the complaint, as it currently stands, fails to allege any actual monetary  
20 damages resulting from Plaintiff's delay in filing. Accordingly, the Court **DISMISSES** the fraud  
21 claim for failure to plead the damages element. The Court **GRANTS** Plaintiff leave to amend to  
22 cure this deficiency.

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### 24 **B. Breach of Contract**

25 Defendants next argue that Plaintiff fails to state a claim for breach of contract. Defendants  
26 contend that Plaintiff's allegations concerning the contractual terms are impermissibly vague and  
27 indefinite. The Court does not agree. "To be enforceable, a promise must be definite enough that a  
28 court can determine the scope of the duty and the limits of performance must be sufficiently defined

1 to provide a rational basis for the assessment of damages.” *Ladas v. California State Automobile*  
2 *Ass’n.*, 19 Cal.App.4th 761, 76-770 (1993). Plaintiff alleges that on November 7, 2005, Bindview  
3 agreed to pay a fee per unauthorized copy made, pursuant to the price and terms of Plaintiff’s  
4 standard licensing agreement in enforcement at the time. (Complaint ¶ 36). Although the complaint  
5 lacks precise price and quantity terms, the scope of the Defendants’ alleged duty is sufficiently  
6 detailed such that the Court could determine damages by examining the terms of Plaintiff’s standard  
7 licensing and pricing agreement and the number of copies made by Bindview. Plaintiff has  
8 sufficiently alleged a contract between Plaintiff and Bindview and the existence of evidence by  
9 which the Court could determine the intent of the parties. Accordingly, the Court **DENIES**  
10 Defendants’ motion to dismiss on this basis.

### 11 **C. Copyright Liability against Pulaski**

12 Defendants next argue that Plaintiff fails to state a copyright claim against Defendant  
13 Pulaski. Defendants contend that Plaintiff plead no facts indicating that Pulaski personally engaged  
14 in copyright infringement and therefore cannot maintain an infringement claim against Pulaski. The  
15 Court finds this argument unavailing. One may be liable for copyright infringement either directly,  
16 through personal participation in the infringing conduct, or indirectly, through vicarious or  
17 contributory liability. A defendant is vicariously liable for copyright infringement if he has the right  
18 and ability to supervise the infringing activity and also has a direct financial interest in such  
19 activities. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764, 2776 (2005). Here,  
20 Plaintiff alleges that Pulaski had the right and ability to supervise the infringing activity as CEO of  
21 Bindview and that he had a direct financial interest in permitting the infringement to continue due to  
22 his stock arrangement. (Complaint ¶ 27, 28, 30, 36, 38). The parties dispute whether Pulaski was  
23 actually involved in Bindview’s day to day operational decisions so as to warrant the imposition of  
24 vicarious liability. However, this is a factual determination, the resolution of which is not  
25 appropriate in a 12(b)(6) motion to dismiss. Accordingly, the Court finds that Plaintiff has stated a  
26 claim for vicarious copyright infringement against Pulaski. See *Fermata Intern. Melodies, Inc. v.*  
27 *Champions Golf Club, Inc.*, 712 F.Supp. 1257, 1262 (S.D.Tex.,1989)(“A corporate officer may be  
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1 held vicariously liable (1) if the officer has a financial stake in the activity and (2) if the officer has  
 2 the ability and right to supervise the activity causing infringement.”); *Symantec Corp. v. CD Micro,*  
 3 *Inc.*, 286 F.Supp.2d 1265, 1275 (D.Or.,2003).<sup>4</sup> The Court **DENIES** Defendants’ motion to dismiss  
 4 on this basis.

## 6 **II. Personal Jurisdiction**

7 Defendant Pulaski separately argues that the Court does not have personal jurisdiction over  
 8 him. When a defendant moves to dismiss a complaint for lack of personal jurisdiction pursuant to  
 9 Federal Rule of Civil Procedure 12(b)(2), the plaintiff bears the burden of demonstrating jurisdiction  
 10 exists. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9<sup>th</sup> Cir. 2004). If the Court  
 11 rules on the motion based on written materials without an evidentiary hearing, “the plaintiff need  
 12 only make a prima facie showing of jurisdictional facts.” *Id.* In such cases, the Court examines  
 13 whether the plaintiff’s pleadings and affidavits make a prima facie showing of personal jurisdiction.  
 14 *Caruth v. Int’l Psychoanalytical Ass’n*, 59 F.3d 126, 128 (9<sup>th</sup> Cir. 1995). “Although the plaintiff  
 15 cannot ‘simply rest on the bare allegations of its complaint,’ uncontroverted allegations in the  
 16 complaint must be taken as true.” *Schwarzenegger*, 374 F.3d at 800 (internal citations omitted).  
 17 The Court resolves conflicts between parties over statements in the affidavits in the plaintiff’s favor.  
 18 *AT&T*, 94 F.3d at 588.

19 A district court sitting in diversity has personal jurisdiction to the extent provided by the law  
 20 of the forum state. *Data Disc., Inc. v. Sys. Tech. Assocs*, 557 F.2d 1280, 1286 (9<sup>th</sup> Cir. 1977).  
 21 California’s jurisdictional statute is co-extensive with federal due process requirements; therefore,  
 22 jurisdictional inquiries under state law and federal due process standards collapse into one, and the  
 23 Court considers only whether the exercise of jurisdiction over a defendant comports with due  
 24 process. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123 (9<sup>th</sup>  
 25 Cir. 2002). Specifically, to satisfy constitutional due process, the non-resident defendant “must have  
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27 <sup>4</sup>Defendants also argue that Plaintiff fails to allege contract, fraud, and copyright claims against Symantec. The  
 28 Court does not agree. Plaintiff alleges that Symantec is Bindview’s successor in interest to all legal claims brought against  
 Bindview, following their merger with Symantec. (Complaint ¶ 17). This is sufficient to survive a 12(b)(6) challenge.  
 Whether Symantec is actually liable for Bindview’s legal claims is a factual determination.

1 at least ‘minimum contacts’ with the relevant forum such that the exercise of jurisdiction ‘does not  
2 offend traditional notions of fair play and substantial justice.’” *Schwarzenegger*, 374 F.3d at 801  
3 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Depending on a defendant’s  
4 contacts with California, the Court may exercise either general or specific jurisdiction over him.  
5 Because Plaintiff has not presented any argument in support of general jurisdiction over Defendant  
6 in this action, the Court will examine whether specific jurisdiction over Defendant exists.

7 “A court exercises specific jurisdiction where the cause of action arises out of or has a  
8 substantial connection to the defendant’s contacts with the forum.” *Glencore Grain Rotterdam B.V.*,  
9 284 F.3d at 1123. The Court applies a three-part test when assessing specific jurisdiction:

- 10 (1) The non-resident defendant must purposefully direct his activities  
11 or consummate some transaction with the forum or resident thereof; or  
12 perform some act by which he purposefully avails himself of the  
13 privilege of conducting activities in the forum, thereby invoking the  
14 benefits and protections of its laws;  
15 (2) the claim must be one which arises out of or relates to the  
16 defendant’s forum-related activities; and  
17 (3) the exercise of jurisdiction must comport with fair play and  
18 substantial justice, *i.e.*, it must be reasonable.

15 *Lake v. Lake*, 817 F.2d 1416, 1421 (9<sup>th</sup> Cir. 1987); *Bancroft & Masters, Inc.*, 223 F.3d at 1086 (9<sup>th</sup>  
16 Cir. 2000). The plaintiff bears the burden of satisfying the first two prongs of the test.  
17 *Schwarzenegger*, 374 F.3d at 802. If the plaintiff fails under either prong, the Court must find that  
18 personal jurisdiction does not exist in the forum state. *Id.* If the plaintiff satisfies both prongs, the  
19 burden shifts to the defendant to “present a compelling case” demonstrating that the exercise of  
20 jurisdiction would be unreasonable. *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 276-  
21 78 (1985)).

22 Plaintiff has established that the Court has specific personal jurisdiction over Pulaski in this  
23 matter. According to the Complaint, Pulaski was involved in sophisticated licensing negotiations  
24 with Netbula, a corporation headquartered in California. Defendants do not deny that Pulaski  
25 actively participated in such negotiations. Plaintiff asserts that Pulaski engaged in intentional fraud  
26 during the course of these negotiations for his own enrichment. (Complaint ¶ 38). Although  
27 Pulaski argues that he is protected by the “fiduciary shield doctrine”, the conduct alleged would  
28 likely be considered outside the scope of Pulaski’s corporate role. Moreover, Pulaski’s ongoing

1 licensing negotiations with a corporation based in California would have placed him on notice such  
2 that “he could reasonably anticipate being hailed into court” in California for any intentionally  
3 tortuous conduct on his part. *Burger King*, 471 US at 477-78. Pulaski is alleged to have had several  
4 conversations with Netbula executives during which he is alleged to have made multiple  
5 representations. Whether Pulaski actually engaged in intentional fraud is a factual inquiry, the  
6 resolution of which is inappropriate for a motion to dismiss. Taking Plaintiff’s allegations together,  
7 the Court finds that Plaintiff has met its burden in demonstrating specific personal jurisdiction over  
8 Pulaski. *Calder v. Jones*, 465 U.S. 783 (1984) (holding that personal jurisdiction was proper where  
9 intentional conduct on the part of the defendant in Florida caused injuries in the plaintiff in  
10 California). The Complaint sufficiently alleges that Pulaski purposely directed his activities within  
11 California and that the instant case arises out of Pulaski’s alleged contacts within the forum state.  
12 *Schwarzenegger*, 374 F.3d at 802. Accordingly, the Court **DENIES** Pulaski’s motion to dismiss for  
13 lack of personal jurisdiction. *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174,  
14 1181 (9<sup>th</sup> Cir. 2004) (once a plaintiff has established personal jurisdiction over one claim, under the  
15 doctrine of pendant personal jurisdiction, a district court may exercise personal jurisdiction over  
16 other claims arising out of a common nucleus of operative facts).

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**CONCLUSION**

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' Motion to Dismiss pursuant to Rule 12(b)(6). The motion granted as to the fraud claim for the reasons identified above and denied on all other grounds. The Court **GRANTS** Plaintiff leave to amend the complaint to cure any pleading deficiencies identified above. Any amendments must be made within 20 days of the filing of this order. The Court also **DENIES** Pulaski's motion to dismiss for lack of personal jurisdiction.

**IT IS SO ORDERED.**

Dated: August 23, 2006



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MARTIN J. JENKINS  
UNITED STATES DISTRICT JUDGE