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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 NETBULA, LLC., a Delaware limited liability
13 company,
14 Plaintiff,
15 v.

16 BINDVIEW DEVELOPMENT
17 CORPORATION, a Texas corporation;
18 SYMANTEC CORPORATION, a Delaware
19 corporation; ERIC J. PULASKI, an individual;
20 and DOES 1-10, inclusive,

21 Defendants.

Case No.: C-06-0711-MJJ

**PLAINTIFF'S OBJECTION TO
MAGISTRATE JUDGE'S JUNE 11, 2007
ORDER ON PLAINTIFF'S MOTION FOR
SANCTIONS**

[F.R.C.P. 11(c), 28 U.S.C. § 1927]

Judge: The Honorable Martin J. Jenkins

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1 **NOTICE OF OBJECTION**

2 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

3 Pursuant to 28 U.S.C. § 636(b) (1), Federal Rule of Civil Procedure 72(a) and Civil Local
4 Rule 72-2, Plaintiff Netbula, LLC will and does object to Magistrate Judge Chen’s decision on
5 Plaintiff’s Motion for Sanctions (Docket No. 103).

6 Netbula’s objection will be based on this Notice, the accompanying Objection to
7 Magistrate Judge Chen’s decision, Memorandum of Points and Authorities, the Court’s file, and
8 on such argument as the Court may permit.

9 **OBJECTION TO MAGISTRATE JUDGE’S DECISION**

10 On April 18, 2007, the Court referred Plaintiff’s Motion for Sanctions under FRCP Rule
11 11 and 28 U.S.C. § 1927 (Docket No. 103, “the Rule 11 Motion”) to a Magistrate Judge. On June
12 11, 2007, the Honorable Edward M. Chen, a United States Magistrate Judge, issued a ruling
13 (Docket No. 193) which denies Plaintiff’s Motion for Sanctions and awards \$20,000 attorneys fees
14 to Defense counsel as the “prevailing party.” The ruling by the Magistrate Judge was dispositive
15 of Plaintiff’s Rule 11 Motion. For reasons below, Plaintiff believes that the Magistrate Judge’s
16 decision is clearly erroneous and contrary to law. Pursuant to 28 U.S.C. § 636(b)(1), Federal Rule
17 of Civil Procedure 72(a) and Civil Local Rule 72-2, Plaintiff objects to the Magistrate Judge’s
18 decision and requests a review by the presiding Judge.
19

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I. INTRODUCTION AND PROCEDURAL HISTORY**

22 On March 14, 2007, Plaintiff served Defendants the Rule 11 Motion, detailing five
23 violations by Defense counsel. On April 3, 2007, Defense counsel sent a letter to Plaintiff,
24 refusing to correct or withdraw any of the defense, contention or allegations in question. On April
25 6, 2007, more than 21 days after the Motion was properly served on Defendants, Plaintiff filed the
26 Rule 11 Motion with the Court. Plaintiff was in full compliance with FRCP Rule 11(c) (1) (A).
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1 On April 24, 2007, the Court referred Plaintiff's Motion for Sanctions under FRCP Rule
2 11 and 28 U.S.C. § 1927 (Docket No. 103, "the Rule 11 Motion") to Magistrate Judge Edward M.
3 Chen.

4 On May 16, 2007, Defendants filed their Opposition (Docket No. 133). Defendants cite
5 *Price v. Hawaii*, 789 F. Supp 330, 335-336 (D. Haw. 1992) in support of their argument that the
6 Rule 11 Motion was untimely. On the same day, Defendants also filed a Motion for Attorneys'
7 Fees (Docket No. 128), seeking \$35,000 for opposing Plaintiff's Rule 11 Motion.

8 On May 23, 2007, Plaintiff filed its reply brief. Docket No. 137.

9 On June 6, 2007, a hearing was held before Magistrate Judge Chen. The Magistrate Judge
10 expressed his opinion that the Rule 11 Motion was untimely, and took the matter under
11 submission.
12

13 On June 11, 2007, the Magistrate Judge issued an order denying Plaintiff's Motion for
14 Sanctions and awarding Defense counsel \$20,000 in attorneys' fees.

15 For the reasons below, Plaintiff believes that the Magistrate Judge's decision is clearly
16 erroneous and requests a judge of the court to make a review.
17

18 **II. ARGUMENT**

19 **A. The Magistrate Judge's ruling applied an erroneous legal standard**

20 **1. The Magistrate Judge's decision was based on erroneous interpretation of the 1993** 21 **Advisory Committee Notes**

22 In reaching his conclusion that Plaintiff's Rule 11 Motion was untimely, the Magistrate Judge
23 wrote:

24 In the instant case, Netbula's Rule 11 motion was untimely
25 because it was not filed until many months after Defendants'
26 offending contentions were made and long after the presiding
27 judge had already considered or ruled upon the papers
28 containing the offending contentions. Netbula's reliance on
Price v. Hawaii, 789 F. Supp. 330 (D. Haw. 1992), is not well
placed. There, the court did note that "'in the case of pleadings

1 the sanctions issue under Rule 11 normally will be determined
2 at the end of the litigation”; however, ““in the case of motions
3 [the sanctions issue normally will be determined] at the time
4 when the motion is decided or shortly thereafter.”” *Id.* at 336
5 (quoting Fed. R. Civ. P. 11, 1983 advisory committee notes).
6 The instant case involves contentions made in motions, and not
7 pleadings.

8 Magistrate Judge’s Order, Docket 193, pp.2:24-3:4(emphasis added)

9 Based on the 21 day safe-harbor provision, “a party cannot delay serving its Rule 11 motion
10 until conclusion of the case (or **judicial rejection** of the offending contention)” (1993, Advisory
11 Committee Notes). Since Plaintiff’s Rule 11 Motion was served before the end of the case, the
12 question is whether the motion was served after “**judicial rejection.**” Plaintiff contends that based
13 on the plain language of the Rule, even after the presiding judge had already considered or ruled
14 upon the papers, unless the contentions are **rejected**, the frivolous arguments or allegations in
15 such papers can be bases for Rule 11 sanctions. In the case where a false allegation of an attorney
16 was relied on by a court, a fraud upon the court might have been committed.

17 Out of the five alleged violations in Plaintiff’s Rule 11 Motion, the only contention that had
18 already been explicitly **rejected** by the Court was Defendants’ mischaracterization of Plaintiff’s
19 fraud claim. However, Plaintiff was well aware of the Rule and pointed out that “[a]lthough the
20 Court rejected Defendants’ contentions; Defendants’ mischaracterization is evidence of their
21 pattern of activity.” Plaintiff’s Reply brief, p.10:2-3. Based on the 1993 Advisory Committee
22 Notes, a pattern of violations is one of the factors in considering sanctions.

23 Moreover, the Magistrate Judge’s finding that Plaintiff’s Rule 11 Motion does not involve
24 pleadings is erroneous. One of the alleged violations was made in the fraud affirmative defense of
25 Defendants’ Second Amended Answer filed in December 2006. “Affirmative defenses are
26 pleadings and, therefore, are subject to all pleading requirements of the Federal Rules of Civil
27 Procedure.” *Heller Financial Inc. v. Midwhey Powder Co.*, 883 F.2d 1286 (7th Cir.1989).
28

1 Contrary to the Magistrate Judge's findings, **one of Plaintiff's allegations does involve pleadings**
2 filed by Defendants in December 2006, a mere three months before the Rule 11 Motion was
3 served. The Magistrate Judge stated that Plaintiff's reliance on *Price v. Hawaii* is not well placed.
4 However, it was Defendants who initially relied on *Price v. Hawaii* (Defendants' Opposition,
5 p.5:19-21). Plaintiff pointed out that even under *Price*, sanctions for violations in pleadings are
6 determined at the end of case.
7

8 While the 1993 Advisory Committee Notes suggest that "[o]rdinarily the motion should be
9 served promptly after the inappropriate paper is filed, and, if delayed too long, **may** be viewed as
10 untimely," there is no formula in Rule 11 itself which states that serving the Motion three to five
11 months after the alleged violation is untimely. Instead, the discretionary determination of
12 timeliness should be on "a case-by-case basis."
13

14 2. **The Magistrate Judge did not follow the plain language of the Rule 11**

15 Sanctions under Rule 11 are discretionary. However, once Plaintiff followed the
16 mandatory safe-harbor provision, the Court must first determine whether violations have been
17 committed, before embarking on the discretionary part of the decision. As shown above, Plaintiff
18 strictly followed the safe-harbor provisions, in compliance with FRCP Rule 11(c)(1)(A). "Once
19 the safe harbor period has expired, the violation is complete, and sanctions are appropriate."
20 *Jackson v. Rohm & Haas Co.*, No. 05-4988 (E.D.Pa. 03/09/2006) (court concludes that
21 withdrawing the offending paper 46 days after being served a Rule 11 motion as too late).
22

23 In its Reply brief in support of the Rule 11 Motion, Plaintiff cites *Warren v. Guelker*, 29
24 F.3d 1386 (9th Cir. 1994), a case in which the Ninth Circuit reversed a district's denial of
25 imposing Rule 11 sanctions on a *pro se* litigant. There, the Ninth Circuit wrote: "Under the plain
26 language of the rule, when one party files a motion for sanctions, the court must determine
27 whether any provisions of subdivision (b) have been violated." The rule is clear. The Court must
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1 first determine whether Rule 11 has been violated. Only then can it engage in discretionary
2 decisions on whether to impose sanctions.

3 In the instant case, Defendants were given ample opportunity to correct or withdraw their
4 allegedly frivolous allegations and arguments. Furthermore, Defense counsel has the capacity to
5 make such corrections – they are still the attorneys of Defendants. All they had to do was file a
6 paper with the Court, or send a letter to the presiding judge. Instead, they refused to do so.
7

8 **3. The Magistrate Judge shifted the duties of the parties under Rule 11**

9 Under FRCP Rule 11, a signer of a paper has a duty not to make frivolous contentions. The
10 Rule does not impose a burden on the opposing side to correct the other side’s violations. In his
11 ruling, the Magistrate Judge says that the Plaintiff should have asked the Defendants to withdraw
12 the contentions. In fact, Plaintiff did alert Defendants before filing its Rule 11 motion. Under Rule
13 11, Plaintiff is not required to pre-warn Defendants multiple times – the 21 day safe-harbor period
14 gave Defendants plenty of time to make corrections.
15

16 **4. The proper standard on “prevailing party”**

17 “If warranted, the court may award to the party prevailing on the motion the reasonable
18 expenses and attorney's fees incurred in presenting or opposing the motion.” FRCP Rule
19 11(c)(1)(A). However, to be a prevailing party, one must “receive at least some relief on the
20 merits.” See *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human*
21 *Resources*, 532 U. S. 598, 605 (2001).
22

23 With Plaintiff’s Rule 11 Motion, (a) Defendants were forced to tell the truth to the Court:
24 Plaintiff did bring some key documents requested by Defendants to that meeting; (b) Defendants
25 were forced to admit that they mistakenly concluded that Netbula was formed after the publication
26 of the copyrighted work; (c) Defendants were forced to admit that they took the prices of two
27 different products in computing the average price of one product. Defendants were forced to
28

1 change their positions by the Rule 11 Motion. Therefore, the Defendants were not the prevailing
2 party.

3 **B. The Magistrate Judge erred in analyzing the record**

4 **1. Defendants' misrepresentation of the May 15, 2006 Settlement Conference in the** 5 **Joint Case Management Statement**

6 In Section 1.B of the Joint Case Management Statement (filed on September 29, 2006), titled
7 "**Description of Events Submitted by Defendants**", Defense counsel wrote that in the May 15,
8 2006 meeting, "Symantec and BindView provided the materials requested of them... Netbula, on
9 the other hand, *did not provide any of the materials requested of them.*" (emphasis added).

10 After being served the Rule 11 Motion, Defendants finally admitted, in the May 15, 2006
11 settlement conference, that both parties brought some documents requested by the other side, and
12 neither party produced all the documents requested.

13 The Magistrate Judge wrote in his decision: "*In any event, Defendants' statement was not*
14 *misleading. Netbula had not produced all the documents requested.*" Magistrate Judge's Order,
15 p.4:15-16.

16 However, Defendants alleged that Netbula did not provide **any** documents requested, not that
17 Netbula did not produce **all** of the documents requested. Defendants painted a picture that they
18 brought documents while Plaintiff did not bring **any**, while in fact Plaintiff brought documents but
19 Defendants refused to accept them. As shown in Plaintiff's Rule 11 Motion, Defendants repeated
20 similar accusations in their discovery papers. In the Opposition, Defendants further
21 mischaracterized the record by fabricating an interpretation of Mr. Wakefield's May 16, 2006
22 email that was contrary to the allegations in their discovery motion filed on March 22, 2007. See
23 Plaintiff's Reply brief for the Rule 11 Motion, pp.14:19-15:2.
24
25
26

27 In awarding attorneys fees to Defendants, the magistrate wrote:
28

1
2 In addition, contrary to Netbula's assertion, the factual
3 investigation needed to respond to the Rule 11 motion on
4 the merits was not a task that could quickly be
5 accomplished. For example, a fair amount of time was
6 reasonably expended to look into the history of events
7 surrounding the May 15, 2006, settlement meeting.
8 Given the circumstances, having reviewed the opposition
9 brief and affidavit, the Court concludes that an award of
10 \$20,000 is reasonable.

11 Docket No. 193, p.6:8-13.

12 Defense counsel has the obligation to tell the truth to the Court. They can't decline to
13 accept Plaintiff's documents then tell the Court that Plaintiff did not bring any. In similar cases,
14 doing so is considered fraud and deceit. See *Simon v. San Paolo U.S. Holding Co., Inc.*, 113
15 Cal.App.4th 1137 (Cal.App. Dist.2 12/02/2003). After noticing Defendants' misrepresentations,
16 Plaintiff immediately pointed out in great detail that Plaintiff did bring documents requested by
17 Defendants to the meeting (See Don Yue Decl on November 7, 2006, Docket No. 57). Plaintiff
18 made subsequent effort to alert Defendants of their misrepresentations. Instead of candidly telling
19 the truth, Defendants persisted with their misrepresentations of the May 15, 2006 meeting.

20 Instead of sanctioning Defense counsel for their attempt to mislead the court and prejudice
21 Plaintiff, the Magistrate Judge awarded Defendants \$20,000, partially for their time "expended to
22 look into the history of events surrounding the May 15, 2006, settlement meeting."

23 **2. Defendants' Unclean Hands Accusations**

24 To support their "Unclean Hands" defense, in their opposition to Plaintiff's Motion to
25 Strike, Defendants wrote:

26 Defendants have raised the unclean hands defense in part based on
27 curious but as yet unexplained discrepancies related to its copyright
28 registration application, including (1) a signature by Plaintiff's
agents that post-dates the purported registration date; and (2) a claim
of authorship by "Netbula, LLC," an entity that apparently was not
organized until the year after the alleged date of first publication.

1 Docket No. 49, pp. 9:26-10:4. October 31, 2006.

2
3 The date of first publication of PowerRPC on Netbula's copyright certificate is September 1,
4 1996 (Complaint Exhibit A). On November 7, 2006, one week after Defendants filed the above
5 unclean hands accusation with the Court, Plaintiff informed Defendants that Netbula was founded
6 in July 1996, about two months before the publication of PowerRPC (See Yue Decl ¶3, Docket
7 No. 52, p.1:29, November 7, 2006). On page 7 of the reply brief in question (Docket No. 51),
8 Plaintiff stated that "in non-compliance with Civil L.R. 7-5(a), Defendants failed to provide
9 support for this factual contention". On page 8, regarding the unclean hands accusation, Plaintiff
10 commented: "Again, Defendants provide no supporting affidavit." Docket No. 51, p.8:26-27.
11 Plaintiff protested as much as it could, yet Defendants took no corrective action.
12

13 The Magistrate Judge wrote:

14 Once Defendants made the offending contention in their
15 opposition to the motion to strike, Netbula should have asked
16 Defendants to withdraw the contention because Netbula was
17 incorporated earlier in Delaware. It could have easily document
18 such to Defendants' satisfaction. Netbula did not do so. In fact,
19 even in its reply brief, Netbula failed to bring this corrective
20 information to Defendants' and the presiding judge's attention.

21 Magistrate Judge's Order, p4:7-12.

22 First, Plaintiff did inform Defendants that Netbula was formed in July 1996 and that
23 Defendants' allegations must be incorrect. See Yue Decl ¶3, Docket No. 52, p.1:29, November 7,
24 2006. Second, Defendants provided no basis for its allegations in its original paper. Plaintiff had
25 no idea why Defendants alleged that Netbula, LLC¹ "was not organized until the year after the
26 alleged date of first publication." Defendants could have made incorrect calculations, as they have
27 done in getting the \$6.89 price in their fraud affirmative defense. Defendants had the obligation

28 ¹ As shown in all court filings, Netbula is Delaware Limited Liability Company.

1 not to make frivolous allegations in court filings. Plaintiff did its best to alert Defendants about the
2 problems in previous papers and in the Rule 11 Motion.

3 **2. Defendants' argument that Plaintiff had no right to sue**

4 Plaintiff pointed out the following in its Reply brief

5
6 To show that Plaintiff had **no** legal right to protect its
7 intellectual property during any period of time, Defendants
8 must *exhaust* all possible alternatives of vindicating the right
9 and conclude that *none* of the alternatives are permissible. One
10 cannot say Highway 101 may be closed therefore one has no
11 way to go from San Jose to San Francisco.

12 Plaintiff's Reply Brief, Docket No. 137, pp.10:24-11:3.

13 As Plaintiff pointed out, even if all courts required a copyright certificate for bringing a
14 lawsuit, Plaintiff could have obtained an expedited copyright certificate and then file suit. Thus,
15 Defendants' argument that Plaintiff had no right to sue was baseless. The Magistrate Judge did not
16 consider Plaintiff's valid arguments.

17 **3. Plaintiff's pricing and Defendants' fraud affirmative defense**

18 In its Rule 11 Motion, Plaintiff alleged that the following allegations in Defendants' fraud
19 affirmative defense in their Second Amended Answer filed in December 2006 were frivolous:

20 "Specifically, DEFENDANTS are informed and believe that in the
21 year 2000 the standard list price for Netbula's RPC software was less
22 than \$6.00 per copy (and only \$6.89 per copy even taking into
23 account a one-time initial payment) for the first 1,000 copies and
24 incrementally less for additional units."

25 Second Amended Answer, p.15:18-21

26 As pointed out by Plaintiff, Defendants' above allegation was baseless and not well ground
27 in fact² based on the objective frivolousness standard set by the Ninth Circuit, because

28 1) There was no incremental discount for additional units in Netbula's standard

² Plaintiff disagrees with the Magistrate Judge that the Rule 11 Motion was used to enhance the merit of case. Plaintiff strictly follows the objective frivolousness standard.

1 license agreements in 2000³.

2 2) The price in that agreement was \$5995 per 1000 copy, not \$6.00 per copy.

3 Netbula sold licenses in 1000-unit or 100-unit packs or per copy.

4 3) There was nowhere in the Netbula’s standard agreement in 2000 to derive a
5 \$6.89 per copy price.
6

7 For (3), as shown in Defendants’ Opposition, Defendants claimed that they obtained the
8 \$6.89 price by adding the price of a SDK product and the price of a 1000-pak runtime product
9 then dividing by 1000. Such argument is clearly frivolous. Plaintiff also showed that Defendants’
10 allegations lacked reasonable and competent inquiry because they had access to all relevant
11 StorageTek documents on which they based their allegations.

12 **CONCLUSION**

13
14 For reasons above, the Magistrate Judge’s ruling on Plaintiff’s Rule 11 Motion contains
15 clear errors in both law and fact. Plaintiff requests the Court to make a review of the Magistrate
16 Judge’s decision based on the proper standard.

17 Dated: June 14, 2007

LAW OFFICES OF VONNAH M. BRILLET

18
19 By: _____/S/

20 Vonnah M. Brillet
21 Attorneys for Plaintiff NETBULA, LLC
22
23
24
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26 _____
27 ³ In fact, the only license agreement which had such incremental discount in 2000 was a non-standard
28 agreement signed between Netbula and StorageTek.