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NETBULA, LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NETBULA, LLC., a Delaware limited liability company,

Plaintiff,

v.

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

Defendants.

Case No.: C-06-0711-MJJ-EMC

**PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SANCTIONS**

**[F.R.C.P. 11(c), 28 U.S.C. § 1927]**

Date: June 6, 2007
Time: 10:30 a.m.
Dept.: Courtroom C, 15th Floor
Judge: The Honorable Edward M. Chen

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## INTRODUCTION

In its Motion for Sanctions (Docket No. 103, "the Rule 11 Motion"), Plaintiff detailed Defendants' violations of F.R.C.P. Rule 11. Defendants mischaracterized Plaintiff's fraud claim (Docket No. 17, June 15, 2006); Defendants claimed that Plaintiff had no right to vindicate its legal rights during the period of the alleged fraud (Docket No. 17, 19, June 15, 2006; Docket No. 32, August 1, 2006); Defendants accused Plaintiff of "Unclean Hands" based on false representations of Plaintiff's copyright (Docket No. 49, October 31, 2006); Defendants accused Plaintiff of failing to provide to "any of the materials requested" in an informal settlement conference, without disclosing that they refused to accept the documents Plaintiff brought (Joint Case Management Statement, Docket No. 40, September 29, 2006); and Defendants accused Plaintiff of fraud by mischaracterizing Plaintiff's licensing terms and pricing (Docket No. 49, October 31, 2006; Docket No. 55, December 06, 2006).

Defendants' filings in question were intended to injure Plaintiff's credibility and property rights and prejudice Plaintiff in the Court. Defendants' repeated filings of frivolous and improper papers consumed substantial resource of the Court and Plaintiff. Seeing no sign that Defendants would voluntarily change their behavior, Plaintiff had no choice but to seek enforcement of the Rules from the Court. Plaintiff's Motion for Sanctions fully described how each of Defendants' allegations or arguments was both baseless and without competent inquiry. Plaintiff also showed that Defendants' conduct was willful and in wanton disregard of the rules of the Federal Court.

Defendants' frivolous and improper allegations and arguments frustrated the legal process in the Federal Court. Defense counsel and their law firm, Fenwick & West LLP refused to withdraw or correct any of their papers after being served the Rule 11 Motion. The sanction provisions in FRCP Rule 11 and 28 U.S.C. § 1927 were designed to deter the type of conduct committed by Defendants. As Plaintiff will show below, Defendants' Opposition to Plaintiff's

1 Motions for Sanctions (Docket No. 133) is yet another example of their sanctionable conduct.

2 **BACKGROUND OF THE CASE**

3 Plaintiff Netbula, LLC ("Netbula") is a Delaware Limited Liability Company founded in
4 July 1996. Netbula's main product line is called PowerRPC, a software technology that can be
5 used to execute commands on a remote computer. A programmer who uses PowerRPC to develop
6 new programs must purchase Software Development Kit ("SDK") licenses. To distribute the
7 newly developed software, the licensee of the SDK product must purchase another license to
8 incorporate a component of PowerRPC -- the "pwrpc32.dll" file. This license to copy the
9 "pwrpc32.dll" is called a "runtime license". Netbula offers several product packages for the
10 runtime license: a Limited Distribution License is the right to distribute up to 1000 copies; then
11 there are the "small-pak" licenses, such as a 100-pak. These runtime license packages must be pre-
12 paid. If the licenses are purchased on a per-copy basis, the price for the right to make one copy of
13 "pwrpc32.dll" was about $50 in 2000 and stayed at roughly this price from 1999 to 2006. See
14 Docket 70 Exhibit A for purchase orders and invoices evidencing the $50 price. The per-copy
15 price of $50 was about the same as a competitor's pricing on a very similar product.

16 In September 2005, Defendant BindView Development Corporation ("BindView")
17 contacted Netbula to inquire about purchasing a license for PowerRPC. On September 29, 2005,
18 Netbula sent a license agreement template to BindView (Docket No. 70, Exhibit A, NBMAY15-
19 DOCS—0000001-8), in which the pricing for 1000 units of PowerRPC client runtime license was
20 set at $19,995. Netbula later suspected that BindView had been using PowerRPC without
21 authorization and sent multiple correspondences to BindView inquiring about the suspected use of
22 PowerRPC. In October 2005, BindView provided a report stating that it had distributed 1681
23 copies of "pwrpc32.dll" in six years. After finding BindView's report to be false and that
24 BindView sold unlimited licenses of the infringing product, Netbula prepared to take legal action
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26
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against BindView. However, on November 7, 2005, BindView's CEO, defendant Eric J. Pulaski ("Pulaski") telephoned Don Yue ("Yue") of Netbula, promising to pay license fees and interests. Pulaski admitted that BindView had included "pwrpc32.dll" in its HackerShield and bv-CIS software ("bv-CIS") since 1999, and had sold unlimited licenses of bv-CIS to many companies. Since BindView's grant of unlimited licenses would result in unlimited liabilities for BindView at any non-zero price for PowerRPC license, Pulaski negotiated for an alternative licensing term. Yue agreed to offer BindView to pay about $50 per copy based on the number of actual copies made, instead of the number of copies BindView authorized others to make. Pulaski agreed to these terms and obtained a promise from Yue not to sue BindView during the pending merger between Symantec Corporation ("Symantec") and BindView at the time.

In addition to BindView's promise, Netbula also relied on BindView's November 8, 2005 SEC filing[1] to hold off a lawsuit. In the SEC filing, BindView warranted that it did not infringe others' intellectual property. Netbula believed that Defendants would abide by Netbula's licensing terms to make their SEC filings true. However, BindView later refused to provide any further usage report and refused to pay license fees based on the number of copies. In January 2006, Symantec and BindView completed their merger. On January 31, 2006, Netbula filed the instant lawsuit against BindView, Symantec and Pulaski, alleging, *inter alia*, copyright infringement, fraud and breach of contract. Netbula lawsuit seeks copyright damages, defendants' profits attributable to infringement, actual and punitive damages for fraud, damages for the contract claim, imposition of a constructive trust and injunctive relief.

## ARGUMENT

[1] SECURITIES EXCHANGE ACT OF 1934 Release No. 51283 published on March 1, 2005 warned about potential Exchange Act Section 10(b) and Section 14(a) liability for publication of false or misleading material disclosures regarding material contractual provisions such as representations attached to Proxy Statements.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

**A. Plaintiff's Rule 11 Motion is timely**

Defendants cite *Price v. Hawaii*, 789 F. Supp 330, 335-336 (D. Haw. 1992) in support of their argument that the Rule 11 Motion was untimely. However, Defendants neglect to mention that in *Price* the Rule 11 sanctions motion was filed more than two years after the case was dismissed[2]. In noting that "the motion for Rule 11 sanctions, filed more than two years after the dismissal, is not prompt or timely," the *Price* court stated that "it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation."

Here, the five alleged Rule 11 violations by Defendants occurred from June 15, 2006 to December 06, 2006. The Rule 11 Motion was served on March 14, 2006[3]. The recent violations were made three to five months before the Rule 11 Motion was served. The oldest violation was only nine months before. The Rule 11 Motion was thus served shortly after violations and before the "end of the litigation."

In *Patterson v. Apple Computer, Inc.*, 04-0405PJH. (N.D.Cal. 09/19/2005), the offending paper was filed in March 2004; a rule 11 motion was filed more then one year later. The Rule 11 sanctions in the *Patterson* case were granted in part in September 2005. Case C04-0405-PJH, 09/19/2005, Docket No. 133. Clearly, an attorney cannot assume that he has escaped the sting of Rule 11 simply because the opposing party has not yet moved for sanctions after a few months.

**B. Defendants misstated the legal standard for Rule 11 sanctions**

In *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 09/06/1990), the Ninth Circuit took the case *en banc* to reconsider "Rule 11 sanctions for partially frivolous pleadings." The *en banc* court concluded that *Murphy v. Business Cards Tomorrow, Inc.*, 854 F.2d 1202, 1205

[2] The district court dismissed the *Price* action in December 1989, the Rule 11 motion was filed in January 1992.

[3] Verbal warnings about Rule 11 concerns were given to Defense counsel much earlier.

1 (9th Cir. 1988) mistakenly stated the rule for partially frivolous pleadings and **overruled** *Murphy*[4].
2 Based on Supreme Court decision in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 L. Ed.
3 2d 359, 110 S. Ct. 2447, 2454 (1990), the *Townsend* court recognized that Rule 11 requires an
4 inquiry to be reasonable under all the circumstances. See also, *In re Grantham Brothers*, 922 F.2d
5 1438 (9th Cir. 1991). "Sanctions shall be imposed whether the pleading or motion is frivolous in
6 whole or in part."[5] *Burnette v. Godshall*, 828 F. Supp. 1439, 1447 (N.D.Cal. 1993).
7
8 Defendants argue that "Rule 11 permits sanctions only where a pleading, motion or other
9 paper *itself* is frivolous, not an individual argument in support of it." Opposition, Docket No. 133,
10 p.9:10-15. Defendants base their position on *Golden Eagle Distributing Corp. v. Burroughs Crop.*,
11 801 F.2d 1531, 1540-41(9th Cir. 1986): "one argument or sub-argument in support of an otherwise
12 valid motion, pleading or other paper is unmeritorious does not warrant a finding that the motion
13 or pleading is frivolous or that the Rule has been violated." Defendants confused "unmeritorious"
14 with "frivolous" and misconstrued *Golden Eagle*, which only states that an "*unmeritorious*"
15 argument does not render a whole paper "*frivolous*."
16
17 **C. Defendants' violations were all sanctionable under Rule 11**
18 **1. Defendants Mischaracterize Plaintiff's Fraud Claim**
19 To establish a fraud claim under California law, a plaintiff must show: (1) a misrepresentation;
20 (2) knowledge of falsity; (3) intent to defraud, i.e., induce reliance; (4) justifiable reliance; and (5)
21 resulting damage. *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996).
22
23 In the original Complaint ("Complaint"), Plaintiff pled the fraud claim with substantial clarity:
24
25 [4] "Rule 11 permits sanctions only when the paper as a whole is frivolous or of a harassing nature, not when one of the allegations or arguments in the paper may be so characterized." *Murphy v. Business Cards Tomorrow, Inc.*, 854 F.2d 1202, 1205 (9th Cir. 1988).
26
27 [5] For instance, recently, Judge Jeremy Fogel sanctioned an attorney for making partially baseless allegations. See *Kinderstart.com v. Google Inc.*, C06-2057-JF, Docket No. 92, March 16, 2007.
28

Paragraph 66 of the Complaint showed the false promise[6]; Paragraphs 67-69 established the knowledge of falsity[7]; Paragraph 70 established Defendants' intent to defraud[8]; Paragraph 71 established justifiable reliance[9]; Paragraph 72 showed the resulting damage[10].

In their motions to dismiss (Docket No. 19), Defendants asked the Court to dismiss the fraud claim and three other claims "without leave to amend." The Court found that Defendants "mischaracterize" Plaintiff's fraud claim, and ruled on the issue of reliance damages:

> Plaintiff's alleged reliance and decision to forgo immediately filing a lawsuit is enough to establish actionable damages. However, the complaint, as it currently stands, fails to allege any actual monetary damages resulting from Plaintiff's delay in filing…The Court **GRANTS** Plaintiff leave to amend to cure this deficiency.
>
> Court Order on Motion to Dismiss, Docket No. 37, p.6:17-22.

Plaintiff won nearly all arguments in opposing Defendants' motion to dismiss, but is only seeking Rule 11 sanctions for the mischaracterization of the fraud claim, based on the objective standard of frivolousness set by the Ninth Circuit. First, Defendants' argument that Plaintiff relied on the false BindView reports was baseless. Nowhere in the Complaint did Plaintiff alleged reliance on the false reports, in fact, Plaintiff found the reports to be false after investigation, indicating non-reliance. Second, Defendants failed to perform reasonable and competent inquiry

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6 "Defendant Pulaski...represented to...Netbula that Bindview would provide a complete and accurate informational accounting of all licenses and other distributions of Netbula's RPC technology..."

7 "the … related representations . . . that said reports would and did contain complete and accurate information regarding BindView's license usage … were knowingly false when made..."

5. "The false representations were made to Plaintiff with the wrongful intent to induce Plaintiff to rely to its detriment and forego legal action vindicating its rights and intellectual property."

6. "Plaintiff did not know the representations were false, but believed them to be true and reasonably and justifiably relied upon them to its detriment in foregoing immediate legal action."

7. "Plaintiff has been damaged by Defendants' conduct and fraud in that it has been forced … to delay the legal vindication of its rights to its detriment."

before they filed their papers in Federal Court. Defendants' mischaracterization of the fraud claim had no likelihood of success under any legal standard. Although the Court rejected Defendants' contentions, Defendants' mischaracterization is evidence of their pattern of activity

**2. Defendants' argument that Plaintiff did not have the right to vindicate its rights was frivolous**

Plaintiff alleged that as a result of relying on Defendants' misrepresentations, it delayed the legal vindication of its rights and suffered damages. In their Motion to Dismiss, Defendants stated that during the period of alleged fraud "plaintiff had not yet obtained a copyright registration, and therefore had no right to sue… Plaintiff cannot have been damaged by refraining from filing a lawsuit it had no right to pursue." Defendants' Motion to Dismiss, Docket 17, pp.17:22-18:3.

As pointed out in the Rule 11 Motion, Plaintiff could have (1) filed lawsuit in Northern District of California with a pending copyright application under the *Napster*[11] precedent; (2) filed suit in Texas with a pending copyright application[12]; (3) expedited a copyright application and filed suit with a certificate; (4) filed a lawsuit then expedited the application; (5) complained with U.S. government agencies. From November 7, 2005 to January 2006, there were about two months. Approaches (2), (3) and (5) could have definitely worked. Approaches (1) and (4) also have high likelihood of success based on the precedents cited.

In their Opposition, citing cases in the Central District of California while ignoring the *Napster* precedent in the Northern District, Defendants continue to argue that Plaintiff had no right to sue. Defendants' argument defies logic.

To show that Plaintiff had **no** legal right to protect its intellectual property during any period

[11] *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1101 (N.D. Cal. 2002)

[12] "In order to bring suit for copyright infringement, it is not necessary to prove possession of a registration certificate. One need only prove payment of the required fee, deposit of the work in question, and receipt by the Copyright Office of a registration application." See *Apple Barrel Productions Inc. v. Beard*, 730 F.2d 384 (5th Cir. 04/23/1984).

of time, Defendants must ***exhaust*** all possible alternatives of vindicating the right and conclude that ***none*** of the alternatives are permissible. One cannot say Highway 101 may be closed therefore one has no way to go from San Jose to San Francisco. Whether Plaintiff filed a copyright application is irrelevant to the inquiry of whether Plaintiff had the right to do so. Even in the hypothetical situation in which Plaintiff did not file any copyright registration before the relevant period, it had the right and ability to protect its intellectual property in Court or otherwise by following proper procedures.

Defendants continue to mischaracterize the record on Plaintiff's copyright registration. As Plaintiff pointed out time and again, Plaintiff mailed its copyright registration application in October 2005. The registration was expedited in December 2005, in anticipation of a prospective lawsuit. Plaintiff produced a copy of the October 2005 copyright application (which was the basis for the copyright registration certificate), the cancelled check for the copyright registration fee, and the deposited source code in February 2007. In Section 4 of the copyright certificate attached to the Complaint, it is clearly marked "APPLICATION RECEIVED OCT. 18, 2005" and "ONE DEPOSIT RECEIVED OCT. 18, 2005". The Effective Date of Registration is "10 18 05".

Given the documents presented by Plaintiff (including the October 2005 copyright application), Defendants' continuing argument that Plaintiff's copyright application was signed on December 7, 2005 was clearly frivolous, because it was impossible for the U.S. Copyright Office to receive an application on October 18, 2005 that was signed in December 2005.

**3. Defendants' allegation of Unclean Hands against Plaintiff was frivolous**

In accusing Plaintiff of "unclean hands," Defendants claimed that Plaintiff copyright certificate contained a "discrepancy" on the publication date of the copyrighted work, which is September 1, 1996. According to Defendants, Netbula, LLC "apparently was not organized until the year after the alleged date of first publication." Docket No. 49, p.14:1-4.

Defendants claim that they checked the "California Business Portal" website and found that Netbula filed papers in 1997. However, the page Mr. Wakefield's obtained from the California website (Docket No. 130, page 31) plainly shows that NETBULA, LLC is formed under the jurisdiction of "DELAWARE". In every paper authored by Defendants in the instant case, they correctly put "NETBULA, LLC., a Delaware limited liability company" on the cover page. As demonstrated by Mr. Wakefield's Declaration (Docket No. 130, page 33), with just a few mouse clicks, he was able to confirm that Netbula, LLC was actually founded on July 24, 1996 under Delaware law. Defendants had twenty-one days to respond to Plaintiff's Motion to Strike; they insisted on accusing Plaintiff of unclean hands by attacking the truthfulness of Plaintiff's copyright registration. Fenwick & West LLP is a full service law firm with a lot of lawyers and assistants, yet they failed to perform a simple inquiry that can be done in minutes. Such kind of conduct is exactly what Rule 11 aims to deter.

Despite the clear proof of frivolousness of their allegation and argument, Defendants claim they should not be sanctioned because they prevailed on that motion. They are wrong. The Court could have been influenced by Defendants' frivolous allegations even though it did not explicitly base its conclusions on them. Defendants also claim that Plaintiff did not request them to clarify the issue in its reply brief (Docket No. 51). Defendants are again mistaken. On page 7 of the Reply brief, Plaintiff stated that "in non-compliance with Civil L.R. 7-5(a), Defendants failed to provide support for this factual contention". On page 8, regarding the unclean hands accusation, Plaintiff commented: "Again, Defendants provide no supporting affidavit." Docket No. 51, p.8:26-27. Plaintiff's protested, Defendants took no corrective action.

Even after being served the Rule 11 Motion, Defendants refused to withdraw the frivolous allegations within the safe-harbor period. Their analogy of their frivolous unclean hands accusations to an inaccurate description of a business location is self-serving.

1 **4. Defendants' allegations regarding the May 15, 2006 settlement meeting was for improper**
2 **purpose**
3 One of the primary purposes of a Case Management Conference is to plan discovery. In the
4 Joint Case Management Statement ("JCMS") (Docket No. 40), Defendants stated: "On May 15,
5 2006…Symantec and BindView provided the materials requested of them, including information
6 regarding the replacement of the allegedly infringing code contained in bv-CIS/HackerShield.
7 Netbula, on the other hand, ***did not provide any*** of the materials requested of them." (emphasis
8 added). Defendants made these allegations in the Joint Case Management Statement with the clear
9 intention to prejudice Plaintiff in the Court at a time when "status of discovery and document
10 production" was to be discussed.
11
12 The May 15, 2006 informal settlement meeting was the first face-to-face meeting between the
13 parties. Neil Smith was Plaintiff's counsel at the time. Before the meeting, each side asked the
14 other to bring some documents[13]. Defendants brought some, but not all, of the documents
15 requested of them, as did Plaintiff. However, Plaintiff did bring some key documents requested
16 by Defendants: standard license agreements and records evidencing the $50 per-copy pricing. At
17 the end of the meeting, Defendants declined to take the documents Plaintiff brought. See
18 Declaration of Don Yue, May 23, 2007.
19
20 Now, in their Opposition, Defendants claim that "Defendants have never said that Netbula did
21 not bring any documents to the meeting. Rather, they allege that Netbula did not produce the
22 *requested* material."
23
24 Defendants' new argument is plainly false. All documents Plaintiff brought to the meeting
25
26 [13] In Mr. Wakefield's email to Plaintiff's former counsel, he asked Plaintiff to bring, *inter alia,* "standard license forms used by Netbula over time", "documents showing royalty rates charged by Netbula for its Power RPC product and the pwrpc32.dll file over time" and "source code for the pwrpc32.dll file". Defendants did not request Plaintiff to bring copies of ONC RPC and PowerRPC products.
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28

1 were requested by Defendants. Standard licensing terms were most relevant because Plaintiff and
2 BindView had no prior agreement. The per-copy pricing was also most relevant.
3 In Mr. Wakefield's May 16, 2006 email to Neil Smith, he wrote:
4 "(2) Licenses and Purchase Orders/Invoices:
5 Based on our conversation yesterday, it appears that Netbula may have
6 provided copies of ONC RPC and PowerRPC pursuant to purchase
7 orders, rather than license agreements. Accordingly, we would like
copies of both executed license agreements and purchase orders/invoices
8 with Netbula's customers for the Power RPC and ONC RPC products."
9
10 The message, read within the context, clearly indicates that Mr. Wakefield acknowledged
11 that Netbula brought documents pursuant to purchase orders. Surprisingly, in their Opposition,
12 Defendants claim that Mr. Wakefield meant differently,
13 ONC RPC and PowerRPC are Plaintiff's software products, and
14 thus the reference to what Plaintiff "may have provided . . . pursuant
to purchase orders" unmistakably referred to *copies of products*
15 *provided to customers*, not to copies of documents Netbula had
agreed – but failed – to bring to the meeting.
16
Opposition, Docket No. 133, p.23:6-9.
17
18 Defendants' newly manufactured interpretation of the May 16, 2006 Wakefield email is
19 false. Netbula did not provide any "*copies of products provided to customers*" to Defendants
20 before or at the May 15, 2006 meeting. On March 22, 2007, Defendants stated:
21 "Nor has Netbula produced any executable copies of *any* version of any of the
22 relevant products in response to Document Request No. 2. Instead, Netbula
explained that because it purportedly embeds customer-specific information in each
23 copy of the software it distributes, it is also unable to produce executable versions
of its software without "the proper encryption scheme and protocol."
24 (Docket No. 84, p.8:24:9:3)
25 It was true that Plaintiff did not provide any version of any of the relevant products (ONC
26 RPC and PowerRPC) to defendants until April 2007. Thus, it was impossible that Plaintiff "may
27 have provided" "*copies of products provided to customers*" to Defendants on or before May 15,
28

2006. Defendants' attempt to recast the May 16, 2006 Wakefield email into a meaning consistent with their accusations in the JCMS fails to comport with the facts of the case.

Plaintiff's counsel at the time of the Case Management Conference was Richard Antognini. Defendants took advantage of the fact that Mr. Antognini did not have personal knowledge about the May 15, 2006 meeting. Defendants deceived the Court about "status of discovery and document production" at the CMC. Defendants' continuing effort in mischaracterizing the record and misleading the Court further proves the necessity to impose Rule 11 sanctions on them.

**5. Defendants' allegation of fraud was based on misrepresentations of the record**

Defendants made essentially the same allegations in Docket No. 49 and 55:

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

Defendants now admit (Wakefield Decl. Exhibit K) that the allegation above was indeed based on documents they received from SUN Microsystems/StorageTek ("SUN/StorageTek") well before Netbula sued SUN/StorageTek. Despite the fact they had access to the SUN/ StorageTek documents, Defendants mischaracterized license agreement in ways described in the Rule 11 Motion. Plaintiff stated that the Netbula-StorageTek agreement was not standard because the additional discounts for future purchases were negotiated by StorageTek. Mr. Pulgram and Mr. Wakefield are also counsel for SUN/StorageTek in Netbula v. StorageTek (C06-07391-MJJ). They have access to all communications between Netbula and StorageTek concerning the Netbula-StorageTek agreement. Their refusal to admit that the Netbula-StorageTek agreement was not a standard license in their Opposition is sanctionable under FRCP Rule 11 b (4).

Defendants claim that they derived the $6.89 price by adding the price of one SDK license ($895) to the price of a 1000-pak runtime license in 2000 ($5995) and then dividing the total by

1000. The SDK and the 1000-pak runtime are different products. One SDK license allows one programmer to use the SDK on one system[14]. The 1000-pak runtime license allows one to distribute 1000 copies of an application developed with the SDK. One cannot add the price of an apple and the price of an orange in getting the average price of an orange. Defendants' allegation that the price was "only $6.89 per copy even taking into account a one-time initial payment" is both baseless and without competent inquiry (adding the price of two completely different products to get the average price of one product is against common sense).

Despite their claim of reasonableness, Defendants "can no longer avoid the sting of Rule 11 sanctions by operating under the **guise** of a pure heart and empty head." *Smith v. Ricks*, 31 F.3d 1478, 1488 (9th Cir. 1994) (quoting *Zuniga v. United Can Co.*, 812 F.2d 443, 452 (9th Cir. 1987)). Indeed, it is unfathomable that Defense counsel committed such a mistake against common sense. One has to question whether that the $6.89 price was intentionally made to mislead the Court[15] into believing that Defendants' allegations of fraud looked real and had some substance.

"Having taken the copyrighted material, [defendant] is in no better position to haggle over the license fee than an ordinary thief." *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700 (9th Cir. 2004). A copyright infringer "cannot expect to pay the same price in damages as it might have paid after freely negotiated bargaining, or there would be no reason scrupulously to obey the copyright law." *Iowa State Univ. Res. Found., Inc. v. Am. Broad. Cos.*, 475 F. Supp. 78, 83 (S.D.N.Y. 1979), , aff'd, 621 F.2d 57 (2d Cir. 1980). As explained in the Complaint, the First Amended Complaint ("FAC") and other papers, Defendant BindView put the infringing bv-CIS

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[14] StorageTek purchased eight (8) SDK licenses for a total of $7160 and one 1000-pak runtime license for $5995.

[15] When Defense counsel made these allegations in October 2006 and December 2006, discovery has barely started, Plaintiff identified the source of the information as StorageTek only after reviewing all available documents.

software on the internet for unlimited download and authorized others to make an unlimited number of copies. If based on pre-paid licensing terms, at any non-zero price, BindView's liability would be unlimited. Netbula offered BindView a reasonable approach to a licensing solution, which was to count the actual number of copies made and pay the 1-pak price (per-copy rate) for each copy under the condition that BindView acted in good faith[16]. Since BindView's copying occurred in the past, it was not entitled to purchasing in 1000-paks[17] under a prepayment license. The licensing terms negotiated by Pulaski were favorable to BindView.

Defendants based its legally unreasonable fraud accusations against Plaintiff on frivolous allegations and mischaracterization of the record.

**D. Defendants repeatedly violated Rule 11 and must be sanctioned**

Courts take Rule 11 violations very seriously. In *Warren v. Guelker*, 29 F.3d 1386 (9th Cir. 07/14/1994), the Ninth Circuit reversed district court's denial of imposing Rule 11 sanctions on a *pro se* litigant. "Rule 11's express goal is deterrence: IFP litigants, proceeding at the expense of taxpayers, need to be deterred from filing frivolous lawsuits as much as litigants who can afford to pay their own fees and costs." *Id* at 1388. In the instant case, the alleged violations were committed by attorneys. Once Rule 11 violations are identified, sanctions shall be imposed.

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[16] "Mr. Pulaski expressed his understanding of Netbula's concern regarding site licenses issued by BindView. Mr. Pulaski also indicated his understanding that such site licenses authorized BindView customers to make unlimited copies of Netbula's RPC technology containing its 'pwrpc32.dll' file… Mr. Yue assured Mr. Pulaski that, with respect to compensation for site licenses, so long as BindView acted in good faith, Netbula would not count a site license as an "infinite" number of copies but would work with BindView to obtain a reasonable assessment of the actual number of copies made under each site license. Mr. Pulaski inquired about the license fee for each copy of Netbula's RPC technology containing its "pwrpc32.dll" software in the year 2000, and Mr. Yue told Mr. Pulaski the license fee was about $50 per copy at that time." FIRST AMENDED COMPLAINT, Docket No. 38, p.15:4-16

[17] "A prepay license is like paying $100 a month for use up to 1000 cell phone minutes. A per copy license is just like paying per minute usage with no prepayment and higher per minute rate." Docket No. 51, p.6:27-28.

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**E. Defendants acted in bad faith and should be sanctioned under 28 U.S.C. § 1927**

Defendants' mischaracterization of the May 15, 2006 meeting and their renewed attempt to mislead the Court regarding Mr. Wakefield's May 16, 2006 email are clear proof that they are acting in bad faith. Defendants' fraud accusations against Plaintiff were also plain mischaracterization of the record. After being served the Rule 11 Motion, instead of withdrawing or correcting the offending papers, Defendants filed twelve documents on May 16, 2007, multiplying the proceedings to the stretching limit of the system.

Plaintiff requests the Court to find Defendants acting in bad faith and sanction them accordingly.

**CONCLUSION**

Defendants' Rule 11 violations formed a pattern of activity that is aimed to injure Plaintiff, mislead the Court and frustrate the legal process in a Federal Court. As analyzed above, Defendants' opposition to Plaintiff's Rule 11 Motion misstated the relevant legal standards and further mischaracterized the record. Plaintiff asks the Court to sanction Defense counsel and their law firm for willful violation of FRCP Rule 11 and 28 U.S.C. § 1927.

Dated: May 23, 2007 LAW OFFICES OF VONNAH M. BRILLET

By: ___________/S/_________
Vonnah M. Brillet
Attorneys for Plaintiff NETBULA, LLC