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ANTONIO L. CORTÉS  
Attorney at Law (CA Bar No. 142356)  
528 Wisteria Way  
San Rafael, California 94903  
Tel: 415-256-1911  
Fax: 415-256-1919  
Attorney for Plaintiffs  
Netbula, LLC and  
Dongxiao Yue

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

DONGXIAO YUE and NETBULA, )  
LLC, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
CHORDIANT SOFTWARE, INC., *et al.* )  
 )  
Defendant )

CASE NO. CV 08-0019-JW  
**NOTICE AND MOTION TO  
COMPEL DISCOVERY  
RESPONSES FROM DEREK  
WITTE**  
Hearing Date: October 29, 2009  
Hearing Time: 10:00 am  
Location: Courtroom 2  
Judge: Honorable Howard Lloyd

ANTONIO L. CORTÉS  
528 WISTERIA WAY  
SAN RAFAEL, CA 94903  
(415) 256-1911  
FAX: (415) 256-1919

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**TABLE OF CONTENTS**

NOTICE OF MOTION ..... 2

RELIEF SOUGHT ..... 2

POINTS AND AUTHORITIES ..... 3

    I.    MR. WITTE SHOULD BE COMPELLED TO PROVIDE ..... 4  
         PROPER RESPONSES TO THE SUBJECT INTERROGATORIES

        A.    Improper Assertions of Privilege ..... 4

            1.    Interrogatory Nos. 2 and 3 ..... 6

                a.    Most of the Withheld Information is Outside ..... 7  
                     the Scope of the Privilege.

                b.    Any Privileged Communications Regarding the ..... 7  
                     Decision to Remove JRPC Should Be Reviewed  
                     *in Camera*.

            2.    Interrogatory No. 4 ..... 10

            3.    Interrogatory No. 5 ..... 11

            4.    Interrogatory Nos. 10, 11, 12, and 13 ..... 13

                a.    The Objections Are Improper in Many Ways ..... 14

                b.    None of the Objections Provide a Legal Basis for ..... 15  
                     Withholding the Requested Information.

        B.    Unresponsive Answer ..... 16

    II.   MR. WITTE SHOULD BE COMPELLED TO PRODUCE THE ..... 17  
         SUBJECT DOCUMENTS AND A LOG OF ANY NOT  
         PRODUCED AS PRIVILEGED.

        A.    Request No. 1 ..... 17

        B.    Request No. 2 ..... 19

        C.    Request No. 3 ..... 20

        D.    Request Nos. 4 & 5 ..... 22

CONCLUSION ..... 24

ANTONIO L. CORTÉS  
528 WISTERIA WAY  
SAN RAFAEL, CA 94903  
(415) 256-1911  
FAX: (415) 256-1919

**TABLE OF AUTHORITIES**

**Rules**

F. R. Civ. Proc. Rule 37 ..... 2

[F. R. Civ. Proc.] Rule 26(b)(1) ..... 5

F. R. Civ. Proc. Rule 26(b)(5). ..... 19

[F. R. Civ. Proc.] Rule 33(d). ..... 17

F. R. Civ. Proc. Rule 34(b)(2)(B) ..... 20

[F. R. Civ. Proc.] Rule 34(b)(2)(C) ..... 19

F. R. Evid. 501. .... 5

Local Rule 37-2 ..... 2

**Statutes**

Cal. Civil Code § 1710. .... 9

17 USC § 506. .... 9

**Cases**

Clarke v. Commerce Nat. Bank, 974 F. 2d 127 (9th Cir. 1992) ..... 5, 7, 11, 15

Continental Illinois Nat. Bank v. Caton, 36 F.R.D. 682 (D. Ks. 1991) ..... 17

Davidson v. Goord, 215 FRD 73 (W.D.N.Y. 2003) ..... 13, 18

DIRECTTV v. Pucinelli, 224 FRD 677 (D. Kan. 2004) ..... 18

Eureka Financial v. Hartford, 136 FRD 179 (E.D. Cal. 1991). ..... 18

Fisher v. United States, 425 U.S. 391, 48 L. Ed. 2d 39, 96 S. Ct. 1569 (1976) .. 5

In re Napster, Inc. Copyright Litig. 479 F 3d 1078 (9th Cir. 2007) ..... 9, 23-24

In re Green Grand Jury Proceedings, 492 F 3d 976 (8th Cir. 2007) ..... 9-10, 24

In re Richard Roe, Inc., 68 F 3d 38 (2d Cir. 1995) ..... 10, 24

ANTONIO L. CORTÉS  
528 WISTERIA WAY  
SAN RAFAEL, CA 94903  
(415) 256-1911  
FAX: (415) 256-1919

1     Scaife v. Boenne, 191 FRD 590 ( N.D. Ind. 2000) ..... 17

2     United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065 (N.D. Cal. 2002) ...23

3     United States v. Construction Products Research, 73 F.3d 464 (2d Cir. 1996) ..... 18

4     United States v. Zolin, 491 U.S. 554, 109 S. Ct. 2619 (1989) .....10, 24

5     **Treatises**

6

7     2 Schwarzer, Federal Civil Procedure Before Trial, § 11:825 ..... 15, 16

8     2 Schwarzer, Federal Civil Procedure Before Trial, § 11:1733 ..... 14

9     2 Schwarzer, Federal Civil Procedure Before Trial, § 11:1914 ..... 20

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27     ANTONIO L. CORTÉS  
 528 WISTERIA WAY  
 SAN RAFAEL, CA 94903  
 (415) 256-1911  
 28     FAX: (415) 256-1919

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**NOTICE OF MOTION**

PLEASE TAKE NOTICE THAT, on October 29, 2009, in Courtroom 2 on the 5th floor of the United States District Court, Northern District of California, San Jose Division, located at 280 South 1st Street, San Jose, California, at 9:00 a.m. or as soon thereafter as this matter may be heard, pursuant to F. R. Civ. Proc. Rule 37, and Local Rule 37-2, Plaintiffs Netbula, LLC and Dongxiao Yue will most respectfully request this honorable Court to issue an order compelling Defendant Derek Witte to make responsive answers to Interrogatory Nos. 2, 3, 4, 5, 9, 10, 11, 12, and 13 and to produce documents requested in Document Request Nos. 1, 2, 3, 4, & 5.

**RELIEF SOUGHT**

Plaintiffs seek an order:

(a) compelling Mr. Witte to provide all responsive non-privileged information requested by Interrogatory Nos. . 2, 3, 4, 5, 10, 11, 12, and 13;

(b) compelling Mr. Witte to provide a responsive answer to Interrogatory No. 9;

(c) compelling Mr. Witte to produce all non-privileged documents in his possession, custody, or control that are responsive to Document Request Nos. 1, 2, 3, 4, & 5;

(d) compelling Mr. Witte to produce a log of all privileged documents that lists, for each document claimed to be privileged, (i) the date of the document, (ii) the identity and position of all recipients, (iii) the identity and position of the author, (iv) a general description of the document, (v) the privilege claimed, and (vi) the present location of the document; and

ANTONIO L. CORTÉS  
528 WISTERIA WAY  
SAN RAFAEL, CA 94903  
(415) 256-1911  
FAX: (415) 256-1919

1 (e) ordering Mr. Witte to produce to the Court, for *in camera* inspection, all  
2 documents claimed to be privileged that are responsive to Document Request Nos. 4 & 5.

### 3 POINTS AND AUTHORITIES

4 This copyright infringement action is brought by Netbula, LLC and Dr.  
5 Dongxiao Yue alleging copyright infringement by Cordiant software, Inc. ("CSI") and  
6 vicarious infringement by Derek Witte and Steven Springsteel. Two copyrighted Netbula  
7 products are at issue: PowerRPC and JRPC. Prior to commencement of this action, CSI's  
8 programmers contacted Plaintiffs representing that their company had a license to copy  
9 PowerRPC and requesting technical assistance. Netbula provided that assistance, then  
10 made inquiries regarding the number of copies of PowerRPC CSI had made, to determine  
11 whether or not additional license fees were due. In responding to those inquiries, CSI and  
12 Mr. Witte failed to clarify that the PowerRPC license was actually held by a foreign  
13 subsidiary of CSI, Chordiant Software International, Ltd. ("CSIL"). The license held by  
14 CSIL allowed it (and no other entity) to make no more than 1000 "runtime" copies. CSI  
15 and Mr. Witte also failed to clarify that CSI, which did not have a license, had built  
16 PowerRPC into one of its major products, Chordiant Marketing Director ("CMD"), and was  
17 routine granting CMD licenses allowing CSI's licensees to make an unlimited number of  
18 copies of CMD. CSI and Mr. Witte further failed to inform Plaintiffs that each CMD copy  
19 also contained at least two copies of JRPC, for which no entity related to CSI held a license.  
20  
21  
22

23 On December 21, 2007, Mr. Witte represented to Plaintiffs that it had  
24 investigated the copying of "Netbula software" that "Chordiant" had distributed, and that  
25 the total number distributed was "953 copies." Mr. Witte simultaneously represented that  
26 "Chordiant has decided to replace Netbula's code with substitute code not provided by your  
27

1 company," and that it therefore did "not anticipate needing anything further from your  
2 company." Declaration of Dongxiao Yue filed herewith in support of this motion ("Yue  
3 Declaration"), ¶ 9 and Exhibit 1 thereto. Much of the discovery that is the subject of this  
4 motion attempts to clarify the generality of those statements and to explore their accuracy.

5  
6 This action was commenced on January 2, 2008, after those representations.  
7 According to Mr. Witte, the work he did to arrive at the "953 copies" figure had  
8 commenced prior to September 25, 2007. Yue Declaration, ¶ 9 and Exhibit 1 thereto, at 3.

9  
10 Nearly one and one-half years after this action was commenced, on or about  
11 May 1, 2009, CSI and Mr. Witte's counsel revealed that the "Netbula code" it had decided  
12 to replace prior to December 21, 2007 included JRPC as well as PowerRPC. Declaration of  
13 Antonio L. Cortés, filed herewith ("Cortés Declaration"), at ¶ 8 and Exhibit 6 thereto.

14 Again, much of the discovery that is the subject of this motion attempts to determine the  
15 extent to which the distribution of JRPC as a part of CMD was included in Mr. Witte's "953  
16 copies" representation and the extent to which his representation that CSI had decided to  
17 remove "Netbula code" was intended to refer to JRPC, which Plaintiffs allege CSI illegally  
18 copied and licensed as an element of CMD.

19  
20 **I. MR. WITTE SHOULD BE COMPELLED TO PROVIDE PROPER  
21 RESPONSES TO THE SUBJECT INTERROGATORIES.**

22 Mr. Witte's responses to Interrogatory Nos. 2, 3, 4, 5, 10, 11, 12, and 13  
23 withhold information based on improper and unspecified assertions of unspecified  
24 privilege. Additionally, Mr. Witte's response to Interrogatory No. 9 answers is simply  
25 unresponsive.

26 **A. Improper Assertions of Privilege.**

1 Mr. Witte avoids answering Interrogatory Nos. 2, 3, 4, 5, 10, 11, 12, and 13  
2 by taking refuge in the attorney-client privilege and the attorney work product doctrine. For  
3 the following reasons, he improperly fails to answer because neither the privilege nor the  
4 work-product doctrine protect him from disclosing the information requested by those  
5 interrogatories.  
6

7 Rule 26(b)(1) allows discovery of any evidence that is "nonprivileged." The  
8 rule of decision in this copyright litigation will come from federal law, so the scope of the  
9 attorney client privilege "shall be governed by the principles of the common law as they  
10 may be interpreted by the courts of the United States." F. R. Evid. 501. Those principles  
11 do not allow us, simply because we are attorneys, to withhold all evidence we come in  
12 contact with as attorneys. Those principles only allow us to avoid disclosing "confidential  
13 *communications* made by a client to an attorney to obtain legal services." Clarke v.  
14 Commerce Nat. Bank, 974 F. 2d 127, 129 (9th Cir. 1992) [emphasis added]. Because this  
15 causes "the withholding of relevant information," the attorney-client privilege "is applied  
16 only when necessary to achieve its limited purpose of encouraging full and frank disclosure  
17 by the client to his or her attorney." *id.*, citing Fisher v. United States, 425 U.S. 391, 403,  
18 48 L. Ed. 2d 39, 96 S. Ct. 1569 (1976). As further noted by the Clarke Court, the privilege  
19 does not protect all aspects "communications" between the attorney and client even when  
20 those communications can be protected by the privilege. *id.* ("Our decisions have  
21 recognized that the identity of the client, the amount of the fee, the identification of  
22 payment by case file name, and the general purpose of the work performed are usually not  
23 protected from disclosure by the attorney-client privilege.") Clarke v. Commerce Nat. Bank,  
24 *supra*, 974 F. 2d, at 129.  
25  
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1 Under those principles of federal common law, Mr. Witte has withheld  
2 information from Plaintiffs and this Court in his responses to Interrogatory Nos. 2, 3, 4, 5,  
3 10, 11, 12, and 13 that he is not entitled to withhold under his claims of privilege.  
4

5 **1. Interrogatory Nos. 2 and 3.**

6 Interrogatory No. 2 simply asks Mr. Witte to "Describe [his] involvement in  
7 CSI's alleged decision to remove PowerRPC from Chordiant software." Similarly,  
8 Interrogatory No. 3 asks him to ""Describe [his] involvement in CSI's alleged decision to  
9 remove JRPC from Chordiant software." To both of those interrogatories, Mr. Witte  
10 responds with objections only, stating, in the first case:

11 WITTE incorporates by reference his General Objections as if fully set  
12 forth herein. WITTE further objects to the terms "involvement" and  
13 "PowerRPC" as vague, ambiguous, and counterfactual. WITTE further  
14 objects to this interrogatory to the extent it seeks the disclosure of  
15 information protected by the attorney-client privilege (including the joint  
16 representation and common interest privilege), the joint-defense  
17 privilege, the attorney work product doctrine, or any other applicable  
18 privilege, protection, immunity or restrictino on discovery as provided by  
19 applicable law

20 and in the second case making the exact same objection with "JRPC" substituted for  
21 "PowerRPC." He provides no statement at all by way of answering the interrogatories, and  
22 does not explain which of the privileges he contends apply to this request or why he  
23 contends they allow him to not provide the requested information.

24 All or almost all the requested information, however, is discoverable as  
25 either outside the attorney-client privilege or within the "crime-fraud" exception to that  
26 privilege.

27 The CSI decisions these interrogatories ask about were made prior to  
28 December 21, 2007, when Mr. Witte wrote to Plaintiffs that "Chordiant has decided to

1 replace Netbula's code with substitute code not provided by Netbula" Plaintiffs never  
2 threatened legal action until after that decision, and this lawsuit was not initiated until after  
3 that decision. Accordingly, the decision Plaintiffs ask Mr. Witte to describe took place  
4 prior to this lawsuit, and are not protectable "work product."

5  
6 **a. Most of the Withheld Information is Outside the Scope of the  
Privilege.**

7 The only potentially-privileged portions of Mr. Witte's involvement in the  
8 decisions to remove PowerRPC and JRPC from CMD are the confidential communications  
9 between him and CSI to obtain legal services. Specifically not privileged are the identities  
10 of the client representatives with whom he had such communications and the general  
11 purpose of the communications. Clarke, *supra*, at 129. All his involvement in the decision  
12 to remove PowerRPC and JRPC from CMD that did not consist of communications to  
13 obtain legal services are not privileged either. *id.* Even if he had no involvement other than  
14 being asked for and giving legal advice, he should say that under oath and he should  
15 identify who asked for it, to whom it was given, and describe how, when, and where these  
16 communications occurred. Further, his communications to Plaintiffs suggest that his  
17 involvement in these decisions may have been greater than that. *see* Exhibit 1 to Yue  
18 Declaration. Accordingly, Plaintiffs seek to discover the extent of that involvement other  
19 than the content of his advise and the specific requests for that advice, as they are entitled to  
20 discover.  
21  
22

23  
24 **b. Any Privileged Communications Regarding the Decision to  
Remove JRPC Should Be Reviewed *in Camera*.**

1 With respect to Mr. Witte's involvement in the decision to remove JRPC  
2 from CMD, his communications regarding legal advice may fall within the "crime fraud"  
3 exception to the attorney-client privilege, as indicated by the following circumstances.  
4

5 Although Netbula did license power RPC to a subsidiary of CSI, Plaintiffs  
6 have never licensed JRPC to any Chordiant entity. Yue Declaration, ¶ 14. Prior to the  
7 claimed removal of PowerRPC and JRPC from the infringing CSI software, and for over a  
8 year thereafter, Plaintiffs had no reason to suspect that JRPC had been copied into the  
9 infringing CSI software. Cortes Declaration, at ¶ 8 and Exhibit 6 thereto; Yue Declaration,  
10 at ¶ 15. Accordingly, the inquiries by Plaintiffs that led to Defendants' decision to remove  
11 "Netbula's code" rather than having to pay for copying it only concerned Defendants  
12 admitted copying of PowerRPC. Defendants' responses to those inquiries claimed that  
13 Defendants' copying of PowerRPC was within the scope of a license to a CSI subsidiary,  
14 and that they therefore owed Plaintiffs nothing, but in making that response, Mr. Witte  
15 concealed that the infringing software also contained JRPC, for which neither CSI nor any  
16 of its subsidiaries had a license.<sup>1</sup> Accordingly, Plaintiffs suspect that Mr. Witte's  
17 communications concerning the removal of JRPC from the infringing software prior to  
18 December 21, 2007 should reveal whether or not he was concealing that copying from  
19 Plaintiffs, while attempting to persuade them that CSI owed them nothing because all its  
20 copying of their software was within the scope of a license to a CSI subsidiary, concealing  
21 that CSI was also copying their JRPC software, and concealing that Plaintiffs therefore did  
22 have a valid claim against CSI despite Mr. Witte's representations that they did not.  
23  
24  
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26

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27 <sup>1</sup> Again, the copying of JRPC into the infringing software was not revealed to Plaintiffs until  
28 nearly a year and one-half after this action was commenced.

1 Fraud can consist of either "The suggestion, as a fact, of that which is not  
2 true, by one who does not believe it is true," or "The suppression of a fact, by one . . . who  
3 gives information of other facts which are likely to mislead for want of communication of  
4 that fact." Cal. Civil Code § 1710. Accordingly, suppression of the fact that CSI was also  
5 copying JRPC as well as the software licensed to CSI subsidiary while taking the position  
6 that CSI had only copied 953 copies of "Netbula software" could be found by the jury to be  
7 fraudulent in a number of circumstances, including if Mr. Witte was only counting copies of  
8 PowerRPC and not JRPC, or if Mr. Witte was counting both while leading Plaintiffs to  
9 believe that CSI was only copying the software to which its subsidiary had a license.

11 Further, copyright infringement is a crime as well as a civil wrong. 17 USC  
12 § 506.

14 From either perspective, if Mr. Witte's advice was sought, or given, for the  
15 purpose of determining that CSI should remove JRPC before Plaintiffs figured out they had  
16 a claim for the copying of that copyrighted software, or to otherwise prolong illegal  
17 copying, or to otherwise mislead Plaintiffs with respect to the copying of JRPC or the fact  
18 that CSI did not itself have a license to copy PowerRPC, then communications regarding  
19 that advice are discoverable under the crime-fraud exception to the attorney client privilege  
20 because made to further or conceal a continuing or contemplated crime and/or fraud. In re  
21 Napster, Inc. Copyright Litig. 479 F 3d 1078, 1090 (9th Cir. 2007), see also United States v.  
22 Zolin, 491 U.S. 554, 563, 109 S. Ct. 2619, 2626 (1989) ("It is the purpose of the crime-  
23 fraud exception to the attorney-client privilege to assure that the "seal of secrecy," *ibid.*,  
24 between lawyer and client does not extend to communications "made for the purpose of  
25 getting advice for the commission of a fraud" or crime."), In re Green Grand Jury

1 Proceedings, 492 F 3d 976, 979 (8th Cir. 2007), In re Richard Roe, Inc., 68 F 3d 38, 40 (2d  
2 Cir. 1995). The crime-fraud exception applies to work product as well as the privilege. In  
3 re Green Grand Jury Proceedings, *supra*, 492 F 3d, at 979.

4 In circumstances such as these, the appropriate procedure is for the Court to  
5 conduct an *in camera* review of Mr. Witte's communications with CSI regarding the  
6 removal of Netbula software from the infringing software, all of which, according to him,  
7 occurred prior to this lawsuit, to determine whether the crime fraud exception applies.  
8 United States v. Zolin, *supra*, 491 U.S., at 568 ("In our view, the costs of imposing an  
9 absolute bar to consideration of the communications *in camera* for purpose of establishing  
10 the crime-fraud exception are intolerably high."), *see also* In re Green Grand Jury  
11 Proceedings, *supra*, 492 F 3d, at 979 (in camera review conducted).

## 14 2. Interrogatory No. 4.

15 This interrogatory asks Mr. Witte to "Describe the communications between  
16 you and Chordiant employees about Chordiant's reproduction and distribution of Netbula  
17 software and decision to halt such reproduction and distribution." Mr. Witte responds that:

18 WITTE incorporates by reference his General Objections as if fully set  
19 forth herein. WITTE further objects to the term "Netbula software" as  
20 vague, ambiguous, and counterfactual. WITTE further objects to this  
21 interrogatory to the extent it seeks the disclosure of information protected  
22 by the attorney-client privilege (including the joint representation and  
23 common interest privilege), the joint-defense privilege, the attorney work  
24 product doctrine, or any other applicable privilege, protection, immunity  
or restriction on discovery as provided by applicable law. WITTE  
further objects to this Interrogatory as unduly burdensome and  
duplicative of other discovery requests.

25 This is nothing but a blanket, boiler-plate objection citing every existing privilege nearly  
26 identical to his objections to the prior to interrogatories, without any specific explanation of

1 why he contends that a description of such communications is privileged. His objection  
 2 that "Netbula software" is vague and ambiguous is truly ironic as that is the precise term he  
 3 himself used on December 21, 2007 when apparently concealing that CMD contained JRPC  
 4 as well as PowerRPC. His assertion that this request is duplicative of other requests does  
 5 not even identify those other requests, much less identify information provided in response  
 6 to some request in which Plaintiffs could find the information requested by this  
 7 interrogatory.  
 8

9 As to the privilege assertion, to some extent at least, a description of  
 10 communications Plaintiffs ask him to describe would be outside that attorney-client  
 11 privilege. Again, "the identity of the client . . . and the general purpose of the work  
 12 performed are usually not protected from disclosure by the attorney-client privilege.")  
 13 Clarke v. Commerce Nat. Bank, 974 F. 2d, at 129, yet Mr. Witte refuses to disclose who he  
 14 communicated with, the nature of the communications, their general purpose, when they  
 15 occurred, or any other information Plaintiffs are entitled to discover. No response is given -  
 16 - just the boiler-plate objection.  
 17

### 18 3. Interrogatory No. 5.

19 This interrogatory asks Mr. Witte to "Describe the communications between  
 20 you and Chordiant employees that led to your conclusion that 953 copies of Netbula  
 21 programs were distributed by Chordiant, as alleged in your December 21, 2007 email to  
 22 Netbula and Dr. Yue." Mr. Witte responds that:  
 23

24 WITTE incorporates by reference his General Objections as if fully set  
 25 forth herein. WITTE further objects to the terms "led," "your  
 26 conclusion," "distributed," and "Netbula programs" as vague, ambiguous,  
 27 mischaracterizes WITTE's communications with Netbula, which speak  
 28 for themselves. WITTE further objects to this interrogatory to the extent

1 it seeks the disclosure of information protected by the attorney-client  
2 privilege (including the joint representation and common interest  
3 privilege), the joint-defense privilege, the attorney work product  
4 doctrine, or any other applicable privilege, protection, immunity or  
5 restriction on discovery as provided by applicable law.

6 In 2007, Plaintiffs were communicating with me and Chordiant about  
7 Chordiant's use of Netbula's RPC software. Netbula asserted that under  
8 Chordiant's license, Chordiant had to provide a "license usage report."  
9 Although Netbula could not point to any contract that required this,  
10 Chordiant endeavored to provide this information. **Chordiant**  
11 **employees sought to collect the license usage information and**  
12 **communicated it to me in attorney-client privileged communications,**  
13 **and I relayed the factual information, including a description of how**  
14 **we estimated that number, to Netbula.** [emphasis added].

15 Notably, most of the information provided is non-responsive -- it describes  
16 Mr. Witte's communications with Plaintiffs, not CSI employees. The only portion coming  
17 close to the call of the question is the last sentence. Not included is a description of how  
18 the facts supplied by the employees to Mr. Witte supported the 953 copy number, which is  
19 the most critical part of the information requested, and which is factual information that  
20 cannot be hidden from Plaintiffs on an unsubstantiated, un-specified, un-logged claim that  
21 the factual "information" was conveyed to an attorney in a supposedly-privileged manner.

22 This is critical evidence: the number of copies made is a required element  
23 for trial of this case; whether JRPC copies are included in the asserted 953 copies is a  
24 similarly critical fact, and this interrogatory is calculated to discover that; and whether Mr.  
25 Witte and CSI were (or are) intentionally concealing the JRPC copying is critical to  
26 Netbula's ability to prove that the alleged infringement was willful.

27 Further, Mr. Witte contended to Plaintiffs on the basis of the asked about  
28 communications that CSI had not made more than 953 copies of Netbula software. That in

1 itself should be deemed to have waived the privilege as to the communications upon which  
2 that contention was based.

3 As held in one case,

4 . . . the attorney-client privilege cannot at once be used as a shield and a  
5 sword." *United States v. Bilzerian*, 926 F.2d 1285, 1291 (2d Cir. 1991)  
6 (citing cases). Thus, where a party asserts a claim that "in fairness  
7 requires examination of the protected communication," the privilege is  
8 deemed waived. *Id.* In other words, where a litigant "places otherwise  
9 privileged communications at issue" in the litigation, such privilege is  
10 held to be waived. *In re Buspirone Antitrust Litigation*, 208 F.R.D. 516,  
11 520 (S.D.N.Y. 2002) [\*\*12] (citing cases). The "at issue" waiver rule  
12 also applies to attorney work product and material prepared in  
13 contemplation of litigation otherwise protected from discovery by  
14 *Fed.R.Civ.P. 26(b)(4)*.

15 Davidson v. Goord, 215 FRD 73, 77 (W.D.N.Y. 2003).

16 **4. Interrogatory Nos. 10, 11, 12, and 13.**

17 These four interrogatories request similar issues and Plaintiffs have similar  
18 issues with Mr. Witte's blanket objections to answering them. They are:

19 10. Identify each and every employee of Chordiant Software, Inc. with  
20 whom you communicated regarding copyright compliance issues  
21 concerning PowerRPC.

22 11. For each such employee, state the dates of your communications  
23 with them and the general subject matter of those communications.

24 12. Identify each and every employee of Chordiant Software, Inc. with  
25 whom you communicated regarding copyright compliance issues  
26 concerning JRPC.

27 13. For each such employee, state the dates of your communications  
28 with them and the general subject matter of those communications.

Mr. Witte provides none of the information requested in any of them. To  
each, he asserts the following identical objection:

WITTE incorporates by reference his General Objections as if fully set  
forth herein. WITTE further objects to the terms "copyright compliance

1 issues" and "PowerRPC" as vague, ambiguous, and calling for a legal  
 2 conclusion. WITTE further objects that this interrogatory is not limited  
 3 to a relevant and discrete time period. WITTE further objects to this  
 4 interrogatory to the extent it seeks the disclosure of information protected  
 5 by the attorney-client privilege (including the joint representation and  
 common interest privilege), the joint-defense privilege, the attorney  
 work-product doctrine, or any other applicable privilege, protection,  
 immunity or restriction on discovery as provided by applicable law.

6 Aside from making those identical objections to each of these interrogatories, Mr. Witte  
 7 *provides no information at all.*

8 As discussed below: (a) those objections are improper; (b) none of those  
 9 objections provide a legal basis for withholding the requested information; and (c) Plaintiffs  
 10 are entitled to the information Mr. Witte refuses to provide.  
 11

12 **a. The Objections Are Improper in Many Ways.**

13 The Rutter treatise offers the following instruction regarding the degree of  
 14 specificity required of objections to interrogatories:

15 All grounds for objection to an interrogatory must be stated "with  
 16 specificity." [FRCP 33(b)(4); see *Nagele v. Electronic Data Systems*  
 17 *Corp.* (WDNY 2000) 193 FRD 94, 109 -- objection that interrogatories  
 18 were "burdensome" overruled because objection party failed to  
 "particularize" basis for objection; see also *Mancia v. Mayflower Textile*  
 19 *Services Co.* (D MD 2008) 253 FRD 354, 357 -- boilerplate objections  
*waived any legitimate objections responding party may have had]*

20 If required to make the objection understandable, the objection party  
 21 must state *reasons* for any objection. [See FRCP 33(b)(4); *Chubb*  
 22 *Integrated Sys. Ltd. v. National Bank of Wash.* (D DC 1984) 253 FRD  
 52, 58 -- "irrelevant" did not fulfill party's burden to explain its  
 objection]

23 2 Schwarzer, Federal Civil Procedure Before Trial, § 11:1733.

24 Here, Mr. Witte has given the precise same objection in response to each of  
 25 these four interrogatories, copying and pasting them without even bothering to change the  
 26

1 "PowerRPC" in the first two to "JRPC" as would seem more appropriate in the latter two,  
2 leaving it to Plaintiffs to go to the extensive trouble of finding out the specific basis for the  
3 objections, which presumably will be finally revealed in Mr. Witte's brief opposing this  
4 motion. Most importantly, there is no explanation of why the identity of the persons Mr.  
5 Witte communicated with on these subjects, or the general nature of the communications,  
6 would fall within the attorney client privilege, or any of the other privileges asserted in such  
7 a bald manner.  
8

9 **b. None of the Objections Provide a Legal Basis for Withholding the**  
10 **Requested Information.**

11 Attorney-Client Privilege. As discussed at the outset of this motion, the  
12 attorney-client privilege does not allow the withholding of evidence consisting of the  
13 identity of the client who sought legal advice, the identity of the client to whom legal advice  
14 was given, the date of the attorney-client communications, or the "general purpose" of the  
15 legal advice sought or received. Clarke v. Commerce Nat. Bank, 974 F. 2d, at 129. That is  
16 all that these interrogatories ask for. They do not ask what CSI's employees asked Mr.  
17 Witte for advice or the advice he gave in response to such inquirers. They ask for no  
18 privileged information, just the information Clark holds to be outside the privilege.  
19

20 Work Product. Mr. Witte admits in his response to Interrogatory Nos. 5 and  
21 6 that he had communications of the specified types prior to the commencement of this  
22 litigation or the threat thereof. Such communications cannot be protected by the work  
23 product doctrine, which only "protects trial preparation materials that reveal an attorney's  
24 strategy, intended lines of proof, evaluation of strengths and weaknesses, and inferences  
25 drawn from interviews." 2 Schwarzer, Federal Civil Procedure Before Trial, § 11:825.  
26

1 Even if they could, the identity of the person who provided him the factual information he  
2 or she describes in his or her answers to Interrogatory Nos. 5 and 6 is not protectable work  
3 product. *id.*

4 Vagueness and Ambiguity. First, the term PowerRPC was precisely  
5 defined in Plaintiff's interrogatories and was in no manner vague or ambiguous. The term  
6 "copyright compliance issues" is not an obscure or difficult to fathom one, and Plaintiffs  
7 submit that it is simply not vague or ambiguous. However, even if these terms were vague  
8 and ambiguous as Mr. Witte asserts, he still has the duty to answer using his own  
9 reasonable definition that he does understand, and/or to seek clarification from me  
10 regarding the meaning of these words. He is not entitled to withhold evidence based on  
11 those objections as he has done. Counsel's letter and telephone calls regarding Mr. Witte's  
12 failure to answer these interrogatories earlier this month produced no effort by Mr. Witte to  
13 clarify these questions to correct Mr. Witte's asserted inability to understand them.

14 **B. Unresponsive Answer.**

15 Mr. Witte's answer to Interrogatory No. 9 is not responsive to that question.  
16 The interrogatory asks him to: "Identify all employees of Chordiant Software, Inc. who had  
17 authority to advise other employees of Chordiant Software, Inc. regarding compliance with  
18 copyright laws." Mr. Witte responds as follows:

19 During my tenure at Chordiant, Chordiant provided a Code of Business  
20 Conduct and Ethics, which among other things instructed employees  
21 with questions in the area of legal compliance to seek guidance from  
22 supervisors or the Compliance Officer; authorized supervisors to provide  
23 such guidance; stated an express prohibition of violations of third party  
24 intellectual rights (including illegal downloading of software); and  
25 empowered employees to report suspected violations. Pursuant to Rule  
26 33(d), I refer Plaintiffs to the Code of Business Conduct and Ethics  
available at <http://tinyurl.com/nbno93>.

1 That answer doesn't identify any employees. Instead Mr. Witte just refers  
 2 Plaintiffs to Chordiant's code of conduct pursuant to Rule 33(d). That code does not  
 3 identify the Chordiant employees with authority to advise other employees regarding  
 4 compliance with copyright laws. Even if it did, an answer to an interrogatory should be  
 5 complete in itself and cannot consist of an incorporation of some other material by  
 6 reference. Scaife v. Boenne, 191 FRD 590, 594 ( N.D. Ind. 2000) ("It is well established  
 7 that an answer to an interrogatory . . . should be complete in itself and should not refer to  
 8 the pleadings, or to depositions or other documents, or to other interrogatories . . ."),  
 9 Continental Illinois Nat. Bank v. Caton, 36 F.R.D. 682, 686 (D. Ks. 1991) ("This is not a  
 10 proper answer to an interrogatory. Incorporation by reference to a deposition is not a  
 11 responsive answer.")

12 Accordingly, Mr. Witte should be compelled to give a responsive answer to  
 13 Interrogatory No. 9.

14  
 15 **II. MR. WITTE SHOULD BE COMPELLED TO PRODUCE THE SUBJECT  
 16 DOCUMENTS AND A LOG OF ANY NOT PRODUCED AS PRIVILEGED.**

17 Mr. Witte has produced no documents responsive to the following document  
 18 requests. He asserts the attorney-client and work product privilege as to each of them, but  
 19 has provided no privilege log.

20  
 21 **A. Request No. 1.**

22 Document Request No. 1 simply asks Mr. Witte to produce "All documents  
 23 evidencing your titles, positions, powers, duties, and responsibilities within CSI, or any of  
 24 its related entities, such as Chordiant Software International, Ltd., Prime Response, Inc., or  
 25 Prime Response, Ltd., at any time."  
 26

1 Mr. Witte responds as follows:

2 WITTE incorporates by reference his General Objections as if fully set  
3 forth herein. Witte further objects on the ground that the Request is  
4 overly broad, unduly burdensome, and seeks information not relevant to  
5 any claim or defense in this action. WITTE further objects to the terms  
6 "positions, responsibilities, authorities, controlling, supervisory and  
7 advisory powers" as vague, ambiguous, and overly broad. WITTE  
8 further objects to this Request to the extent it seeks documents protected  
9 from discovery by the attorney-client privilege, attorney work product  
10 doctrine, joint defense or common interest privilege, or are otherwise  
11 protected from disclosure.

12 Subject to and without waiving the foregoing general and specific  
13 objections, Mr. Witte responds as follows:

14 Mr. Witte directs Plaintiffs to Chordiant Software, Inc.'s publicly  
15 available records, which identify the responsibilities of General Counsel.

16 Mr. Witte declines to produce documents responsive to this (or any other)  
17 request.

18 Nor does he state any specific reason(s) that producing the requested  
19 documents would be unduly burdensome, or why his other objections are sufficient to  
20 warrant not producing the documents, rendering those objections improper. To state a valid  
21 objection, he must *identify* the document he objects to producing *and* set forth the specific  
22 reason he objects to producing that document. Rule 34(b)(2)(C), Eureka Financial v.  
23 Hartford, 136 FRD 179, 185 (E.D. Cal. 1991). He has done neither, and Plaintiffs request a  
24 determination that his objections have thus been waived. United States v. Construction  
25 Products Research, 73 F.3d 464, 473 (2d Cir. 1996).

26 His instruction to Plaintiffs to find unidentified public documents elsewhere  
27 is also improper. Davidson v. Goord, 215 FRD 73, 77 (W.D.N.Y. 2003); DIRECTTV v.  
28 Pucinelli, 224 FRD 677, 689 (D. Kan. 2004) ("Plaintiff is not allowed to refer Defendant

1 Strauss to documents produced with Plaintiff's disclosures in lieu of providing a written  
2 response." ). Mr. Witte must identify the responsive documents, *and* then either state that he  
3 is going to produce them, that he is unable to produce them, or that he is withholding them  
4 as privileged. If he is withholding documents on his privilege claim, he must provide a  
5 privilege log detailing the nature of the documents and the facts supporting his claim of  
6 privilege in sufficient detail to allow Plaintiffs " to assess the applicability of the [asserted]  
7 privilege or protection." F. R. Civ. Proc. Rule 26(b)(5). He has done none of these things.

9           The requested documents are important for many reasons, including to help  
10 determine: (a) what Chordiant entity Mr. Witte was assisting when communicating with  
11 Plaintiffs about CSI's copying of their software in a manner calculated to lead them to  
12 believe he was employed by their licensee, Chordiant Software International, Ltd. ("CSIL");  
13 (b) whether Mr. Witte was intentionally deceiving Plaintiffs by taking the position that the  
14 "Chordiant" he worked for had a license but not a signed one; and (c) whether Mr. Witte  
15 was aware that the only Netbula license was to CSIL and not to CSI.

17           **B. Request No. 2.**

18           Document Request No. 2 asks Mr. Witte to produce "All documents  
19 evidencing the amount of bonuses, benefits, awards, commissions, incentive programs,  
20 stock option programs, and other financial benefits you were or might have been entitled to  
21 receive from CSI."

22           Mr. Witte responds as follows:

23           WITTE incorporates by reference his General Objections as if fully set  
24 forth herein. WITTE further objects on the ground that the Request is  
25 overly broad, unduly burdensome, and seeks information not relevant to  
26 any claim or defense in this action. WITTE further objects to the terms  
27 "awards" "other financial gains" CSI [sic] as vague, ambiguous, and  
28 overly broad. WITTE further objects to this Request to the extent it

1 seeks documents protected from discovery by the attorney-client  
2 privilege, attorney work product doctrine, joint defense or common  
3 interest privilege, or are otherwise protected from disclosure.

4 Subject to and without waiving the foregoing general and specific  
5 objections, Mr. Witte responds as follows:

6 Mr. Witte directs Plaintiffs to Chordiant Software, Inc.'s publicly  
7 available records, which identify the compensation provided to him as  
8 General Counsel, as well as Bouns Plans and compensation documents in  
9 Chordiant's Possession, Custody or Control.

10 Such documents relate directly to Plaintiffs allegation that Mr. Witte  
11 profited from CSI's copying of Netbula's software -- an essential element of Plaintiffs'  
12 vicarious liability cause of action against Mr. Witte.

13 Mr. Witte declines to produce any such documents. Instead, he makes the  
14 same objections he makes to Request No. 1, and again improperly directs Plaintiffs to  
15 "Chordiant Software, Inc.'s publicly available records" without identifying which  
16 documents those may be. His duty, however, is to either (a) state that he will produce them,  
17 as authorized by F. R. Civ. Proc. Rule 34(b)(2)(B); (b) state that he is unable to comply and  
18 the reason he is unable to do so;<sup>2</sup> or (3) make an objection that "identifies the specific  
19 document or evidence requested as to which the objection is made" and "sets forth the  
20 *reason* for objection." 2 Schwarzer, Federal Civil Procedure Before Trial, § 11:1914  
21 [original emphasis]. Mr. Witte declines to do any of these things, leaving Plaintiffs in  
22 exactly the same position they would have been in had they never requested documents at  
23 all.

24 **C. Request No. 3.**

25  
26  
27 <sup>2</sup> See 2 Schwarzer, Federal Civil Procedure Before Trial, § 11:1913 and the authorities cited  
28 therein.

1 Document Request No. 3 asks Mr. Witte to produce "All communications  
2 between you and any other person or entity, at any time, about Netbula or NETBULA  
3 SOFTWARE."  
4

5 Mr. Witte responds as follows:

6 WITTE incorporates by reference his General Objections as if fully set  
7 forth herein. WITTE further objects on the ground that the Request is  
8 overly broad, unduly burdensome, and seeks information not relevant to  
9 any claim or defense in this action. WITTE further objects to the term  
10 "NETBULA SOFTWARE" to the extent it is vague, ambiguous, and  
11 overly broad; WITTE will construe this as referring to the specific  
12 products and versions of software that were allegedly infringed by  
13 Chordiant Software, Inc.. WITTE further objects to this Request to the  
14 extent it seeks documents protected from discovery by the attorney-client  
15 privilege, attorney work product doctrine, joint defense or common  
16 interest privilege, or are otherwise protected from disclosure.

17 Subject to and without waiving the foregoing general and specific  
18 objections, Mr. Witte responds as follows:

19 Witte has no non-privileged documents responsive to this request other  
20 than documents in the possession, custody or control of Chordiant  
21 Software, Inc. or its publicly available records.

22 Mr. Witte is required to, but does not, identify the privileged records he has.  
23 He is required to, but does not, provide a log of the privileged records. He is required to,  
24 but does not, produce the documents in his own possession, custody, or control that are also  
25 possessed by CSI.

26 Further, Mr. Witte improperly refers Plaintiffs to unspecified documents they  
27 do not possess.

28 This request is intended to discover critical documentation regarding: (a)  
Mr. Witte's role in causing CSI to take the position that it had a license but that the license  
did not restrict CSI to the terms of CSIL's license; (b) the willfulness of CSI's infringement;

1 and (c) Mr. Witte's knowledge regarding CSI's concealment of its copying of JRPC during  
2 the time Mr. Witte was taking those positions.

3 **D. Request Nos. 4 & 5.**

4 Document Request Nos. 4 & 5 asks Mr. Witte to produce the documentary  
5 basis for his December 21, 2007 written representation to Plaintiffs that CSI only had  
6 records of making 685 copies of PowerRPC and estimated it made only 268 copies it could  
7 not document. Specifically, the requests were that he produce:

8  
9 4. All documents supporting your statement in your email to Dr.  
10 Dongxiao Yue ("Dr. Yue") dated December 21, 2007 that there were "a  
11 total of 685 copies" of Netbula programs distributed or in use as to  
12 customers for who Chordiant was providing support.

13 and

14 5. All documents supporting your allegation in your email to Dr. Yue  
15 dated December 21, 2007 that there were "an additional 268 copies" of  
16 Netbula programs.

17 Once again, Mr. Witte will produce no such documents.

18 His identical responses to Request Nos. 4 & 5 read as follows:

19 WITTE incorporates by reference his General Objections as if fully set  
20 forth herein. WITTE further objects on the ground that the Request is  
21 overly broad, unduly burdensome, and seeks information not relevant to  
22 any claim or defense in this action. WITTE further objects to the term  
23 "NETBULA SOFTWARE" to the extent it is vague, ambiguous, and  
24 overly broad; WITTE will construe this as referring to the specific  
25 products and versions of software that were allegedly infringed by  
26 Chordiant Software, Inc.. WITTE further objects to this Request to the  
27 extent it seeks documents protected from discovery by the attorney-client  
28 privilege, attorney work product doctrine, joint defense or common  
interest privilege, or are otherwise protected from disclosure.

Subject to and without waiving the foregoing general and specific  
objections, Mr. Witte responds as follows:

1 Witte has no non-privileged documents responsive to this request other  
2 than documents in the possession, custody or control of Chordiant  
Software, Inc. or its publicly available records.

3 Mr. Witte will produce no documents in response to either request. His  
4 apparent excuse is that such documents are privileged and/or are also possessed by CSI. To  
5 be more precise, he again provides nothing but his personally-verified statement that "Mr.  
6 Witte has no non-privileged documents responsive to this request other than documents in  
7 the possession, custody or control of Chordiant Software, Inc. or in its publicly available  
8 records."  
9

10 He is required to, but will not, provide a description of the responsive  
11 documents in his own possession, custody, or control. He is required to, but will not,  
12 provide a log of the documents he claims are privileged that show the general nature of each  
13 document, the identity and position of its author, the date it was written, the identity and  
14 position of all addressees and recipients, the document's present location, and the specific  
15 reasons it was withheld. This is especially important with respect to any responsive email  
16 strings, of which Plaintiffs believe there are many, because if any message in the string has  
17 been disclosed to a party outside the scope of the privilege, which Mr. Witte's refusal to  
18 provide a log indicates, the privilege is waived on all attached emails. United States v.  
19 Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1074-1075 (N.D. Cal. 2002).  
20  
21

22 For the same reasons set forth above in Plaintiffs' request for an *in camera*  
23 inspection of the documents to be identified in response to the interrogatories that Mr.  
24 Witte's does not answer on his claims of privilege, all documents responsive to Request  
25 Nos. 4 & 5 should be reviewed *in camera* to determine whether or not they are within the  
26 crime-fraud exception to the attorney-client privilege and the work-product doctrine. In re  
27

1 Napster, Inc. Copyright Litig. 479 F 3d 1078, 1090 (9th Cir. 2007), United States v. Zolin,  
2 491 U.S. 554, 563, 109 S. Ct. 2619, 2626 (1989), In re Green Grand Jury Proceedings, 492  
3 F 3d 976, 979 (8th Cir. 2007), In re Richard Roe, Inc., 68 F 3d 38, 40 (2d Cir. 1995).

### 4 CONCLUSION

5  
6 Plaintiffs have timely requested documents and interrogatory answers from  
7 Mr. Witte but have received no documents and virtually no information from him. All  
8 Plaintiffs interrogatories and document requests were reasonably crafted to request many  
9 documents and much information that was outside the scope of any privilege. To the extent  
10 Plaintiffs have requested privileged documents and information, Mr. Witte has refused to  
11 produce a privilege log with the required specifics regarding those documents and  
12 information. Further, the circumstances of this case warrant an order requiring Mr. Witte to  
13 produce to the Court for in camera inspection full responses to Interrogatory Nos. 2, 3, 4,  
14 and 5, and all documents responsive to Document Request Nos. 4 & 5, so the Court may  
15 review them to determine whether they fall within the crime-fraud exception to the  
16 attorney-client privilege and the work-product doctrine.  
17

18 Respectfully submitted,

19 DATED: September 24, 2009

20  
21 \_\_\_\_\_/s/\_\_\_\_\_  
22 Antonio L. Cortes,  
23 Counsel for Plaintiffs